

## **Delaware: The Ideal Forum for Dispute Resolution**

*Delaware is internationally renowned for its corporate governance regime, which draws from its enabling business statutes and large body of case law and is reinforced by its efficient and professional courts, particularly in the areas of corporate, business, and commercial law.*

### **Well-Established and Predictable Body of Law**

Delaware is known as the preeminent authority on corporate law, a reputation earned through the development of more than a century of jurisprudence. Delaware case law is frequently cited by courts in jurisdictions throughout the United States, and internationally on corporate law matters. Most of the relevant Delaware statutes affecting corporate affairs have been litigated thoroughly, resulting in a predictable and detailed body of law that increases certainty in corporate decision-making.

As a result, advisors to directors of Delaware business entities considering major corporate transactions can more accurately guide their clients on their fiduciary duties. Some states have attempted to emulate the success of the Delaware corporate law, but have yet to create a meaningful body of precedent. Others have adopted corporate statutes similar to Delaware's and have established business courts, but their judges continue to cite Delaware corporate statutes and case law in legal opinions.

Even in the early stages of deal structuring, Delaware corporate law plays a prominent role as the law of choice among decision makers and advisors. Investors, corporate management and their advisors frequently look to Delaware law when structuring transactions involving out-of-state or international investors.<sup>1</sup>

### **Experienced and Respected Jurists**

Established in 1792, the Delaware Court of Chancery is the oldest business court in the United States and is widely recognized as the nation's preeminent forum for the resolution of corporate disputes.<sup>ii</sup> Delaware's judges, who have unparalleled experience in handling sophisticated business matters, are appointed by the Governor after an exhaustive selection process and then confirmed by the State Senate.

All cases before the Court of Chancery are heard by these experienced jurists, rather than by potentially uninformed or unpredictable juries. Delaware is consistently ranked first overall by the U.S. Chamber of Commerce Lawsuit Climate Ranking of States (every year from 2002 through the most recent survey)<sup>iii</sup> and first for Judicial Competence, demonstrating the State's well-deserved reputation for its outstanding jurists.

### **Neutral Forum**

Plaintiff attorneys and defense attorneys alike prefer Delaware because the State enjoys a reputation as a neutral forum for litigation. Each year since 2002, the U.S. Chamber of Commerce has ranked Delaware first for "Judges' Impartiality." With respect to corporate law, Delaware is neither management-friendly nor stockholder-friendly; its aim is to provide both managers and investors with laws optimal for engaging in ethical and profitable business, by balancing the need for managerial flexibility with strong tools to hold managers accountable for advancing the best interest of the stockholders.

Because most corporate litigation involves companies that are headquartered in another state, litigants in Delaware courts are not subject to the hometown bias which can influence courts and juries in states where a party to a lawsuit maintains a significant presence in the community. In addition, Delaware is the only state in the U.S. whose constitution requires its courts to be politically balanced so that in each court, and across all of the courts collectively, there are an equal number of registered Republicans and registered Democrats.

## Speed and Responsiveness

In the corporate arena, speedy resolution is essential and the Court of Chancery is highly responsive. The Court does not hear criminal cases or routine civil cases that seek money damages (such as products liability, automobile negligence or breach of contract). The Court's limited jurisdiction enables it to focus on corporate law disputes and significant business cases. This gives Court of Chancery judges (referred to as Chancellor or Vice Chancellors) the time and focus to resolve disputes efficiently and accurately, frequently within days or weeks.

One significant case brought in the Court of Chancery demonstrates this efficiency. The motion for dismissal in *In re KKR Financial Holdings LLC Shareholder Litigation*<sup>iv</sup>, was fully briefed and submitted for decision on July 29, 2014, and a 43-page opinion was released on October 14, 2014, just 10 weeks later.<sup>v</sup> Likewise, in *Activision Blizzard Inc. v. Hayes et al.*,<sup>vi</sup> the Delaware Supreme Court issued its decision and delivered the order from the bench only *an hour* after hearing oral argument.<sup>vii</sup>

In addition, the Court of Chancery's Summary Process offers speedy resolution of certain types of corporate proceedings (demand for books and records, dispute over board composition, demand for appraisal of shares, demand for appointment of custodian or receiver and dissolution), typically in three months or less. Finally, Delaware courts employ the "90-day rule," which requires that cases be decided within 90 days of submission. When a judge is not in compliance with this rule, s/he is required to provide an explanation for the delay. Ultimately the judge can be referred for judicial reprimand for violation of this rule without explanation.

## Ease of Forum Selection

International companies that are incorporated or otherwise formed in Delaware are entitled to access Delaware's courts to resolve their disputes. In fact, access to Delaware's courts is a top reason why more than 65 percent of Fortune<sup>®</sup> 500 companies are incorporated in Delaware, and 98 percent of the IPOs in the United States in 2013 were incorporated in Delaware.<sup>viii</sup>

Since 98 percent of public company mergers in the U.S. are challenged in court, advanced planning is critical to mitigate the inevitable impact of shareholder litigation. Delaware companies can ensure that shareholder disputes end up in Delaware courts by adopting a corporate bylaw that designates Delaware as the exclusive forum for shareholder litigation. Such exclusive forum bylaws have been upheld by the Delaware Court of Chancery,<sup>ix</sup> and were endorsed by the Delaware State legislature in 2015.

Exclusive forum bylaws prevent plaintiffs from forum shopping and engaging in multi-jurisdiction shareholder litigation. In addition, they ensure that corporate defendants benefit from all the advantages that the Court of Chancery has to offer, including its top jurists and procedures designed to limit the costs and uncertainty associated with corporate litigation.

Similarly, Limited Liability Company operating agreements and business contracts can include a clause designating Delaware as the exclusive forum and choice of law for commercial disputes. Moreover, business contracts can specify either the Court of Chancery or the Superior Court's Complex Commercial Litigation Division<sup>x</sup> as the litigation forum for disputes, so long as the requisite criteria are met. They also can require that disputes first be submitted to a form of Alternative Dispute Resolution (mediation or arbitration) in a Delaware court, thereby facilitating expeditious resolution and avoiding the time and expense of full blown litigation.

## Innovative Arbitration Regime

Delaware business entities also benefit from an important dispute resolution advantage in the form of the Delaware Rapid Arbitration Act ("DRAA"). Under the DRAA, where both parties agree to have disputes decided

under this regime, the disputes can be resolved 120 days from the time the arbitrator accepts the appointment. That timeline can be extended to 180 days, but only with the unanimous consent of the parties and the arbitrator. The parties select the arbitrators, or ask the Court of Chancery to provide a list of qualified arbitrators from which to choose. Arbitrators who do not issue final awards within the prescribed timeframe face reductions in their fees corresponding to the length of the delay.<sup>xi</sup>

The Act, created to offer an alternative to increasingly expensive and protracted traditional arbitrations, employs best practices from private international arbitrations. It can be used to resolve any dispute so long as one of the parties involved is a Delaware business entity, though it need not be located in Delaware.

Under the Act, expert arbitrators resolve business disputes in highly-expedited, confidential proceedings. The arbitrators are not sitting judges, and arbitrations do not take place in the courts. Parties may appeal to the Delaware Supreme Court in limited circumstances and under limited standards of review.<sup>xii</sup>

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<sup>i</sup> <http://blogs.law.harvard.edu/corpgov/2013/01/08/delaware-law-as-lingua-franca-evidence-from-vc-backed-startups/> (summarizing a Social Science Research Paper calling Delaware corporate law the “lingua franca” among deal makers and their advisors for venture capital-backed startups).

<sup>ii</sup> Delaware’s Superior Court is also authorized to hear corporate disputes. The Superior Court is a court of general jurisdiction where plaintiffs seek money damages (as opposed to equitable relief which can only be brought in the Court of Chancery).

<sup>iii</sup> The U.S. Chamber of Commerce Lawsuit Climate Ranking of States is typically published every two years, and the 2012 survey is the most recent publication available.

<sup>iv</sup> *In re KKR Financial Holdings LLC Shareholder Litigation*, Consol. C.A. No. 9210-CB (Del. Ch. Oct. 14, 2014)

<sup>v</sup> As of the time of the writing of this paper, the case is on appeal before the Delaware Supreme Court, the highest court in Delaware. Although it is technically possible to appeal a ruling from the Delaware Supreme Court to the United States Supreme Court, the grounds for a successful appeal in such cases are very limited.

<sup>vi</sup> *Activision Blizzard, Inc. v. Hayes et al.*, No 497, 2013 (Del. Nov. 15, 2013).

<sup>vii</sup> <http://global.blogs.delaware.gov/2014/02/14/fast-action-at-the-delaware-supreme-court-keeps-business-on-track/>

<sup>viii</sup> This percentage excludes the few IPOs that were incorporated in their home state (7 out of 156) and the REITs, all of which incorporate in Maryland.

<sup>ix</sup> *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013) (upholding the facial validity of forum selection bylaws).

<sup>x</sup> The Complex Commercial Litigation Division (CCLD) operates as part of Delaware’s Superior Court, providing a fast-track alternative for complex commercial litigation where monetary damages are sought. Cases can be heard in a matter of months, when appropriate, and motions can be scheduled within a few days. CCLD jurists are well-versed in complex commercial litigation and have strong business law backgrounds or proven records of managing complex civil litigation and deciding complicated business disputes. <http://global.blogs.delaware.gov/2014/05/28/alternative-business-court-in-delaware-gives-corporations-more-choice-more-control/>

<sup>xi</sup> <http://courts.delaware.gov/rules/DeRapidArbitraion.pdf>

<sup>xii</sup> <http://global.blogs.delaware.gov/2015/05/04/new-delaware-arbitration-law-offers-fast-efficient-dispute-resolution-2/>.