



Dispute Resolution

in 45 jurisdictions worldwide

Contributing editor: Simon Bushell

2013



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Dispute Resolution 2013

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Dispute Resolution 2013

Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 7908 1188
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First published 2003
Eleventh edition 2013
ISSN 1741-0630

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Delaware

Samuel A Nolen and Robert W Whetzel

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Litigation

1 Court system

What is the structure of the civil court system?

The Delaware judicial system consists of the Supreme Court, the Court of Chancery, the Superior Court, the Family Court, the Court of Common Pleas and the Justice of the Peace Courts. The Delaware Constitution of 1897 also establishes a Court on the Judiciary with power to censure, remove or retire judicial officers for misconduct or failure to perform duties.

The Supreme Court is the highest court in the state. The Court of Chancery and the Superior Court are the trial-level courts of general jurisdiction, appeals from which are directly to the Supreme Court. The Family Court exercises jurisdiction over matters of domestic relations and most offences involving juveniles. The remaining courts are courts of limited jurisdiction.

The Supreme Court

The Supreme Court is the highest appellate court in Delaware and has final appellate jurisdiction in civil appeals from final judgments, discretionary appellate jurisdiction over interlocutory appeals in civil cases and final appellate jurisdiction in criminal appeals where the sentence exceeds certain minimums. The Supreme Court has additional jurisdiction with respect to writs of prohibition, quo warranto, certiorari and mandamus.

The Supreme Court consists of five justices, one of whom is the chief justice. The chief justice sets administrative policy for the state courts.

Justices of the Supreme Court are appointed by the governor, subject to the advice and consent of the Delaware Senate, for 12-year terms. Justices must be citizens of Delaware learned in the law.

The Supreme Court is nationally and internationally regarded as expert in issues of corporate law, including mergers and acquisitions, shareholder rights, fiduciary relations and director liability. Its decisions often form the basis for the development of jurisprudence in other states on these subjects. On average, appeals to the Supreme Court are resolved in less than 190 days. The court is accustomed to hearing expedited appeals where circumstances warrant.

The Supreme Court has additional constitutional jurisdiction to hear and determine questions of law certified to it by other Delaware courts, the Supreme Court of the United States, a court of appeals or district court of the United States, the highest appellate court of any other state or the United States Securities and Exchange Commission.

The Court of Chancery

The Court of Chancery has jurisdiction to hear and determine all causes and matters in equity and to grant traditional equitable remedies such as injunctions, reformation, rescission, specific performance, accountings and the like. The general equity jurisdiction of the Court of Chancery derives from the jurisdiction of the English

High Court of Chancery as it existed at the time of the separation of the American colonies from the English Crown, but its jurisdiction has been substantially supplemented by statutory grants of jurisdiction over specific subject matters. The Court of Chancery also has limited appellate jurisdiction, hearing appeals from specified state agencies, such as the securities commissioner.

Chancery litigation consists largely of corporate and partnership matters, as to which it has developed a national and international reputation for expertise. It also hears matters involving trusts and estates, other fiduciary matters, commercial and contractual matters and real estate disputes. The Court of Chancery also has jurisdiction to hear certain 'technology disputes' and to mediate disputes confidentially, as described more particularly below.

The Court of Chancery consists of one chancellor and four vice chancellors. The chancellor and vice chancellors are appointed by the governor, subject to the advice and consent of the Senate, for 12-year terms. In view of the particular expertise expected of the Court of Chancery in corporate and other fiduciary matters, the chancellor and vice chancellors historically have been experienced and sophisticated practitioners familiar with these areas at the time of their selection.

The Superior Court

The Superior Court is the state's trial-level court of general jurisdiction hearing matters of law, as opposed to equity matters, which are heard by the Court of Chancery. The Superior Court has statewide jurisdiction over civil and criminal cases such as cases of personal injury, libel and slander, contract claims, professional malpractice, product liability and property cases such as mechanics' liens, condemnations, mortgage foreclosures and certain landlord-tenant disputes. The Superior Court has a complex civil litigation division, which provides specialised case management procedures for commercial disputes. The Superior Court's authority to award damages is not subject to a monetary maximum. Trial by jury is available as at common law. The Superior Court has exclusive criminal jurisdiction over felonies and most drug offences. The Superior Court also has jurisdiction over involuntary commitment proceedings.

The Superior Court exercises appellate jurisdiction in appeals from the Court of Common Pleas, Family Court (adult criminal cases) and various administrative agencies.

Superior Court judges are appointed by the governor, subject to the advice and consent of the Senate, for 12-year terms. The judges are drawn from a wide background of experience in the legal profession, reflecting the varied nature of the cases that come before the Superior Court.

Family Court

The Family Court is a unified statewide court with jurisdiction over virtually all family and juvenile matters. Appeals are generally to the Delaware Supreme Court. Family Court judges are appointed by the governor, subject to the advice and consent of the Senate, for 12-year terms.

Court of Common Pleas

The Court of Common Pleas has statewide jurisdiction in civil actions where the amount involved in the complaint does not exceed US\$50,000. Civil cases in the Court of Common Pleas are heard without a jury. The Court of Common Pleas has jurisdiction over most criminal misdemeanours occurring in the state. Court of Common Pleas judges are appointed by the governor for 12-year terms, subject to the advice and consent of the Senate.

Justice of the Peace Courts

The Justice of the Peace Courts have jurisdiction over civil cases in which the amount in controversy does not exceed US\$15,000. Justice of the Peace Courts are authorised to hear certain misdemeanours and most motor vehicle cases (excluding felonies) and may act as committing magistrates for all crimes. Civil appeals may be taken de novo to the Court of Common Pleas. Justices of the peace are nominated by the governor and confirmed by the Senate for terms of four years.

2 Judges and juries

What is the role of the judge and the jury in civil proceedings?

In the Superior Court, any party may demand a jury trial for issues so triable. A jury in the Superior Court will typically consist of six members unless a demand is made for a 12-person jury. In jury trials, the jury makes determinations of fact and the judge will instruct the jury on issues of law. If a jury is not demanded, the judge will assume the role of fact-finder.

Jury trials are not available in the Court of Chancery. Accordingly, the chancellor or vice chancellor makes all findings of fact and conclusions of law.

3 Limitation issues

What are the time limits for bringing civil claims?

Statutes of limitation are applicable to actions at law. The Court of Chancery, as a court of equity, does not apply statutes of limitation but applies the equitable doctrine of laches to bar causes of action where a claimant has unreasonably delayed in bringing suit. The Court of Chancery normally borrows from the applicable statute of limitation when applying the doctrine of laches.

A one-year limitations period applies to actions upon a claim for wages, salary or overtime for work, labour or personal services performed, or for damages for failure to pay a claim of this nature; a two-year limitations period applies to actions for wrongful death and personal injury or injury to personal property; a three-year limitations period applies to breach of contract actions; and a six-year limitations period applies to causes of action arising from a promissory note, bill of exchange or similar instrument.

Tolling agreements suspending the limitations period as well as agreements shortening the limitations period are permitted.

4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

No formal procedures are required before commencing a civil action. No procedural rule requires a pre-litigation exchange of documents.

5 Starting proceedings

How are civil proceedings commenced?

A civil action is commenced by filing a complaint and any required accompanying documents in court along with the requisite filing fee. Upon issuance of a summons, the complaint is served by the sheriff or by a special process server.

6 Timetable

What is the typical procedure and timetable for a civil claim?

A party served with a complaint must file an answer or serve a responsive pleading or motion within 20 days. Parties may extend the time within which an answer or responsive pleading must be filed by stipulation, subject to court approval. A defendant may also assert counterclaims against the plaintiff, cross-claims against co-defendants or third-party claims against a new defendant. A counterclaim, cross-claim or third-party complaint must be answered within 20 days of service.

Any party may move for summary judgment before trial. If a civil action is not resolved on a motion to dismiss or motion for summary judgment, the time within which a case proceeds to trial varies depending on the court and complexity of the case. It is not unusual for civil actions to take between one and two years to proceed to trial.

7 Case management

Can the parties control the procedure and the timetable?

Parties to civil actions make recommendations to the court regarding the time by which the parties agree that certain events must occur. The court will typically enter a scheduling order establishing dates for the completion of fact and expert discovery, the filing of case dispositive motions, the exchange of witness and document lists, pretrial conference and trial.

8 Evidence – documents

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is a duty to preserve documents relevant to a dispute beginning at the time litigation may reasonably be anticipated. The Court of Chancery has issued guidelines for preservation of electronically stored information. Court rules specify pretrial discovery procedures, including document production. Parties may require the production of relevant documents by serving a request for production, and may enforce that request through a motion to compel.

9 Evidence – privilege

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Documents and other communications made between a lawyer and a client or their representatives for the purpose of facilitating the rendition of legal services are generally protected by the attorney-client privilege. The privilege applies equally to advice of in-house lawyers. Materials prepared in anticipation of litigation or for trial, or which contain mental impressions, conclusions, opinions or legal theories of counsel concerning the litigation, are likewise protected from discovery. Additional privileges, such as physician-patient, husband-wife (including same-sex partners in civil unions), religious confession and political vote privileges, also exist.

10 Evidence – pretrial

Do parties exchange written evidence from witnesses and experts prior to trial?

Court rules provide for the exchange of documentary evidence before trial as well as the discovery of experts' reports. Pretrial orders will normally require disclosure of the substance of anticipated testimony of fact and expert witnesses before trial.

11 Evidence – trial

How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence at trial is presented through the submission of written or physical exhibits and the oral examination of witnesses. Trials are adversarial proceedings in which evidence is elicited by questioning of witnesses by counsel for the party presenting such witnesses and cross-examination by counsel for the opposing party. The presiding judge or chancellor may ask questions but does not conduct the examination.

12 Interim remedies

What interim remedies are available?

The Court of Chancery has jurisdiction to enter injunctions, including temporary restraining orders and preliminary injunctions. Interim relief is normally granted only after the party to which it is directed is given notice and an opportunity to be heard, and such relief may only be granted without notice in cases of clear risk of imminent irreparable injury and upon a demonstration of sufficient reasons why notice could not or should not be given.

The Court of Chancery may also sequester Delaware-situs property of a non-resident defendant to compel the defendant's appearance. A defendant who appears following sequestration may apply for release of the sequestered property.

The Superior Court may attach property of a foreign corporation if the requesting party has asserted a claim in excess of US\$50 and the Superior Court has jurisdiction over the defendant. The purpose of this law is to compel a non-resident defendant's appearance at trial.

13 Remedies

What substantive remedies are available?

The Superior Court may award consequential, incidental, compensatory, liquidated and, in appropriate cases, punitive damages. Pre- and post-judgment interest is available for judgments obtained in Delaware.

The Court of Chancery may grant traditional equitable remedies, such as specific performance, rescission, rescissory damages and injunctive relief. It may also award declaratory relief, impose constructive trusts and generally fashion such relief as is equitable in the circumstances. The Court of Chancery has no jurisdiction to award punitive damages.

14 Enforcement

What means of enforcement are available?

Delaware courts can hold a party in contempt for disobeying a court order. The Superior Court and Court of Chancery can also sanction any party that fails to obey a court order to provide or permit discovery. Permissible sanctions include an order establishing facts as true, an order refusing to allow the disobedient party to support or oppose designated claims or an order striking the pleadings.

The Court of Chancery can seize a person or a person's property to enforce a court order.

The date and amount of a judgment are entered in the record of each case. Judgments are final when the action is complete or interlocutory when incomplete. Default judgments are interlocutory until damages are determined. A judgment debt is satisfied after full payment of the debt in the form agreed to by the parties. Non-payment for 20 years creates a rebuttable presumption that a judgment is satisfied. Upon receiving payment, the judgment debtor must enter in the record that the judgment is satisfied. If the entry is not made voluntarily, Delaware courts can compel the party to make an entry in

the record and assess damages between US\$10 and US\$500. A party is not responsible for entering satisfaction in the record if a sheriff sells seized property to satisfy the judgment. Residents of states other than Delaware should appear within 30 days after receiving notice to collect payment and enter that the judgment is satisfied in the record.

15 Public access

Are court hearings held in public? Are court documents available to the public?

Delaware courts are presumptively open to the public and press in both criminal and civil proceedings. A courtroom may only be closed if the party seeking closure provides specific evidence that closure is necessary to protect a compelling interest.

Documents filed with the court may be sealed to retain confidentiality upon compliance with the conditions and restrictions established in the court's rules. The party filing a sealed document must later file a redacted version of the document to which the public has access. A non-party desiring access to a sealed document may file an application with the court to unseal the document.

16 Costs

Does the court have power to order costs?

In the Superior Court and the Court of Chancery, the prevailing party is entitled to recover ordinary costs, which include expert witness fees and court costs. The prevailing party is not entitled to recover attorneys' fees as a general rule, but parties may provide otherwise by contract and courts may order a party to pay its adversary's attorneys' fees if the party has engaged in bad faith or frivolous litigation.

If, following the entry of judgment, the adverse party moves for a new trial or for a stay of execution of judgment pending appeal, the court has the authority to require the party to post a bond or security.

17 Funding arrangements

Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingent fee agreements are enforceable in Delaware provided that they are in writing, signed by the client and state the method by which the fee is to be determined in the event of settlement, trial or appeal. The fee agreement must specify the litigation and other expenses to be deducted from any recovery and must clearly notify the client of any expenses for which the client will be liable whether or nor the client is the prevailing party. The Delaware rules of professional conduct prohibit a lawyer from entering into a contingent fee agreement for family law and criminal matters. Delaware law prohibits the assignment of a claim to an unrelated party in exchange for that party's agreement to fund the claim and share any proceedings.

18 Insurance

Is insurance available to cover all or part of a party's legal costs?

Yes. Delaware courts recognise and will enforce insurance contracts that cover or indemnify a party for the costs and fees it incurs during litigation and, subject to public policy, for liability resulting from such litigation.

19 Class action

May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Litigants having similar claims or defences may bring a class action in the Court of Chancery or Superior Court. In general, a class action may be pursued only if:

- the class is so numerous that joinder of all members is impractical;
- there are questions of law or fact common to the class;
- the claims or defences of the representative parties are typical of the claims or defences of the class; and
- the representative parties will fairly and adequately protect the interests of the class.

An action may be maintained as a class action if, in addition to the foregoing:

- the prosecution of separate individual actions would present a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the party opposing the class;
- individual adjudications would as a practical matter be dispositive of the interests of the other class members or impair their ability to protect their interests;
- the questions of law or fact common to the class predominate over individual questions and a class action would be more fair and efficient than individual actions; or
- the party opposing the class has acted or refused to act on grounds generally applicable to the class, rendering final injunctive or declaratory relief with respect to the class appropriate.

Once initiated, a class action may only be settled with court approval to ensure fairness and adequacy of the settlement to the class. Notice of a proposed settlement must be given to the class members, unless the action is dismissed without prejudice to the class or with prejudice to the named plaintiff only, and upon a showing that the plaintiff and plaintiff's attorney have not received compensation or a promise thereof for the dismissal.

20 Appeal

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Appeals from the Court of Chancery or Superior Court are to the Delaware Supreme Court. There is no intermediate court of appeals.

An appeal from a final judgment of the Court of Chancery or Superior Court must be taken within 30 days of entry of final judgment. Appeals from interlocutory decisions of the Court of Chancery or Superior Court are possible, but the Supreme Court has discretion whether to accept them and has issued rules establishing criteria for such appeals. To be appealable, an interlocutory order must determine a substantial issue in the case, establish a legal right and meet at least one of certain additional criteria such as sustaining controverted jurisdiction, presenting an issue of law of first instance or one on which trial court decisions are in conflict, presenting an unsettled question of the constitutionality, construction or application of a Delaware statute, or otherwise meeting interests of justice. Interlocutory appeals must be filed within 10 days of entry of the order appealed.

Appeals from Justice of the Peace Courts are to the Court of Common Pleas. Appeals from the Court of Common Pleas are to the Superior Court. Appeals from the Family Court in civil cases are to the Delaware Supreme Court, while appeals in Family Court criminal matters are to the Superior Court.

There is no further direct appeal from decisions of the Delaware Supreme Court, but review of decisions involving validity of a federal law or issues arising under the Constitution of the United States may be sought by petition for writ of certiorari to the United States Supreme Court.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Delaware has enacted the Uniform Foreign Money-Judgments Recognition Act. Under that act, Delaware will recognise a foreign judgment that is final, conclusive and enforceable in the country where it was rendered. The judgment-creditor must properly authenticate the foreign judgment and file it with the prothonotary. The judgment-creditor must also provide an affidavit setting forth the name and last known address of the judgment-creditor and judgment-debtor. The judgment-debtor is then formally notified of the judgment by the prothonotary. Execution of a foreign judgment may begin no earlier than 20 days after the judgment is filed.

A foreign judgment is not enforceable in Delaware if it was rendered in a system that does not provide impartial tribunals or otherwise fails to comply with the requirements of due process. A foreign judgment also will not be recognised if the foreign court lacked jurisdiction over the judgment-debtor or the subject matter of the dispute.

Delaware courts may also decide not to recognise foreign judgments in other circumstances, such as if:

- the defendant in the proceedings in the foreign court did not receive timely notice;
- the judgment was obtained by fraud;
- the cause of action on which the judgment is based is repugnant to Delaware's public policy;
- the foreign judgment conflicts with another final and conclusive judgment;
- the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled; or
- the foreign court was a seriously inconvenient forum trying the action.

22 Foreign proceedings

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Oral or documentary evidence may be obtained in Delaware for use in civil proceedings in other jurisdictions by any court of the United States, any state, district or territory in the United States or any foreign country issuing a commission for the taking of such evidence. Subject to procedural requirements, the Superior Court will issue a subpoena ordering the witness to appear at a time and place stated in the subpoena. The court may enforce obedience to the subpoena or punish any disobedience, and the summoned party will be liable for damages occasioned by failure to comply.

Arbitration**23 UNCITRAL Model Law**

Is the arbitration law based on the UNCITRAL Model Law?

The Delaware Uniform Arbitration Act (DUAA) was adopted in 1972, four years before the adoption of the UNCITRAL Arbitration Rules. The DUAA is based upon the Uniform Arbitration Act promulgated by the National Conference of Commissioners on Uniform State Laws, with some changes and provisions peculiar to Delaware.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Under the DUAA, a written agreement to submit to arbitration a controversy existing at or arising after the effective date of the agreement will be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of the contract, without regard to the justiciable character of the controversy.

25 Choice of arbitrator

If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In the absence of a specified method in the arbitration agreement, or if the agreed method fails or for any reason cannot be followed, or when an appointed arbitrator fails or is unable to act and the arbitrator's successor has not been duly appointed, the Court of Chancery will appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

26 Arbitral procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

The Delaware Court of Chancery has jurisdiction to enforce arbitration agreements and to enter judgment on an award. In determining any matter under the DUAA, the court shall not consider whether the claim with respect to which arbitration is sought is tenable or otherwise pass upon the merits of the dispute.

The DUAA sets forth certain requirements for the arbitration procedure to follow, including the method by which the arbitration is to be commenced. The DUAA also provides requirements for the arbitration unless otherwise provided by the arbitration agreement, including hearing procedures and that the power of the arbitrators shall be exercised by a majority.

A party must serve upon another party a notice of intention to arbitrate, stating that unless the party served applies to enjoin the arbitration within 20 days after such service, such party shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. A complaint seeking to enjoin arbitration must be made by the party served within 20 days after service of the notice or the party shall be so precluded. Notice of the filing of such complaint shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. A party aggrieved by the failure of another to arbitrate may file a complaint for an order compelling arbitration.

27 Court intervention

On what grounds can the court intervene during an arbitration?

The court may upon proper application direct the arbitrators to proceed promptly with the hearing and determination of the controversy, and fix a time for the award to be made.

28 Interim relief

Do arbitrators have powers to grant interim relief?

The DUAA does not afford or deny arbitrators the powers to grant interim or conservatory relief. Arbitrators may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts and all other documents and evidence, and have the power to administer oaths. Arbitrators also have the power to issue subpoenas in their own names, and may permit a deposition to be taken of a witness who cannot be subpoenaed or is unable to attend the hearing.

All provisions of law compelling a person under subpoena to testify are applicable.

29 Award

When and in what form must the award be delivered?

The award shall be in writing signed by the arbitrators. An award shall be made within the time fixed by the agreement or, if not fixed, within such time as the court orders on complaint or application of a party in an existing case. The parties may extend the time in writing either before or after the expiration thereof.

30 Appeal

On what grounds can an award be appealed to the court?

The court has jurisdiction to vacate an award where:

- the award was procured by corruption, fraud or other undue means;
- there was evident partiality by a neutral arbitrator, corruption or misconduct prejudicing the rights of any party;
- the arbitrators exceeded their powers, or a final and definite award was not made;
- the arbitrators failed to conduct the hearing or follow the procedures as set forth in the DUAA, so as to prejudice substantially the rights of a party, unless waived; or
- there was no valid arbitration agreement, the agreement was not complied with or the arbitration was barred by limitation.

The court has jurisdiction to modify or correct the award where:

- there was an evident miscalculation or mistake in the award;
- the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- the award is imperfect in a matter of form, not affecting the merits of the controversy.

Appeals may be taken to the Delaware Supreme Court from a final order compelling or enjoining arbitration, confirming or denying confirmation of an award, modifying, correcting or vacating an award or any other final judgment or decree entered under the DUAA.

31 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

The court shall confirm an award upon complaint or application of a party in an existing case made within one year after its delivery to the party, unless grounds are urged for vacating, modifying or correcting the award within the time limits allowed. Upon the granting of an order confirming, modifying or correcting an award, except in cases where the award is for money damages, a final judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Upon the granting of an order confirming, modifying or correcting an award for money damages, a duly certified copy of the award and of the order confirming, modifying or correcting the award shall be filed with the prothonotary of the Superior Court in the county where the arbitration was conducted and the award made. Such a transferred award shall, from that date, become and be a lien on all the real estate of the debtor in the county, in the same manner and as fully as judgments rendered in the Superior Court are liens, and may be executed and enforced in the same way as judgments of that court.

32 Costs

Can a successful party recover its costs?

Unless otherwise provided in the arbitration agreement, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid

Update and trends

The Delaware courts have continued to address cutting-edge merger and acquisition issues in their role as the pre-eminent forum for resolution of corporate and fiduciary issues in M&A. Among the issues addressed in 2012 were fairness and loyalty issues in controlling shareholder transactions (*In re Southern Peru Copper Shareholder Deriv Litig*, 30 A3d 60 (Del Ch 2011), aff'd sub nom; *Americas Mining v Theriault*, 51 A3d 1213 (Del 2012) (final judgment against parent company of over US\$2 billion); and *In re Delphi Fin Grp Shareholder Litig*, CA No. 7144-VCG (Del Ch 6 March 2012) (declining to enjoin transaction despite likely breach of duty of loyalty by controlling shareholder based on differential merger consideration)). The courts also addressed emerging M&A practices such as the validity of 'don't ask, don't waive' provisions in standstill agreements (compare *In re Complete Genomics Shareholder Litig*, CA No. 7888-VCL (Del Ch 27 November 2012) with *In re Ancestry.com Shareholder Litig*, CA No. 7988-CS (Del Ch 17 December 2012)); investment banker conflicts of interest (*In re Del Monte Foods Co Shareholder Litig*, 25 A.3d 813 (Del Ch 2011), and *In re Micromet Shareholders Litig*, CA No. 7197-VCP (Del Ch 29 February 2012)); and breach of confidentiality agreements entered into in connection with negotiated transactions (*Martin Marietta Materials, Inc v Vulcan Materials Co*, 56 A3d 1072 (Del Ch 2012)).

as provided in the award. The court may reduce or disallow any fee or expense that it finds excessive, or may allocate it as justice requires.

Alternative dispute resolution

33 Types of ADR

What types of ADR process are commonly used? Is a particular ADR process popular?

The Court of Chancery may conduct private mediation proceedings for business and technology disputes. For technology disputes, the dispute must involve a claim for monetary damages over US\$1 million and the parties must consent to the court's jurisdiction. For business disputes, the parties must consent to the court's jurisdiction and, in disputes involving solely a claim for monetary damages, the amount must be no less than US\$1 million. In both instances, at least one party must be a Delaware entity. Mediation is commenced by the parties submitting a petition for mediation to the court. The petition, any supporting documents and communication made in or in connection with the mediation are considered confidential and not of public record. Upon receipt of a petition, the court will appoint a mediator, who will be a judge or master sitting permanently in the court.

The Court of Chancery has adopted rules authorising it to arbitrate business disputes. Arbitration under such rules is currently

unavailable due to litigation regarding constitutionality of the process.

ADR is available in the Superior Court. The Superior Court Civil Rules provide that ADR may include, but is not limited to, mediation, arbitration and neutral case assessment. Mediation is the most common form of ADR utilised by parties for cases pending in the Superior Court.

34 Requirements for ADR

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

In general, civil cases pending in the Superior Court are subject to compulsory ADR. If the parties cannot agree to the format of ADR, the case shall be mediated unless otherwise ordered by the court. ADR is not compulsory in the Court of Chancery.

Miscellaneous

35 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The Superior Court has established a Complex Commercial Litigation Division (the CCLD) for the resolution of certain business disputes where equitable jurisdiction is lacking. Three kinds of cases may be assigned to the CCLD: those involving a claim by any party of US\$1 million or more; cases where an exclusive choice of court agreement exists; or any case that the president judge of the Superior Court designates for the CCLD. Consumer and class action cases, assuming they can satisfy one of these criteria, are not excluded. However, cases with claims for personal, physical, or mental injury, mortgage foreclosure actions, mechanics liens, and condemnation proceedings are ineligible. Cases assigned to the CCLD are distributed among judges assigned to the CCLD panel on a rotating basis. The rules governing the CCLD are designed to provide the CCLD judges with greater flexibility to implement case schedules that meet the needs of specific cases assigned to the CCLD.

The Superior Court has also established summary proceeding rules for commercial disputes in the Superior Court where the amount in controversy exceeds US\$100,000 as to at least one party, exclusive of interests and costs, and where the parties have agreed to expedited summary proceedings. Neither punitive damages nor a jury trial are available in the summary proceedings. Rules for expedited discovery are provided for summary proceedings, and the parties may elect to forgo witnesses at trial and submit briefs in support of their cause.

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