

# International Comparative Legal Guides



Practical cross-border insights into litigation and dispute resolution work

## Litigation & Dispute Resolution 2023

16<sup>th</sup> Edition

Contributing Editor:  
**Greg Lascelles**  
Covington & Burling LLP

**CDR** Commercial  
Dispute  
Resolution

**ICLG.com**

# Expert Analysis Chapter

- 1** **When Will a Defendant Owe a Claimant a Duty to Take Reasonable Care? Recent Changes in How the English Courts Approach This Question**  
Greg Lascelles & Alan Kenny, Covington & Burling LLP

## Q&A Chapters

- 6** **Austria**  
Pitkowitz & Partners: Dr. Nikolaus Pitkowitz & Roxanne de Jesus
- 14** **Belgium**  
Lydian: Hugo Keulers, Jo Willems, Yves Lenders & Lola Stenuit
- 22** **Bermuda**  
Wakefield Quin Limited: John Hindess
- 30** **Brazil**  
LP LAW | LOPES PINTO ADVOGADOS: Diogo José Nolasco Dominguez
- 37** **England & Wales**  
Covington & Burling LLP: Greg Lascelles & Alan Kenny
- 52** **Finland**  
Borenus Attorneys Ltd: Kristiina Liljedahl & Vilma Haavisto
- 60** **France**  
Laude Esquier Champey: Olivier Laude, Benoit Renard & Gauthier Doléac
- 70** **Germany**  
Willkie Farr & Gallagher LLP: Matthias Schrader, Dr. Johannes Schmidt, Dr. Harry Nettle & Svenja Wachtel
- 78** **Ghana**  
Juris Ghana Legal Practitioners: Godwin Mensah Sackey, Papa Yaw Owusu-Ankomah & Kwesi Papa Owusu-Ankomah
- 87** **Greece**  
Kyriakides Georgopoulos Law Firm: John C. Kyriakides & Alexia Giagini
- 97** **Hong Kong**  
Kirkland & Ellis: Fergus Saurin & Jacky Fung
- 106** **India**  
Shardul Amarchand Mangaldas & Co.: Shally Bhasin, Chaitanya Safaya & Prateek Gupta
- 118** **Indonesia**  
Sandiva Legal Network: Arthur Wailan Sanger, Mochamad Akbar Fachreza & Jessica Novia Puspitaningrum
- 125** **Japan**  
Nagashima Ohno & Tsunematsu: Koki Yanagisawa & Hiroyuki Ebisawa
- 134** **Kenya**  
Umsizi LLP: Jacqueline Oyuyo Githinji
- 145** **Lithuania**  
WALLESS: Gediminas Dominas & Tomas Balčiūnas
- 153** **Luxembourg**  
Arendt & Medernach: Clara Mara-Marhuenda & Sandrine Margetidis-Sigwalt
- 161** **Mexico**  
OLIVARES: Armando Arenas Reyes & Eduardo Arana Ramírez
- 171** **Netherlands**  
Florent: Yvette Borrius & Chris Jager
- 180** **Nigeria**  
Famsville Solicitors: Woye Famojuro, Temiloluwa Dosumu, Michael Ajinde & Samuel Olawepo
- 190** **Philippines**  
SyCip Salazar Hernandez & Gatmaitan: Ramon G. Songco & Anthony W. Dee
- 199** **Singapore**  
Allen & Gledhill LLP: Afzal Ali, Ho Pey Yann & Daniel Seow
- 208** **Spain**  
Monereo Meyer Abogados: Sonia Gumpert Melgosa & Michael Fries
- 215** **Switzerland**  
BMG Avocats: Rocco Rondi, Guillaume Fatio & Mimoza Lekiqi
- 224** **Thailand**  
Chandler MHM Limited: Waree Shinsirikul, Wanchana Bunditkrisada, Sakolrat Srangsomwong & Chonlawat Rojanaparpal
- 232** **USA – Connecticut**  
Shipman & Goodwin LLP: Kathleen M. LaManna & Diane C. Polletta
- 243** **USA – Delaware**  
Potter Anderson & Corroon LLP: Jonathan A. Choa, John A. Sensing & Carla M. Jones
- 251** **USA – Illinois**  
Much Shelist, P.C.: Steven P. Blonder & Charlotte F. Franklin
- 258** **USA – Mississippi**  
Jones Walker LLP: Neville H. Boschert
- 266** **USA – Pennsylvania**  
Blank Rome LLP: James T. Smith, Rebecca D. Ward, Stephanie C. Chomentowski & Melanie S. Carter
- 273** **Zambia**  
Dentons Eric Silwamba, Jalasi and Linyama Legal Practitioners: Eric Suwilanji Silwamba, Lubinda Linyama, Mailesi Undi & Mwape Chileshe

## USA – Delaware



Jonathan A. Choa



John A. Sensing



Carla M. Jones

Potter Anderson & Corroon LLP

### 1 Litigation – Preliminaries

#### 1.1 What type of legal system does your jurisdiction have? Are there any rules that govern civil procedure in your jurisdiction?

Delaware is governed by a hybrid of constitutional provisions, statutes, and case law. Matters pending before each court are subject to the rules of practice and procedure of that court and other local court rules and directives.

#### 1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

Article IV of the Constitution of Delaware establishes a Supreme Court, Court of Chancery, Superior Court, Family Court, Court of Common Pleas, and Justice of the Peace Courts.

The Supreme Court is the highest court and the only true appellate court. Civil appeals from both the Superior Court and the Court of Chancery are heard directly by the Supreme Court, and parties have an absolute right of appeal from final judgments entered in either the Superior Court or the Court of Chancery.

The Constitution preserves the historic divide between law, in the Superior Court, and equity, in the Court of Chancery. The Superior Court is Delaware's trial court of general jurisdiction. It has state-wide original jurisdiction over all civil cases, except equity cases. The Court of Chancery has jurisdiction to hear and determine all matters and causes in equity. The Delaware legislature has vested additional statutory jurisdiction in the Court of Chancery with respect to various corporate matters.

Delaware is also home to the United States District Court for the District of Delaware, which is a federal court as opposed to a Delaware state court.

#### 1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

**Pleading.** Generally, a plaintiff commences a civil proceeding by filing a complaint and promptly serving the complaint on

all defendants. A defendant has 20 days to file a responsive pleading after the defendant has been served. The defendant also pleads affirmative defences in the answer and certain defences are waived if not made at the time the answer is filed. *In lieu* of filing an answer, the defendant may file a motion to dismiss.

**Discovery.** Discovery is the opportunity to develop facts. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Discovery can be in the form of: depositions upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, or tangible things; permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

**Trial.** There is an absolute right to a trial by jury in an action at law (*i.e.*, in the Superior Court), but not in an action in equity (*i.e.*, in the Court of Chancery). In a jury trial, the judge decides questions of law, and the jury decides questions of fact. In a non-jury trial, the judge decides questions of fact and questions of law.

**Final judgment and appeal.** Generally, parties have an absolute right of appeal from final judgments to the Supreme Court. An appeal is commenced by a notice of appeal. A notice of appeal must be filed with the Supreme Court within 30 days after entry upon the docket of the judgment, order, or decree from which the appeal is taken. Generally, only questions fairly presented to the trial court may be presented for review.

The Court of Chancery has broad power to permit expedited proceedings, but expedition is not granted as a matter of right. Expedition can be sought at any phase of the pre-trial proceedings; however, a motion to expedite must be filed contemporaneously with any motion for a temporary restraining order or preliminary injunction, and at the inception of statutory summary proceedings. With the exception of statutory summary proceedings, which are automatically afforded a level of expedited treatment, the Court of Chancery will grant a motion to expedite only upon a showing of good cause by the party seeking the accelerated schedule.

The Superior Court has established the Complex Commercial Litigation Division, designed to expeditiously resolve certain qualifying large commercial disputes where equitable jurisdiction is lacking, in similar fashion, to the Court of Chancery.

**1.4 What is your jurisdiction’s local judiciary’s approach to exclusive jurisdiction clauses?**

Exclusive jurisdiction clauses, also known as forum selection clauses, are presumptively valid in Delaware and will be specifically enforced unless the resisting party clearly shows that enforcement would be unreasonable and unjust, or that the forum selection clause is itself invalid for such reasons as fraud and overreaching.

**1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?**

Costs in civil proceedings vary according to the court and nature of the action. Additional fees may also be assessed throughout the litigation. Generally, the initial fee to file a complaint in the Superior Court is \$200, and to file a complaint in the Complex Commercial Litigation Division is \$250. In the Court of Chancery, the initial fee to file a new action is \$300 with one or two defendants, \$450 with three or more defendants, and \$600 for a case asserting class action or derivative claims. A motion or application for an expedited proceeding costs \$500.

The authority to tax costs of the prevailing party in civil cases is granted by statute and is governed by court rules. The amount of the fees to be taxed is within the discretion of the trial court.

Delaware follows the general rule that, regardless of the outcome of litigation, each party is responsible for paying his or her own attorneys’ fees.

**1.6 Are there any particular rules about funding litigation in your jurisdiction? Are claimants and defendants permitted to enter into contingency fee arrangements and conditional fee arrangements?**

Under the Delaware Lawyers’ Rules of Professional Conduct, the fees charged by an attorney must be reasonable. Written contingency fee arrangements are permissible if they comply with Delaware Lawyers’ Rules of Professional Conduct 1.5 and applicable Delaware law (other than divorce-domestic relations matters and representing a defendant in a criminal case).

There are no particular rules on funding litigation, subject to the doctrines of champerty and maintenance.

**1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?**

Delaware common law still recognises the doctrines of champerty and maintenance, which restrict certain assignments. An assignment is champertous if an assignee of a cause of action initiates litigation at his or her own risk and expense, in exchange for a share of the proceeds if successful. Maintenance is the intermeddling of a disinterested third party to encourage a lawsuit by maintaining or assisting either party to the action, with money or otherwise. Recently, however, the Superior Court has held that third-party litigation funding does not run afoul of the doctrines of champerty or maintenance.

**1.8 Can a party obtain security for/a guarantee over its legal costs?**

In every case in which the plaintiff is not, at the time of filing the complaint, a resident of Delaware or, being so, afterwards moves from Delaware, an order for security for costs may be entered upon motion.

**2 Before Commencing Proceedings**

**2.1 Is there any particular formality with which you must comply before you initiate proceedings?**

Generally, there are no specific formalities with which a plaintiff must comply before initiating proceedings by filing a complaint. Potential plaintiffs may be required to comply with requirements to exhaust administrative remedies with state government agencies (e.g., when filing suit against government entities or in employment law cases). Notice may also be required in certain types of cases such as landlord-tenant disputes. Delaware courts may proceed very quickly, in particular the Court of Chancery. In the event of expedited proceedings, plaintiffs should be prepared to present the basics of their case soon after filing the complaint. Plaintiffs should consider the relief sought when choosing in which Delaware state court to initiate proceedings. At the trial level, only the Court of Chancery can grant injunctive relief.

**2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?**

The statute of limitation for various claims are summarised in the table below.

Injury to person, libel/slander/defamation	Two years	10 Del. C. § 8119
Wrongful death, injury to personal property	Two years	10 Del. C. § 8107
Medical malpractice	Two to three years	10 Del. C. § 6856
Trespass, contracts, collection of debt, fraud	Three years	10 Del. C. § 8106
Judgments	Five years	10 Del. C. § 5072

The limitation period is calculated from the time a cause of action accrues. However, such time may be tolled where an appropriate basis exists. For example, the period may be tolled under the “time of discovery rule” where the cause of action was inherently unknowable, and the plaintiff was blamelessly ignorant of the cause of action. Time limits are treated as a procedural law issue in Delaware courts. Delaware has a “borrowing statute” (10 Del. C. § 8121) which may apply the shorter of competing statutes of limitation.

**3 Commencing Proceedings**

**3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?**

Civil cases are commenced by the filing of a complaint (or, where required by statute, a petition or statement of claim), a *praecipe*,

a court-specific civil information cover sheet, and payment of the filing fee. In the Court of Chancery, the complaint must be verified by the plaintiff or plaintiff's authorised agent (Chancery Court Rule 3(aa)). The court will issue a summons to each defendant for service according to the information provided in the *praecipe*. It is the plaintiff's responsibility to effect proper service on each defendant.

Typically, personal service is made in accordance with 10 *Del. C.* § 3103, which allows the Delaware courts to define appropriate rules of service.

Delaware statutes control service on corporations. Service of legal process upon any Delaware corporation may be made by delivery to any officer or director of the corporation, or the registered agent of the corporation, in Delaware (8 *Del. C.* § 321). Service of process on domestic limited liability companies is made in a similar fashion (6 *Del. C.* § 18–105). Service on corporations may also be made pursuant to 10 *Del. C.* § 3111, which allows for service on foreign corporations by serving any agent of a corporation in Delaware when none of the officers, directors, managers, or a registered agent reside in Delaware.

Service on persons outside the jurisdiction may be made by any of the methods specified in 10 *Del. C.* § 3104(d), including service by the manner of the foreign jurisdiction and mail to the person to be served with a signed receipt.

In Delaware, non-resident directors, trustees, members of the governing body, or officers of a Delaware corporation may be served through the registered agent of the Delaware corporation in cases where such person is a necessary or proper party in proceedings by, on behalf of, or against the corporation (10 *Del. C.* § 3114). Further information regarding service in Delaware can be found in Titles 6, 8, 10, and 12 of the Delaware Code.

### 3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Pre-action interim remedies are not available in Delaware. In the Court of Chancery, a plaintiff may move for a temporary restraining order or preliminary injunctive relief following the filing of the complaint. To obtain preliminary injunctive relief, the movant must show a reasonable likelihood of success on the merits, imminent irreparable harm that will result if an injunction is not granted, and that the damage to the plaintiff if the injunction is issued will exceed the damage to the defendant if the injunction is issued (called the "balancing of the equities"). Public interest considerations may also be relevant. A preliminary injunction is unlikely to be issued where a plaintiff is unreasonably delayed in filing its complaint or seeking preliminary injunctive relief.

In exceptional circumstances, a temporary restraining order may be obtained on an *ex parte* basis, with a subsequent full hearing on a motion for a preliminary injunction soon following. To obtain a temporary restraining order, a movant must demonstrate a colourable claim on the merits, imminent irreparable harm to the movant if a temporary restraining order is not granted, and that the balancing of the equities favours the movant.

### 3.3 What are the main elements of the claimant's pleadings?

Every pleading must contain a caption setting forth the name of the court, the title of the action, the case number (if assigned), and a brief descriptive title indicating the nature of the document (e.g., "complaint"). A complaint shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment of the relief to which the party deems itself entitled. Relief in the alternative

or of several different types may be demanded. All averments of a claim shall be made in numbered paragraphs, the contents of which shall be limited as far as practicable to a single set of circumstances. Each claim founded upon a separate transaction or occurrence shall be stated in a separate count whenever separation facilitates the clear presentation of the matters set forth. Pleadings shall be signed by at least one attorney of record or, if a party is not represented by an attorney, by the party.

Delaware is a notice pleading state. Thus, a plaintiff need only plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief sought. Pleading special matters, including, but not limited to, fraud, mistake, and condition of the mind, requires pleading with further particularity. Other special matters may have specific requirements pursuant to the court's local rules or Delaware statutes.

### 3.4 Can the pleadings be amended? If so, are there any restrictions?

A party may amend its pleadings once as a matter of course before a responsive pleading is served or, if no responsive pleading is permitted and a trial date has not been set, within 20 days after service. Otherwise, a party may amend its pleadings only by leave of court or written consent of the adverse party. Delaware courts freely give leave to amend, where justice so requires.

### 3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A plaintiff may dismiss an action on its own by filing a notice of dismissal only before an answer is served, or a motion for summary judgment is filed. Otherwise, an action may be voluntarily dismissed by filing a stipulation of dismissal signed by all the parties who have appeared in the action. Unless otherwise stated in the stipulation or notice of dismissal, dismissals are without prejudice except where a plaintiff has once dismissed in any court of the United States, or of any state, an action based on or including the same claim.

## 4 Defending a Claim

### 4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

A defendant generally has two options in responding to a complaint: (1) it may move to dismiss one or more of the claims; or (2) it may answer the complaint. In the answer, the defendant must address each individual allegation separately. In doing so, the defendant may admit or deny the allegation, claim that it lacks sufficient knowledge to answer the allegation, or refuse to respond because the allegation calls for a legal conclusion. Finally, a defendant's answer must assert all relevant affirmative defences, including set-off, or risk waiver of those defences.

A defendant may also assert counterclaims, crossclaims, or a third-party complaint in its answer. These claims can be related to or separate from the claims raised in the plaintiff's complaint.

### 4.2 What is the time limit within which the statement of defence has to be served?

The Court of Chancery and Superior Court require that a motion to dismiss or answer be served within 20 days of service of the

complaint. In federal court, the time period is 21 days. Reasonable extensions to this time period are not uncommon.

**4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?**

Yes, defendants may file third-party complaints against third parties that may share liability in the action.

**4.4 What happens if the defendant does not defend the claim?**

A plaintiff may move for a default judgment against a defendant that fails to respond to a complaint.

**4.5 Can the defendant dispute the court's jurisdiction?**

A defendant can dispute personal jurisdiction through a motion to dismiss. Failure to timely contest personal jurisdiction will waive the defence. A defendant may also dispute a court's subject matter jurisdiction. This defence cannot be waived, and can be raised by a defendant at any time during the litigation, as well as by the court *sua sponte*.

## 5 Joinder & Consolidation

**5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?**

Joinder of third parties may be mandatory or permissive. A mandatory joinder is applicable where: (1) complete relief cannot be accorded among the present parties absent the third party; or (2) the third party claims an interest relating to the subject matter in the litigation and is so situated that disposition of the action in its absence may (i) impair or impede those interests, or (ii) leave a party to the action subject to a substantial risk of incurring double, multiple, or inconsistent obligations by reason of the claimed interest. A joinder will be permitted only to the extent that the joined party does not deprive the court of subject matter jurisdiction.

Permissive joinder applies when a third party asserts any right to relief jointly, severally, or alternatively arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to that non-party will arise in the proceeding.

**5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?**

Delaware courts have the discretion to consolidate any or all pre-trial matters at issue in multiple actions. Consideration in ordering consolidation includes whether the actions involve a common question of law or fact relating to the same transaction or series of transactions. Consolidation for trial purposes is rare.

**5.3 Do you have split trials/bifurcation of proceedings?**

The courts of Delaware may, in the furtherance of convenience or to avoid prejudice, or when separate trials would be expedient

and economical, order separate trials on any claim, crossclaim, counterclaim, third-party claim, or any separate issue.

## 6 Duties & Powers of the Courts

**6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?**

In most instances, new cases are assigned to the Delaware trial court judges on a rotating basis. Cases that are related, either by party or claim, are typically assigned to the same judge. In the federal district court, parties have the option of having their case assigned to a magistrate judge. In the Court of Chancery, certain cases, like those involving wills and trusts, may first be assigned to a Master.

**6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?**

Delaware courts are afforded expansive discretion in managing their litigation dockets. Cases filed in the Superior Court are typically scheduled for an early status conference where the parties meet the assigned judge to establish a reasonable trial scheduling order. The Court of Chancery frequently accommodates requests for expedited proceedings in conjunction with applications for preliminary injunctive relief.

**6.3 In what circumstances (if any) do the civil courts in your jurisdiction allow hearings or trials to be conducted fully or partially remotely by telephone or video conferencing, and what protocols apply? For example, does the court – and/or may parties – record and/or live-stream the hearings and may transcriptions be taken? May participants attend hearings remotely when they are physically located outside of the jurisdiction? Are electronic or hard-copy bundles used for remote hearings?**

Many hearings in Delaware are conducted remotely, either through telephone or video conference. A court reporter is present, and the hearing is transcribed as if it were in person. Video recordings are not made and any recording of the hearing by the parties is not permitted. Trials are still held mostly in person, but witnesses may be permitted to testify remotely for good cause.

Participants do not need to be physically located in the jurisdiction to participate, but they do need to be admitted to practise in that Court.

**6.4 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?**

Delaware courts possess the inherent power to enforce their orders and deter a wide variety of contumacious conduct by imposing sanctions for civil or criminal contempt. Sanctions are most commonly imposed as a consequence of a litigant's failure to comply with discovery orders. In that situation, potential sanctions include, but are not limited to, the court deeming certain facts established, prohibiting the introduction of certain evidence, striking all or a portion of the pleadings, and even entering judgment by default.

### 6.5 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Delaware courts may strike any insufficient defence or any redundant, immaterial, impertinent, or scandalous matter, either in response to a motion or at any time on the court's own initiative. Litigants are entitled to move to dismiss a complaint in whole or in part for failing to state a claim, upon which relief can be granted either before filing a responsive pleading or after the pleadings are closed, but within such time so as not to delay the trial. To resolve a motion to dismiss, Delaware courts are required to accept all well-pleaded factual allegations in the complaint as true, accept even vague allegations in the complaint as well-pleaded if they provide the defendant notice of the claim, and deny the motion to dismiss unless the plaintiff could not recover, under any reasonably conceivable set of circumstances, susceptible of proof.

### 6.6 Can the civil courts in your jurisdiction enter summary judgment?

Delaware courts may enter summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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. Certain judges in the federal district court require the parties to move for permission before filing summary judgment motions.

### 6.7 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Delaware courts are empowered to stay proceedings in order to promote economies of time and effort for the court, litigants, and counsel. Delaware courts have exercised their authority to issue a stay in a variety of contexts; for instance, courts have stayed discovery pending resolution of a motion to dismiss a complaint, and also entered a stay of all proceedings in deference to parallel litigation pending in another jurisdiction or forum; for example, arbitration or patent proceedings in the Patent and Trademark Office.

## 7 Disclosure

### 7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Delaware permits broad discovery of any non-privileged matter that is relevant to the subject matter involved in the pending action and is proportional to the needs of the case, whether it relates to the claim or defence of the party seeking discovery or to the claim or defence of any other party, including the existence, description, nature, custody, condition, and location of any documents, electronically stored information, or tangible things, and the identity and location of persons having knowledge of any discoverable matter.

Methods of discovery include: depositions upon oral examination or written questions; written interrogatories; production

of documents, electronically stored information, or tangible things; permission to enter upon land or other property; physical and mental examinations; and requests for admission. While declining to adopt a "one-size-fits-all" approach to the collection and review of electronic documents, the federal district court and the Court of Chancery have separately promulgated a series of written recommendations designed to provide counsel with guidance as to its expectations on the preservation and disclosure of electronic discovery.

Predictive coding has not received broad approval and its acceptance varies from judge to judge.

### 7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Delaware recognises a number of privileges, including the attorney-client privilege, physician-patient privilege, spousal privilege, and priest-penitent privilege. Generally speaking, and subject to any applicable exceptions, most notably waiver, a person claiming one of these privileges may refuse to disclose – or prevent any other person from disclosing – the information that is the subject of that privilege. No inferences may be drawn in connection with the assertion of a legal privilege.

### 7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Third parties may be subpoenaed to provide the same discovery as a party. A Delaware attorney may issue and sign a subpoena as an officer of the court. The litigant or attorney responsible for issuing and serving a third-party subpoena is obligated to take reasonable steps to avoid imposing undue burden or expense on the person subject to that subpoena. In the federal system, a Delaware subpoena can be served anywhere in the United States. In the state court system, if the person or entity to be subpoenaed is outside of Delaware, a commission may be necessary to secure a subpoena from the state where the person or entity is located.

### 7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

Delaware courts wield broad supervisory powers over the civil discovery process and are permitted to exercise those powers in response to a motion or on their own initiative after reasonable notice. Litigants most commonly invoke the court's oversight through motions to compel or to protect against certain discovery. Disputes resolved in this context subject the loser to the risk of paying the winner's reasonable expenses and attorneys' fees. The federal district court, Superior Court, and the Court of Chancery have appointed special discovery Masters to oversee cases with unusually frequent or contentious discovery disputes, and to prepare written recommendations as to how those disputes might be resolved.

### 7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

As a general rule, proceedings in a Delaware civil action are considered a matter of public record. As a matter of practice, however, parties frequently submit joint applications seeking court permission to maintain the confidentiality of certain categories of information that would otherwise be disclosed in litigation. Delaware courts are most likely to protect and prohibit from

public disclosure information such as: trade secrets; sensitive proprietary information; financial, business, or personnel records; personal information such as medical records; and personally identifiable information such as social security numbers, financial account numbers, and the names of minor children.

## 8 Evidence

### 8.1 What are the basic rules of evidence in your jurisdiction?

The Delaware Rules of Evidence govern the admissibility of evidence in the Delaware state courts. The Federal Rules of Evidence govern proceedings in the federal district court. The two sets of rules are substantively similar.

### 8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

All relevant evidence is admissible, unless otherwise provided by statute or the applicable rules of evidence. “Relevant evidence” means evidence having 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. Relevant evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Generally, if scientific, technical, or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.

### 8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter. If the witness is not testifying as an expert, the witness’ testimony is limited to opinions or inferences which are: (1) rationally based on the perception of the witness; (2) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialised knowledge.

Generally, witness statements, other than those of an opposing party, are not admissible at trial if the witness does not appear at trial. However, depositions can be introduced at trial under certain circumstances, if otherwise admissible under the applicable rules of evidence. The deposition of a party may be used by an adverse party for any purpose.

### 8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Parties must disclose the identity of expert witnesses and their area of testimony before trial. Discussions between counsel and

consulting experts are generally protected by the attorney-client privilege. As to testifying experts, the federal district court and the Superior Court have specific rules that protect most communications between counsel and testifying experts, including draft reports. In the Court of Chancery, such protection can be agreed to by the parties.

There is no express prohibition against concurrent expert evidence, but it has not been commonly accepted. Furthermore, concurrent expert evidence is not particularly well aligned with the general view that an expert’s loyalty is to the retaining party.

Experts are typically retained by a party to support its position in a lawsuit, and the opposing party examines the credibility of that expert during cross-examination. However, the court does have the power to appoint its own experts.

## 9 Judgments & Orders

### 9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Delaware courts may issue final judgments in accordance with a jury verdict or on the court’s own factual findings. Delaware courts may also issue summary judgments without trial and declaratory judgments. Delaware courts also have the power to issue interlocutory orders.

### 9.2 Are the civil courts in your jurisdiction empowered to issue binding declarations as to (i) parties’ contractual or other civil law rights or obligations, (ii) the proper interpretation of wording in contracts, statutes or other documents, (iii) the existence of facts, or (iv) a principle of law? If so, when may such relief be sought and what factors are relevant to whether such relief is granted? In particular, may such relief be granted where the party seeking the declaration has no subsisting cause of action, and/or no party has suffered loss, and/or there has been no breach of contract/duty?

10 *Del. C. § 6501 et seq.* grants Delaware courts the power to issue binding declarations regarding parties’ contractual or other civil law rights or obligations. Declaratory judgments can be issued even if a contract has not yet been breached or a party has not suffered loss.

For a Delaware court to adjudicate a declaratory judgment action, the controversy must: (1) involve the rights or other legal relations of the party seeking declaratory relief; (2) be one in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) be between parties where interests are real and adverse; and (4) be ripe for judicial declaration.

To determine whether a declaratory judgment action is ripe for adjudication, Delaware courts look to such factors as: (1) the legitimate interests of the plaintiff in a prompt resolution of the controversy; (2) the hardship inflicted in the event of further delay in deciding the matter; (3) the possibility of future factual development that might be relevant to the determination made; (4) the need to conserve scarce judicial resources; and (5) a due respect for identifiable policies of the law, touching upon the subject matter of the dispute.

### 9.3 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Delaware courts follow the American Rule where each party bears its own costs of litigation, including attorneys’ fees, absent



a rule, statute, or contractual obligation to the contrary. Delaware courts and juries have the power to make rulings on damages, including compensatory and punitive damages. A jury's damage award can be amended by the court. The Court of Chancery will not order punitive damages. In tort actions in the Superior Court and Court of Common Pleas, interest is added to any final judgment under certain circumstances.

#### 9.4 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments are enforced through the Superior Court pursuant to Superior Court Civil Rule 69.

Foreign judgments may be enforced in Delaware pursuant to 10 *Del. C.* § 4781 *et seq.* Foreign judgments must first be domesticated by filing in the Superior Court. Such judgments shall have the same effect and be subject to the same procedures, defences, and proceedings for reopening, vacating, or staying, as a judgment of the Superior Court, and may be enforced or satisfied in like manner. A foreign judgment requires a triple seal or apostille from the issuing foreign court.

#### 9.5 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Appeals shall be made within 30 days after entry of a judgment, order, or decree. Cross appeals may be made within the greater of 15 days after the first notice of appeal or the time otherwise allowed. "The Rules of the Supreme Court of the State of Delaware" set forth the rules for appealing a civil court order or judgment. The United States Courts of Appeal have their own set of rules.

## 10 Settlement

#### 10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The Superior Court requires that the parties in most cases participate in alternative dispute resolution (ADR), in a form to be agreed on by the parties. The federal district court will assign a magistrate judge to assist in mediation.

## 11 Alternative Dispute Resolution

#### 11.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In Delaware, parties may agree upon different methods of ADR, including: arbitration, where a neutral arbitrator hears both sides of a controversy and renders a decision based on the facts and law; mediation, where a mediator facilitates the parties in reaching a mutually acceptable resolution of a controversy; and neutral assessment, where a neutral assessor provides the parties with an evaluation of the merits of the controversy.

#### 11.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Delaware has the Delaware Uniform Arbitration Act, which is similar to the Federal Arbitration Act. Delaware also has the

Delaware Rapid Arbitration Act, which allows for expedited arbitration. Mediation is available to consenting parties in litigation in the Court of Chancery, as well as to parties with business and technology disputes where no litigation is pending but the amount in controversy exceeds \$1,000,000. Such mediations will be conducted by a judicial officer of the Court of Chancery.

#### 11.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Delaware courts favour ADR and will typically allow for it upon agreement of the parties. In the Superior Court, ADR is compulsory in all civil cases, save a few exceptions including class actions, replevin, foreign or domestic attachment, statutory penalty and mortgage foreclosure actions, and *in forma pauperis* actions, as well as a number of enumerated special proceedings.

#### 11.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Delaware courts are generally only involved in deciding whether or not a dispute is subject to arbitration and the scope of that arbitration. After the decision, Delaware courts do not typically issue interim orders during the actual arbitration. As to mediation, the federal court will appoint a magistrate judge to assist the parties in mediating. The Superior Court requires the parties to engage in ADR for most actions.

#### 11.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Parties can move to confirm or vacate arbitral awards in the Delaware courts. That right can be limited by agreement. For example, under the Delaware Rapid Arbitration Act, the parties can agree to have no review, a review before an Appellate Arbitrator selected by the parties, or a review before an Appellate Arbitrator selected by the Court of Chancery. In the absence of such an agreement, a review may be conducted by the Supreme Court in conformity with the Federal Arbitration Act.

Other than in the Superior Court, a party typically cannot be forced to engage in ADR.

Settlement agreements generally do not need to be sanctioned by the court. Exceptions where court approval is required include class actions and derivative actions brought on behalf of a company.

#### 11.6 What are the major alternative dispute resolution institutions in your jurisdiction?

Most national ADR institutions, such as the American Arbitration Association (AAA) and JAMS, are available in Delaware.



**Jonathan A. Choa** is a partner in the firm's General Litigation Group. He has a wide-ranging practice focused on technology disputes. Jonathan has represented companies in patent infringement actions and breach of contract suits, as well as in licensing disputes. He also has extensive experience representing clients in complex commercial disputes, including securities claims and corporate disputes. He has represented clients in federal and state court proceedings and has experience in appellate proceedings, including preparing briefs for actions before the United States Courts of Appeal for the Federal and Second Circuits.

His clients include Fortune 500 e-commerce companies, pharmaceutical companies, cell phone and semiconductor manufacturers, and large financial institutions.

**Potter Anderson & Corroon LLP**

Hercules Plaza  
1313 North Market Street  
Wilmington DE 19801  
USA

Tel: +1 302 984 6189  
Email: [jchoa@potteranderson.com](mailto:jchoa@potteranderson.com)  
URL: [www.potteranderson.com](http://www.potteranderson.com)



**John A. Sensing** is a partner in the firm's General Litigation Group. He represents businesses and individuals in a myriad of commercial litigation matters in Delaware courts, focusing on complex commercial litigation, business tort matters, and contract disputes, as well as the defence of federal antitrust and securities claims. He also represents clients in expedited matters relating to the enforcement of contractual restrictive covenants, and represents insurance policyholders in complex coverage litigation against their insurers.

John practises in courts throughout Delaware, including the Delaware Court of Chancery, the Delaware Superior Court, and the United States District Court for the District of Delaware. He is also experienced in appellate proceedings before the Delaware Supreme Court and the United States Court of Appeals for the Third Circuit.

**Potter Anderson & Corroon LLP**

Hercules Plaza  
1313 North Market Street  
Wilmington DE 19801  
USA

Tel: +1 302 984 6093  
Email: [jsensing@potteranderson.com](mailto:jsensing@potteranderson.com)  
URL: [www.potteranderson.com](http://www.potteranderson.com)



**Carla M. Jones** is an attorney in the firm's General Litigation Group who represents clients in Delaware's state courts and in the United States District Court for the District of Delaware. She focuses on complex commercial litigation, business disputes, and contract disputes. Before entering private practice, Carla served as a judicial law clerk for the Superior Court of the State of Delaware.

**Potter Anderson & Corroon LLP**

Hercules Plaza  
1313 North Market Street  
Wilmington DE 19801  
USA

Tel: +1 302 984 6122  
Email: [cjones@potteranderson.com](mailto:cjones@potteranderson.com)  
URL: [www.potteranderson.com](http://www.potteranderson.com)

Potter Anderson & Corroon LLP is one of the largest and most highly regarded Delaware law firms, providing specialised legal services to regional, national, and international clients. With nearly 100 attorneys, the firm's practice is centred on corporate law, corporate litigation, intellectual property, commercial litigation, restructuring/bankruptcy, healthcare, and labour and employment.

[www.potteranderson.com](http://www.potteranderson.com)



# ICLG.com



## Current titles in the ICLG series

Alternative Investment Funds  
Anti-Money Laundering  
Aviation Finance & Leasing  
Aviation Law  
Business Crime  
Cartels & Leniency  
Class & Group Actions  
Competition Litigation  
Construction & Engineering Law  
Consumer Protection  
Copyright  
Corporate Governance  
Corporate Immigration  
Corporate Investigations  
Corporate Tax  
Cybersecurity  
Data Protection  
Derivatives  
Designs  
Digital Business  
Digital Health  
Drug & Medical Device Litigation  
Employment & Labour Law  
Enforcement of Foreign Judgments  
Environment & Climate Change Law  
Environmental, Social & Governance Law  
Family Law  
Fintech  
Foreign Direct Investment Regimes  
Franchise  
Gambling  
Insurance & Reinsurance  
International Arbitration  
Investor-State Arbitration  
Lending & Secured Finance  
Litigation & Dispute Resolution  
Merger Control  
Mergers & Acquisitions  
Mining Law  
Oil & Gas Regulation  
Patents  
Pharmaceutical Advertising  
Private Client  
Private Equity  
Product Liability  
Project Finance  
Public Investment Funds  
Public Procurement  
Real Estate  
Renewable Energy  
Restructuring & Insolvency  
Sanctions  
Securitisation  
Shipping Law  
Technology Sourcing  
Telecoms, Media & Internet  
Trade Marks  
Vertical Agreements and Dominant Firms