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# THE DISPUTE RESOLUTION REVIEW

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SEVENTH EDITION

EDITOR  
JONATHAN COTTON

LAW BUSINESS RESEARCH

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# THE DISPUTE RESOLUTION REVIEW

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Seventh Edition

Editor  
JONATHAN COTTON

LAW BUSINESS RESEARCH LTD

# THE LAW REVIEWS

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# EDITOR'S PREFACE

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*The Dispute Resolution Review* covers 48 countries and territories. Disputes have never respected national boundaries and the continued globalisation of business in the 21st century means that it is more important than ever before that clients and lawyers look beyond the horizon of their home jurisdiction.

*The Dispute Resolution Review* is an excellent resource, written by leading practitioners across the globe. It provides an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is written with both in-house and private legal practitioners in mind, as well as the large number of other professionals and businesspeople whose working lives bring them into contact with disputes in jurisdictions around the world.

This Review is testament to the fact that jurisdictions face common problems. Whether the issue is how to control the costs of litigation, which documents litigants are entitled to demand from their opponents, or whether a court should enforce a judgment from another jurisdiction, it is fascinating to see the different ways in which different jurisdictions have grappled with these issues and, in some cases, worked together to produce a harmonised solution to international challenges. We can all learn something from the approaches taken by the 48 jurisdictions set out in this book.

A feature of some of the prefaces to previous editions has been the impact that the turbulent economic times were having in the world of dispute resolution. Although at the time of writing the worst of the global recession that gripped many of the world's economies has largely passed, it has left its mark. Old and new challenges and risks remain in many parts of the world such as renewed speculation on the future of the eurozone, the sanctions imposed on Russia, and falls in the price of oil. In some regions, the 'green shoots' of recovery have blossomed while in others they continue to need careful nurturing. Both situations bring their different challenges for those involved in disputes and, while the boom in insolvency-related disputes and frauds unearthed in the recession remain, the coming year could see an increase in investment and acquisitions with a subsequent focus on disputes concerning the contracts governing those investments.

I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at p. 739 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, in particular Nick Barette, Eve Ryle-Hodges and Shani Bans, who have impressed once again in managing a project of this size and scope, and in adding a professional look and finish to the contributions.

**Jonathan Cotton**

Slaughter and May

London

February 2015

## Chapter 48

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# UNITED STATES: DELAWARE

*Elena C Norman and Lakshmi A Muthu*<sup>1</sup>

### I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

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

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

The Delaware state court system is a two-tier system, meaning that decisions of the states' 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.<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

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

2 10 Del. C. Section 341.

3 8 Del. C. Section 111.

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

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

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

## II THE YEAR IN REVIEW

The past 12 months witnessed several Delaware decisions involving cross-border issues. In *In re Southern China Livestock Inc Litigation*<sup>8</sup> and *In re Activision Blizzard, Inc Stockholder Litigation*,<sup>9</sup> the Court of Chancery emphasised that foreign-based Delaware entities and foreign directors of Delaware entities cannot avoid Delaware court proceedings.

In *Southern China*, the Court of Chancery made it clear that a foreign-based Delaware company cannot ignore its 'corporate entity duties' without the risk of 'extraordinary' adverse judgments.<sup>10</sup> The case involved plaintiff shareholders who had invested in a Delaware company based in China 'because they believed the company was soon to go public through an [initial public offering]'.<sup>11</sup> Instead of going public, 'the company went dark and stopped reporting to the [United States Securities and

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4 6 Del. C. Section 18-111.

5 6 Del. C. Section 15-122.

6 6 Del. C. Section 17-111.

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

8 CA No. 8851-VCN (Del. Ch. 15 January 2014) (TRANSCRIPT).

9 86 A.3d 531 (Del. Ch. 21 February 2014).

10 CA No. 8851-VCN, at 16 (Del. Ch. 15 January 2014) (TRANSCRIPT).

11 Id. at 4.



Exchange Commission]’.<sup>12</sup> The plaintiffs sought financial information from the defendant company through court proceedings, but the defendant company failed to respond to the plaintiffs’ requests. The court entered a default judgment requiring the defendant company to produce its books and records to the plaintiffs, but the defendant company ignored the judgment.<sup>13</sup> The plaintiffs then moved for contempt against the defendant company.<sup>14</sup> Again, the defendant company failed to respond to the plaintiffs’ motion.<sup>15</sup> Faced with the refusal of a Delaware company to comply with Delaware court orders, the court (1) granted the plaintiffs ‘the option to “put” their shares in [the defendant company] at fair market value’, (2) ordered the defendant company to pay the plaintiffs attorneys’ costs and fees, and (3) appointed a receiver to manage the defendant company for the purpose of enforcing the defendant company’s compliance with the court’s orders.<sup>16</sup>

In *Activision Blizzard*, the Court of Chancery highlighted its jurisdiction to decide discovery disputes between plaintiffs and directors of Delaware entities who reside outside of the United States. The plaintiff in *Activision Blizzard* brought an action challenging a transaction between Vivendi (a French company) and Activision (a Delaware company). During the course of discovery, the plaintiff sought documents from and depositions of individuals who served as directors of Activision and senior officers of Vivendi (the director defendants). Certain of these individuals were resident in France. The director defendants refused to produce documents located in France, arguing that producing documents located in France for use outside of France would violate French law if not done in compliance with France’s Data Protection Act and the Hague Evidence Convention.<sup>17</sup> The court disagreed, holding that it ‘has the power to require foreign litigants like the [director defendants] to respond to discovery conducted under the Court of Chancery Rules’.<sup>18</sup> The court, however, noted that it would ‘exercise special vigilance to protect foreign litigants from the danger that unnecessary or unduly burdensome, discovery may place them in a disadvantageous position’.<sup>19</sup>

In considering how discovery should proceed in *Activision Blizzard*, the Court of Chancery found that the discovery sought from the director defendants was ‘vital to the litigation’ and ‘sufficiently specific so as not to confront the [director defendants] with ‘unnecessary, or unduly burdensome, discovery’. Furthermore, the court found that it could not predict whether the Hague Evidence Convention would provide

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12 Id.

13 Id.

14 Id. at 5.

15 Id.

16 Order Granting Plaintiffs’ Motion for Contempt, *In re Southern China Livestock Inc Litig*, CA No. 8851-VCN, at 2-4 (Del. Ch. 17 January 2014).

17 86 A.3d 531, 543 (Del. Ch. 21 February 2014).

18 Id.

19 Id. (quoting *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 US 522, 546 (1987)).

‘an adequate alternative means of securing discovery’.<sup>20</sup> Citing these findings and Delaware’s ‘substantial interest in providing an effective forum for litigating disputes involving the internal affairs of Delaware corporations’,<sup>21</sup> the court ordered that the director defendants produce documents under both the Court of Chancery Rules and the Hague Evidence Convention.<sup>22</sup> The court also ordered the director defendants who resided in France to ‘make themselves available for depositions in the United States’.<sup>23</sup> The court explained that ‘by accepting a directorship in a Delaware corporation, the [director defendants] agreed to the jurisdiction of the State of Delaware, including for purposes of discovery’.<sup>24</sup>

Although the Court of Chancery will enforce discovery requests for materials located outside the United States where Delaware entities and directors of Delaware entities are involved, the court recently demonstrated that it does not view its ability to protect discovery requests for materials located outside of the United States as unrestrained. In *Theravectys SA v. Immune Design Corp.*,<sup>25</sup> the plaintiff alleged that the defendant induced non-party Henogen, a Belgium-based company, to breach Henogen’s contract with the plaintiff.<sup>26</sup> During discovery, the plaintiff served discovery requests on non-party Novasep US, a US affiliate of Henogen, seeking, *inter alia*, documents in possession of and controlled by Henogen and Novasep US’s other European affiliates. Novasep US objected to the discovery requests, arguing, *inter alia*, that ‘even if it controlled [the documents sought], French and Belgian laws prevent[ed] their production’.<sup>27</sup> The court declined to address the French and Belgian laws cited by Novasep US and instead held that, under the Court of Chancery Rules, Novasep US was not required to produce the documents located outside of the United States because the plaintiff had failed to establish that Novasep US controlled the documents.<sup>28</sup>

### 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

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20 Id. at 547.

21 Id.

22 Id. at 550.

23 Id. at 551.

24 Id.

25 2014 Del. Ch. LEXIS 220 (Del. Ch. 31 October 2014).

26 Id. at \*1.

27 Id. at \*3.

28 Id. at \*8.

and procedure in Delaware's state courts are largely based on the Federal Rules of Civil Procedure<sup>29</sup> and the Federal Rules of Evidence.<sup>30</sup>

Of particular importance to business and commercial-law practitioners are the rules of the Superior Court and the rules of the Court of Chancery. Both courts regularly update their procedures to address the needs of practitioners. For example, in May 2010, the Superior Court created a complex commercial litigation division to manage cases with amounts in controversy of \$1 million or more.<sup>31</sup>

## 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

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

30 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.

31 See Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2010-3 (26 April 2010), available at [http://courts.delaware.gov/superior/pdf/Administrative\\_Directive\\_2010-3.pdf](http://courts.delaware.gov/superior/pdf/Administrative_Directive_2010-3.pdf).

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

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

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

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

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

37 History of Alternative Dispute Resolution (ADR) in Superior Court of Delaware, available at [http://courts.delaware.gov/Superior/ADR/adr\\_history.stm](http://courts.delaware.gov/Superior/ADR/adr_history.stm).

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>

Over the last few years, Delaware state courts have recognised the importance of electronic discovery. The Court of Chancery recently amended its discovery rules to specifically address electronically stored information (ESI).<sup>41</sup> Opposing parties and their counsel should confer regarding the preservation of ESI early in the litigation and attorney oversight of the identification and preservation processes is very important. In *Eorhb, Inc v. HOA Holdings, LLC*, the Court of Chancery directed parties to use technologies such as ‘predictive coding’ to select documents for production when a large quantity of electronically stored documents is involved.<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 Superior Court, any 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

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

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

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

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

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 Del. Ch. LEXIS 199, at \*14 (Del. Ch. 11 December 1990) (internal quotation marks omitted).

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

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

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

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 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

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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 Del. LEXIS 377, at \*7 (Del. 1989).

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

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

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

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

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> Though, in *BVF Partners LP v. New Orleans Employees 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>

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

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

59 See, e.g., *In re Celera Corp. S'holder Litig*, 2012 Del. Ch. LEXIS 66, at \*2–6 (Del. Ch. 23 March 2012) (approving a settlement of a class's claims in connection to a merger based solely on therapeutic benefits), rev'd in part on other grounds by *BVP P'rs L.P. v. New Orleans Empls Ret Sys*, 59 A.3d 418 (Del. 2012); *In re Sauer-Danfoss Inc S'holders Litig*, 65 A.3d 1116, at 1136, 1141–42 (Del. Ch. 29 April 2011) (awarding attorney's fees for efforts in obtaining a class action settlement based purely on supplemental disclosures, but noting that '[a]ll supplemental disclosures are not equal'); *In re Countrywide Corp S'holders Litig*, 2009 Del. Ch. LEXIS 155, at \*15, \*26 (Del. Ch. 24 August 2009) (approving a proposed settlement and finding that 'settlement for only therapeutic disclosures is neither unfair nor unreasonable' because the party's 'potential federal securities law claims possess no obvious value').

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

61 Id. at 436–37.

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

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

v **Service out of the jurisdiction**

Natural persons and legal entities may be served with legal process outside of Delaware. Delaware's primary vehicle for service of process outside the state is its long-arm statute.<sup>64</sup> This statute authorises service of process outside of Delaware on any individual or entity that:

- a* transacts any business or performs any work or service in Delaware;
- b* contracts to supply services or things in Delaware;
- c* causes tortious injury in Delaware by an act or omission in Delaware;
- d* causes tortious injury in or outside of Delaware by an act or omission outside of Delaware if the person or entity engages in a persistent course of conduct in Delaware or derives substantial revenue from services or things used or consumed in Delaware;
- 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 asking a Delaware court to recognise and enforce the foreign judgment. A Delaware court will recognise a foreign judgment if it concludes that a foreign court with jurisdiction rendered the judgment after a full and fair trial.<sup>66</sup>

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>

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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 Id.

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

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

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

69 10 Del. C. Section 4810(1)–(2).

**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), ‘[t]he 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 Chancery Rule 5.1.<sup>74</sup> Chancery Rule 5.1 makes clear that most information presented to the Court should be available to the public.<sup>75</sup> 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.<sup>76</sup>

**ix Litigation funding**

The law on third-party litigation funding is sparse in Delaware. Questions have arisen as to whether any protection from discovery may apply to communications between a party to litigation and litigation-funding companies that the party is considering retaining. For example, in *Leader Technologies Inc v. Facebook Inc*<sup>77</sup> the US District Court for the District

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

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

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

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

75 *Id.* at 4.

76 *Id.*

77 719 F. Supp. 2d 373 (D. Del. 2010).



of Delaware held that attorney–client work product will lose its protection from discovery if it is shared with litigation–funding companies that have not yet been retained.<sup>78</sup>

## IV LEGAL PRACTICE

### i Conflicts of interest and Chinese walls

Under the Delaware Lawyers’ Rules of Professional Conduct, a lawyer generally cannot represent a potential client if the representation involves a concurrent conflict of interest.<sup>79</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>80</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>81</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>82</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>83</sup> Also, subject to certain conditions, a member of a firm can avoid such an imputation by obtaining the informed consent of the former client.<sup>84</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>85</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 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.<sup>86</sup>

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78 See *id.* at 376.

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

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

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

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

83 Del. Lawyers’ R. Prof’l Conduct 1.10(c)(1)-(2).

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

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

86 Del. Lawyers’ R. Prof’l Conduct 1.6(b)(2)-(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 proposed European Data Protection Regulation.<sup>87</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>88</sup> Additionally, parties can redact confidential information from public court documents.<sup>89</sup>

### iv Other areas of interest

Delaware court procedure requires lawyers from outside of Delaware who want to practise in Delaware courts to associate with lawyers admitted to the Delaware Bar.<sup>90</sup> 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*.<sup>91</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>92</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>93</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

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'.<sup>94</sup> Therefore,

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

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

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

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

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

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

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

94 DRE 502(a)(3).

in Delaware, the attorney–client privilege applies to foreign lawyers. Furthermore, the privilege applies regardless of whether the attorney involved in the communications is outside counsel to a client or in-house counsel to a client.<sup>95</sup> The privilege is not, however, accorded to communications that render business advice as opposed to legal advice.<sup>96</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>97</sup> In *Kalisman v. Friedman*, the Court of Chancery recently held that a corporation ‘cannot pick and choose which directors get information by asserting the attorney–client privilege against [one director] but not against the [other] directors’.<sup>98</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 the communication withheld and the nature of the legal advice that was being provided. To ensure that the privilege is invoked properly, Delaware courts have required the senior Delaware lawyers on both sides of litigation to certify entries on privilege logs.<sup>99</sup>

Delaware courts also recognise the attorney work-product doctrine (protecting information prepared in anticipation of litigation)<sup>100</sup> 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’).<sup>101</sup>

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

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

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

98 2013 Del. Ch. LEXIS 100, at \*10–11 (Del. Ch. 17 April 2013); however, the Court of Chancery recognised that there were limitations to a director’s ability to access privileged information, including, among other things, a showing of ‘sufficient adversity between the director and the corporation such that the director could no longer have a reasonable expectation that he was a client of the board [of directors] counsel’. *Id.* at \*14.

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

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

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

ii Production of documents

During the course of discovery, parties may obtain non-privileged documents and electronically stored information that are ‘relevant to the subject matter involved in the pending actions, whether it relates to the claim or defense’.<sup>102</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>103</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>104</sup> The request must specify where, when and how the documents should be produced.<sup>105</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 is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.*<sup>106</sup>

Delaware courts often adjudicate disputes where the evidence is located outside Delaware and require parties to produce documents located in foreign jurisdictions.<sup>107</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>108</sup> Indeed, the Supreme Court of Delaware has held that requiring a party to litigation in Delaware to produce documents, which in large part would need to be obtained from the United Kingdom through the Hague Convention, does not present that party with an overwhelming hardship.<sup>109</sup> Further, one Delaware court has noted that ‘[w]here litigants are large national or international corporations

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

103 DRE. 401.

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

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

106 Ct. Ch. R. 26(b)(1) (emphasis added).

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

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

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

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>110</sup>

A party must produce all documents that are responsive to a proper document request and in its ‘possession, custody or control’.<sup>111</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>112</sup>

## VI ALTERNATIVES TO LITIGATION

### i Overview of alternatives to litigation

Parties seeking to resolve a dispute outside of the courtroom may do so through arbitration and mediation. As noted above, the Superior Court has a compulsory alternative dispute resolution (compulsory ADR) programme.<sup>113</sup> This programme operates pursuant to Rule 16 of the Rules of Civil Procedure for the Superior Court of the State of Delaware. Under this programme, every civil case filed in the Superior Court is subject to compulsory ADR.<sup>114</sup> This permits parties to choose the format of

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

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

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

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

the alternative dispute resolution, which may include one of the following options: arbitration, mediation and neutral assessment. If parties cannot agree upon a format, the default format is mediation. In addition, in the Court of Chancery, judges are authorised to sit as mediators in disputes that are pending in the Court of Chancery or have been filed for the purpose of court mediation.<sup>115</sup> These programmes allow parties to efficiently resolve their disputes while maintaining a greater level of confidentiality than litigation typically affords.

## ii Arbitration

Pursuant to the Superior Court compulsory ADR programme, parties can agree to undergo arbitration after filing an action. The parties may select the arbitrator by agreement or, if no such agreement can be reached, the Superior Court will appoint an arbitrator.<sup>116</sup> Furthermore, the parties can agree to make the arbitrator's decision binding.<sup>117</sup> If the parties agree to binding arbitration, the matter will be removed from the Superior Court's docket.<sup>118</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>119</sup> Every party has trial *de novo* appeal rights if they are not satisfied with the arbitrator's decision.<sup>120</sup>

Previously, judges sitting on the Delaware Court of Chancery conducted confidential arbitrations pursuant to legislation enacted in 2009.<sup>121</sup> However, in 2012, the US District Court for the District of Delaware struck down the Court of Chancery arbitration programme, finding 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.<sup>122</sup> In October 2013, a three-judge panel of the United States Courts of Appeals for the Third Circuit affirmed the US District Court's decision.<sup>123</sup> The Court of Chancery filed a petition asking the Supreme Court of the United States to review the three-judge panel's decision, but, in March 2014, the Supreme Court of the United States declined the Court of Chancery's request.<sup>124</sup> In June 2014, Chief Justice Leo E Strine Jr of the

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115 10 Del. C. Section 349.

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

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

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

119 Id.

120 Superior Court, Alternative Dispute Resolution: Guidelines for Superior Court Arbitration, available at [http://courts.delaware.gov/Superior/ADR/adr\\_arb\\_guideline.stm](http://courts.delaware.gov/Superior/ADR/adr_arb_guideline.stm).

121 *Del Coal for Open Gov't Inc v. Strine*, 733 F.3d 510, 512 (3d Cir. 2013).

122 *Del Coal for Open Gov't v. Strine*, 2012 US Dist. LEXIS 123980, at \*28–31 (D. Del. 30 August 2012).

123 *Del Coal for Open Gov't Inc v. Strine*, 733 F.3d 510, 521 (3d Cir. 2013).

124 See B Kendall, '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).

Supreme Court of Delaware announced that the Governor of Delaware and Delaware's Corporate Law Council, a group that is responsible for recommending and drafting amendments to the Delaware General Corporation Law, 'are working on a different approach [to arbitration] to be ready for the consideration by [Delaware's] General Assembly in January [2015]'.<sup>125</sup>

The rules of the Delaware Superior Court and Court of Chancery 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>126</sup> and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention<sup>127</sup>).<sup>128</sup>

### iii Mediation

Mediation is available as an alternative to litigation in both the Superior Court and the Court of Chancery. In the Superior Court, under the compulsory ADR programme, mediation is the default format for alternative dispute resolution. The parties may select the mediator by agreement from the Superior Court's approved Mediator Directory, which 'consists of members of the Delaware Bar and others who have completed the Superior Court's mediation training', or, if no such agreement can be reached, the Superior Court will appoint a mediator from its Mediator Directory.<sup>129</sup> The mediator's role in the mediation process is to help the parties reach 'a mutually acceptable resolution of a controversy'.<sup>130</sup> If the mediation is unsuccessful, 'no party may use statements made during the mediation or memoranda, materials or other tangible evidence prepared for the mediation at any point in the litigation in any way, without limitation, to impeach the testimony of any witness'.<sup>131</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. Section 347 and [Court of Chancery] Rules 93 to 95, which provide for "mediation only" dispute resolution for certain types of business

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125 State of the Judiciary Address, at 3 (4 June 2014), available at <http://courts.delaware.gov/Supreme/docs/State-of-the-Judiciary-2014june04.pdf>.

126 9 USC Section 1, et seq. (2013).

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

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

129 Super. Ct. Civ. R. 16(b)(4)(a); Superior Court Alternative Dispute Resolution: Mediator Directory, available at [http://courts.delaware.gov/Superior/ADR/adr\\_mediator\\_all.stm](http://courts.delaware.gov/Superior/ADR/adr_mediator_all.stm).

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

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

disputes where there is no pre-existing pending action'.<sup>132</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: at least one party is a business entity; at least one of the parties to the dispute 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 \$1 million.<sup>133</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>134</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>135</sup> 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.<sup>136</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>137</sup> The parties may select a neutral assessor from a list of approved neutral assessors by agreement, or, if no such agreement can be reached, the Superior Court will select a neutral assessor from the approved list.<sup>138</sup> The neutral assessment process consists of the parties providing the neutral assessor with confidential statements and participating in a confidential neutral assessment hearing.<sup>139</sup> 'The neutral assessor may use mediation or arbitration techniques to aid the parties in reaching a settlement.'<sup>140</sup> Moreover, the parties can agree to make the neutral assessment outcome binding.<sup>141</sup>

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

133 10 Del. C. Section 347(a)(1)–(5).

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

135 *Id.*

136 *Id.* at 4.

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

138 Superior Court Alternative Dispute Resolution: Guidelines for Superior Court Neutral Assessment, available at [http://courts.delaware.gov/Superior/ADR/adr\\_neutral\\_guideline.stm](http://courts.delaware.gov/Superior/ADR/adr_neutral_guideline.stm).

139 *Id.*

140 *Id.*

141 *Id.*



## **VII OUTLOOK AND CONCLUSIONS**

Delaware courts are at the forefront of complex litigation in the United States, often hearing matters involving foreign individuals and entities. Among other reasons, this is based on the sophistication and flexibility of the courts. In the coming year, one can expect increasing numbers of decisions involving foreign litigants and cross-border issues, as well as more cases from the Court of Chancery and the Delaware Supreme Court involving alternative entities.

## Appendix 1

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# ABOUT THE AUTHORS

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Elena C Norman is a partner in the corporate counselling and litigation section at Young Conaway Stargatt & Taylor, LLP in Wilmington, Delaware.

Ms Norman regularly counsels clients on Delaware corporate and commercial matters, and frequently represents parties to litigation, most often in the Delaware Court of Chancery. Her practice focuses primarily on counselling and litigation in connection with merger and acquisition transactions, going-private transactions, corporate stock appraisal, corporate governance, Delaware alternative entities, and cases involving fraud and breach of contract. Ms Norman also litigates commercial matters in the district and bankruptcy courts.

Ms Norman often represents non-US entities in US litigation proceedings and she frequently speaks on corporate governance and cross-border legal issues.

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