

THE NEW DELAWARE MEDIATION STATUTE

BY EDWARD M. McNALLY AND BARBARA MACDONALD*

I. INTRODUCTION

The Delaware legislature has recently enacted legislation that, in appropriate circumstances, requires mediation of substantial commercial disputes before the parties resort to litigation. The legislation, known as the Delaware Voluntary Alternative Dispute Resolution Act (Delaware ADR Act)¹ differs significantly from mediation programs existing in other jurisdictions because it requires the parties to attempt mediation before going to court. The statute's backers, including Delaware's Governor, Secretary of State, judiciary, and organized bar, are confident that the Delaware ADR Act will greatly encourage mediation as an alternative to traditional litigation.

This article first examines the benefits of mediation in commercial disputes, including its advantages over litigation and other forms of alternative dispute resolution such as arbitration. Second, the article will address past problems associated with both the implementation of a mediation program and the process of mediation itself and will show how the Delaware ADR Act is designed to solve these problems. Finally, the article will review the key provisions of the Delaware ADR Act, explaining its basic provisions and offering some practical observations about how the Act works.

II. THE BENEFITS OF A MEDIATION PROGRAM

The resolution of business disputes is an ever-growing problem in the United States.² While cultures in other countries strongly encourage

*The authors are both partners in the Wilmington, Delaware, law firm of Morris, James, Hitchens & Williams. Mr. McNally is the chairman of the Alternative Dispute Resolution Subcommittee of the Delaware State Bar Association and is the principal drafter of the Delaware Voluntary Alternative Dispute Resolution Act discussed in this article.

¹DEL. CODE ANN. tit. 6, § 7701(a) (1995).

²See Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 825. The study cited an ABA Journal poll surveying 578 lawyers regarding the question, "Is there too much litigation?" Sixty-two percent of the lawyers surveyed responded yes. Paul Reidinger, *The Litigation Boom*, A.B.A. J., Feb. 1, 1987, at 37. Professor Rowe then responded to the study saying, "If lawyers feel that way, the perception that our dispute processing systems have significant problems must be widespread indeed." Rowe, *supra*, at 826.

compromise and avoidance of disputes,³ the American focus on individualism and competitiveness makes it harder to resolve disagreements. Indeed, Americans are much more prone to use litigation than negotiation.⁴ However, businesses are increasingly finding that litigation has become too expensive.⁵ Moreover, with the overcrowded dockets of many courts, delay has become a substantial problem.⁶ Many

³See, e.g., David J. Przeracki, Note, "Working it Out": A Japanese Alternative to Fighting it Out, 37 CLEV. ST. L. REV. 149, 150 (1989). The article overviews the Japanese system of dispute resolution and states:

The fundamental difference between Japanese and American approaches to the law lies in cultural heritage differences between the two countries. The Japanese approach emphasizes the maintenance of societal harmony. The American approach stresses the maximization of individual rights and benefits. The Japanese approach is non-confrontational; the American approach is confrontation.

Id. at 150-51. Further, "[t]he Japanese approach yields an exceptionally low rate of litigation." *Id.* at 151. See also James A.R. Nafziger & Ruan Jiafang, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 WILLIAMETTE L. REV. 619, 629 (1987) (exemplifying a Chinese preference for conciliation and mediation shown in contract language reflecting that disputes shall be settled by amicable consultation and negotiation). However, "scattered data reveal a growing [Chinese] acceptance of adjudication, albeit in a flexible, relational form." *Id.* at 622.

⁴See, e.g., Edward D. Re., *The Causes of Popular Dissatisfaction With the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 107 (1994) (explaining that the term "litigation explosion" refers in general terms to the increasing amount of individuals resorting to the courts to resolve all sorts of disputes and grievances). See *infra* note 6.

⁵See Tom Arnold, *Fundamentals of Alternative Dispute Resolution: Why Prefer ADR*, in PATENT LITIGATION 1993, at 655 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3909, 1993), which states:

One million dollars per party for a patent trial and appeal, or almost any other two-week trial plus appeal, is now almost routine — two to five million and more, not uncommon. Over \$200 million, total for both sides, estimated in the Polaroid v. Kodak case of 1991.

As estimated by quite a number of lawyers, thirty percent of the cost is in the control of the judge. Thirty percent of the cost is in the control of adverse counsel. . . . Your own (non-contingent fee) trial counsel's control of costs is never 50% in a commercial case.

So the acute problem is not only the cost, but the incapacity to reliably estimate or budget the cost of complex commercial cases within half a million dollars or so.

Id.

⁶See Kenneth R. Feinberg, *Mediation — A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S6 (1989). "The expense [of litigation] is compounded by the long delays caused by overcrowded court dockets and, sometimes, by dilatory procedural and legal tactics." *Id.* at S6. "Whether or not we confront a 'litigation crisis', we must face the fact that tens of thousands of administrative decisions and court cases are handled through highly adversarial sets of procedures that are all too often complex, costly, and lengthy and can even inhibit consensual resolution." Senator Charles E. Grassley & Charles Pou, Jr., *Congress, The*

disputes requiring prompt resolution tend to linger for years causing frustration and diverting time and effort from more productive concerns. In addition, litigation is inherently uncertain.⁷ Regardless of how much time and money is spent, the outcome cannot be utilized for planning in any rational manner. Further, executives tend to feel the whole process is in the control of others who seem to benefit from making it longer and more expensive.⁸

All of these factors have led to a growing consensus among business people that there must be a better way to resolve business disputes. The available alternative to full-scale litigation is commonly referred to as "alternative dispute resolution" (ADR).⁹ While the number of ADR proceedings that take place in any year is comparatively small when contrasted to the number of litigated court cases, there are thousands of ADR proceedings yearly, particularly in the larger states such as California and New York.¹⁰

Despite its growing popularity, certain ADR proceedings entail problems of cost, delay, and uncertainty.¹¹ For example, arbitration

Executive Branch and the Dispute Resolution Process, 1992 J. DISP. RESOL. 1, 3 (1992). Senator Grassley and Mr. Pou give some examples of overcrowded dockets and delay.

Within the federal bureaucracy, a few examples should serve to illustrate the problems we face. Administrative caseloads increased by approximately 50% between 1978 and 1983. For example, the Social Security caseload increased 85% from 1978 to 1983. During this same period, the Labor Department's caseload also increased fivefold. During fiscal year 1986, the Armed Services Board of Contract Appeals' (ASBCA) docketed appeals numbered 200% more than in 1978. Between fiscal years 1984-1985, the numbers of new appeals and cases pending at the ASBCA increased by about 20% each.

Id. at 5 (footnotes omitted).

⁷See generally Corporate Counsel Section of the New York State Bar Association, *Legal Development: Report on Cost-Effective Management of Corporate Litigation*, 59 ALB. L. REV. 263, 269 (1995) (stating that corporations, seeking alternatives to expensive litigation and the uncertain results, have turned to alternative dispute resolution (ADR) and proactive litigation management).

⁸See *id.* at 265-66 (stating that corporate managers, looking for cost-effective predictable outcomes to disputes, have turned to ADR).

⁹Arbitration, mini-trials, summary jury trials, and mediation are among the more common forms of ADR. See Kathryn A. Gilchrist, *The Res Judicata Standard of Confirmed Arbitration Awards in Wisconsin*, 1987 WIS. L. REV. 895, 896 n.4 (1987); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 218 (1995); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U.L. REV. 1, 13-14 (1991).

¹⁰Resnik, *supra* note 9, at 234 n.87 (stating that within the past 10 years, "86 percent of the [district courts] had 'adopted authorization to refer appropriate cases to various court designated alternative dispute resolution programs'") (citations omitted).

¹¹See Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1988)

proceedings require the parties to abide by the decision of the arbitrator without the possibility of appeal.¹² Thus, the uncertainties about the result that are inherent in litigation will also be present in arbitration since the parties remain unable to control the outcome. Moreover, disputes among the parties over preliminary matters like the selection of an arbitrator and other failures to cooperate prior to the actual arbitration all lead to delay and increased expenses.¹³ Finally, many arbitration decisions are usually limited to simply announcing a result unaccompanied by any explanation of why that result was reached,

(noting the procedural hurdles as well as the various other problems often associated with arbitration proceedings).

¹²See *id.* at 439-40.

¹³See generally Jack Joseph, *Courting ADR*, 8 CBA REC. 14, 16-17 (1994) (noting that arbitration is not always less expensive than litigation); Stipanowich, *supra* note 11, at 443 (noting that selection of an arbiter or the process thereof often require judicial resolution because the parties are unable to agree). Commentators note that arbitration is not always as cost efficient as its supporters allege. Joseph, *supra*, at 16-17. The main saving derived from arbitration is the limited appeal, motion and discovery process it allows. *Id.*; Mark D. Calvert, *Out with the Old, In with the New: The Mini-trial is the New Wave in Resolving International Disputes*, 1991 J. DISP. RESOL. 111, 113 (1991). Commentators often deem complex international disputes as being inadequate for arbitration. *Id.* Although arbitration may be efficient in domestic business disputes, costs rise in international cases due to the need for translators, experts, the language barrier, and a complex legal process. *Id.* Moreover, it is asserted that these parties do not arbitrate out of choice, but because they are fearful of submitting to foreign jurisdiction. *Id.*; Steven C. Nelson, *Alternative to Litigation of International Disputes*, 23 INT'L LAW. 187, 200 (Spring 1989) (discussing the disadvantages of arbitration in the international business setting). The complex nature of international cases combined with the presence of multiple parties and proceedings make arbitration a difficult task. *Id.* Furthermore, the discovery process is extremely limited and parties' substantive rights are often affected in unforeseen ways. *Id.* at 187-204; Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637, 638 (1995); Maria R. Larmari, Note, *The Role of Alternative Dispute Resolution in Government Construction Contract Disputes*, 23 HOFSTRA L. REV. 205, 215, 219-20 (1994) (stating that arbitration lacks uniformity leading to increased cost and time, particularly when a large number of disputes are necessary to resolve). "As a practical matter, claims that arbitration is faster and cheaper than litigation appear increasingly ungrounded." Burton, *supra*, at 637; S. Leonard Scheff, *Cave Arbitration*, 30 ARIZ. ATT'Y 11 (June 1994) (criticizing arbitration as being expensive); see also Jessica T. Martin, Note, *Advanced Micro Devices v. Intel Corporation and Judicial Review of Commercial Arbitration Awards: When Does a Remedy 'Exceed' Arbitral Powers?*, 46 HASTINGS L.J. 1907, 1911 (1995) (discussing arbitration's primary purpose as avoiding "litigation and its concomitant costs and delays") (citing Ehrlich v. A.G. Edwards & Sons, Inc., 675 F. Supp. 559, 562 (W.D.S.D. 1987), cert. denied, 476 U.S. 1141 (1986)); Lloyd N. Shields, *Arbitration as ADR*, 41 LA. B.J. 222, 224 (Oct. 1993) (noting that arbitration which is "protracted" with "substantial discovery" will not be cheaper than litigation).

leaving disappointed parties feeling that the arbitrator failed to fully consider or acknowledge their positions.¹⁴

Similar problems accompany the other often used methods of alternative dispute resolution. For example, mini-trials and summary jury trials are not usually employed until after litigation has commenced, thus driving up the expense associated with both methods.¹⁵ Furthermore, while these alternatives do not involve a full-scale trial, they do entail much of the cost, uncertainty, and frustration associated with the litigation system.¹⁶ In short, they have not proven to be an effective alternative method for resolving business disputes.

Mediation, on the other hand, has proven successful in avoiding many of these problems.¹⁷ In a mediation, the parties meet with a neutral

¹⁴See Stephen A. Hochman, *Do We Need a Lawyer's Arbitration Forum for Commercial Arbitration?*, C976 A.L.I.-A.B.A. 171, 181-87 (1994) (noting that arbiters do not explain awards, forcing disputants to believe that they are disregarding the law or making a decision based on the subjective).

¹⁵See generally Kevin C. Abbott & Sharon O. Flanery, *The Use of Minitrials in Mineral Disputes*, 14 E. MIN. L. FOUND. § 9.02 (1993) (discussing the disadvantages of the minitrial). The minitrial and summary jury trial are similar in that they are both "abbreviated trial presentations." *Id.* The only distinguishing feature is that the minitrial is presided over by a judge while the summary jury trial is decided by a jury. *Id.* Minitrials may be less expensive than actual litigation; however, these mechanisms are much more costly than mediation because full blown litigation will ensue if the dispute is not settled at the minitrial. *Id.* Yet, these devices are praised for being less expensive and time-consuming than arbitration. Abbott & Flanery, *supra*, § 9.02. *But see* Calvert, *supra* note 13, at 119 (arguing that minitrials are the best form of alternative dispute resolution for international business disputes).

¹⁶See generally Judge Robert M. Parker & Leslie J. Hagin, "ADR" *Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. REV. 1905, 1910 (1993) (stating that ADR methods may cause a quicker resolution to occur, but they are often employed after a substantial legal bill has already accrued).

¹⁷See William E. Huth, *Trends in ADR Utilization for Resolving Complex Commercial Disputes*, in DISPUTE RESOLUTION ALTERNATIVES SUPERCOURSE 371 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5177, 1993). Huth notes the following five reasons for using mediation as opposed to arbitration in resolving "complex commercial disputes." *Id.*

1. the preservation of existent relationships;
2. avoidance of the adversarial nature of arbitration;
3. parties, instead of the arbiter, can retain control of the proceeding;
4. mediation does not adjudicate like arbitration does, but bases the remedy on the parties' individual needs;
5. mediation is inexpensive and time-efficient as opposed to arbitration.

Id.; John B. Bates, Jr., *Using Mediation to Win for Your Client (With Forms)*, 38 PRAC. LAW. 23 (Mar. 1992) (outlining the advantages of mediation); J. Michael Keating, Jr., *Getting Reluctant Parties to Mediate, A Guide for Advocates*, 13 ALT. TO HIGH COST LITIG. 9 (Jan. 1995) (noting that mediation is preferable in commercial disputes because it reflects the business world and lets the parties control the outcome of their case). *See also* Roger M. Deitz, *Mediation of Securities Disputes: A Practical Introduction*, 900 PLI/CORP. 35 (July-Aug. 1995) (noting that arbitration is an "imperfect process" for resolving securities disputes and

mediator in an attempt to reach a consensual resolution of their dispute.¹⁸ The mediator will use various techniques to format and facilitate discussions.¹⁹ Because the process will not result in a binding resolution of the dispute unless the parties agree to the resolution, there is less risk of "losing" by engaging in a mediation.²⁰ Thus, parties can spend less time and money during the mediation.²¹ It is for these reasons that as much as eighty-five percent of such mediations result in the settlement of

positing that mediation provides a remedy for arbitration's shortcomings); Lousie A. LaMothe, *Thinking About Mediation*, 19 LITIG. 1 (Summer 1993) (discussing mediation as a resolution technique and noting that arbitration is the resolution method most like litigation). Mediation is touted as being both time and cost efficient because it lets the parties pinpoint the underlying issues of their case. Elaine A. Wohlner & John A. Rymers, *Civil Mediation: Where, When and Why it is Effective*, 24 COLO. LAW. 2161 (1995). Mediation is deemed especially effective in business and employment disputes because it preserves the parties' relationship while also protecting privacy. *Id.* at 2162. Mediation can be time consuming without producing a positive result because certain differences are completely non-negotiable, regardless of the parties desire to settle. *Id.*

¹⁸HON. EUGENE F. LYNCH ET AL., NEGOTIATION AND SETTLEMENT § 7:29, at 207 (1992). The treatise explains that "the neutral mediator's role is to help both sides find a consensual solution to their dispute." *Id.*

¹⁹STEPHEN P. DOYLE & ROGER S. HAYDOCK, WITHOUT THE PUNCHES RESOLVING DISPUTES WITHOUT LITIGATION 88-92 (1991). The mediator's tactics, include identifying the crucial issues from the perspectives of both parties, encouraging the parties to communicate among themselves and with the mediator in order to reveal as much information as possible and exploring options and urging resolution. *Id.* A typical technique used by mediators is known as "shuttle diplomacy." *Id.* at 89. During this process, the parties are in separate locations and the mediator travels back and forth between each location, parlaying the demands and counteroffers of each party. *Id.* Another tactic that is useful to achieving resolution is the "suffer/suffer" tactic. *Id.* at 91. This approach is used when a favorable result to each party has not been formulated, but a result in which each party loses or concedes something important is formulated, thus ending in a "fair" result. *Id.*

See also COMMITTEE ON DISPUTE RESOLUTION BUSINESS SECTION OF THE AMERICAN BAR ASSOCIATION, A DRAFTER'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION 34 (Bruce E. Meyerson & Corrine Cooper eds., 1991) (pointing out that the parties' active participation in the mediation is essential to a successful result).

²⁰DOYLE & HAYDOCK, *supra* note 19, at 92 (indicating that the resolution can be made binding by contract). "Mediation . . . reduces the chances that an unfair or unsatisfactory result will occur and increases the chances that a resolution will be complied with because of a party's involvement." *Id.* at 72. Due to its completely non-binding nature, mediation is virtually risk-free. Feinberg, *supra* note 6, at S7-S8.

²¹*See* Feinberg, *supra* note 6, at S10. Mediation is cost effective because there is less time involved, thus there is a savings in legal fees, as well as less potential for loss of profits and loss of opportunity. *Id.* at S10-S12. Further, the parties often share the cost involved in hiring the mediator. *Id.* at S11. The author points out examples of how mediation can save time, including a ten year dispute between competitors in the telecommunications industry that took only three months to resolve through mediation. *Id.* at S10.

disputes.²² Despite these advantages, mediation has not been as widely adopted as these benefits seem to suggest.

III. PROBLEMS WITH MEDIATION IN THE PAST

There are several reasons why mediation has not been widely adopted as the preferred method of business dispute resolution. First, there is the wide-spread perception that mediation is simply a more costly method of negotiation between the parties.²³ Under this belief, if the parties themselves cannot negotiate a settlement, then it makes very little sense for them to spend more money to reach a similar failure in a mediation.

Second is the common anxiety that anything short of all-out litigation is a sign of weakness. As one commentator has put it, "Real men do not mediate."²⁴ This perception may explain, in a related context, the reluctance of some employers to mediate disputes with their employees. The employer may feel that even sitting down with an employee is a sign that the employer is no longer the "boss." A similar situation also exists when one of the parties to a dispute has a superior economic or legal position and believes it would be giving up its natural advantage by sitting at the same table with its weaker opponent.

Finally, the procedures utilized in mediation are not widely known. Neither the states nor the federal government have adopted statutes governing the mediation process like those found in the Uniform Arbitration Act.²⁵ As such, parties are very reluctant to agree to mediate when they do not understand the process.

IV. HOW THE DELAWARE MEDIATION STATUTE ADDRESSES THESE PROBLEMS

The Delaware ADR Act is designed to address these past problems while still providing the many benefits of an effective mediation program.

²²See Deitz, *supra* note 17, at 35 (70%); Keating, Jr., *supra* note 17, at 10 (75-85%).

²³See generally Rowe, *supra* note 2, at 900 (stating that substantial user fees may keep litigants from choosing ADR).

²⁴*Id.*

²⁵See generally Feinberg, *supra* note 6, at S20-S22 (indicating that "the primary factor contributing toward unwillingness to try mediation is simply unfamiliarity with the process," and discussing the need for institutionalization). The Uniform Arbitration Act addresses the entire arbitration process, with provisions that deal with a host of issues ranging from the validity of the agreement, to the award, venue, and appeals. THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 177.02 (1995).

First, by creating a legislatively sanctioned process with various enforcement mechanisms, the Delaware ADR Act gives the process a structure and formality which were lacking in mere negotiations. Business people want to follow the law. If the law requires mediation, then they will be compelled to do what they can to make that process a success. Moreover, under the Delaware ADR Act, mediation procedures are designed to focus the parties' attention on the substance of their dispute and how to resolve it, and not allow them to participate in tangential side-arguments that often cause negotiations to fail.

Second, under the Delaware ADR Act, the parties must agree to mediate before any dispute arises, therefore, their participation in the actual mediation will not be perceived as a sign of weakness. Each party can also manifest its willingness to go to full-scale litigation, while participating in the mediation that its prior agreement and the provisions of the Delaware ADR Act require.

Third, set procedures that govern the selection of the mediator and the conduct of the mediation proceedings remove the uncertainty surrounding these aspects of the process. This allows the parties to know exactly what they are getting into. While the Delaware ADR Act permits the parties to adopt different procedures by agreement,²⁶ the Act provides a road map with which to begin.

A final, but very significant benefit of the Act, is the minimal cost associated with mediation. For example, the Act limits the mediator's fees,²⁷ the length of the mediation,²⁸ and the amount of paperwork that can be submitted.²⁹ Thus, mediation is unlikely to become just another costly step on the path to full-scale litigation. Considering the minimal costs and the potential benefits, mediation proves to be a cost efficient, worthwhile alternative to litigation.

V. HOW THE DELAWARE ADR STATUTE WORKS

A. *Invoking the Statutory Provisions*

The key to the Delaware ADR Act is the ADR Certificate (Certificate) which is filed with the Secretary of State of the State of Delaware.³⁰ Filing has two effects. First, any party who files a

²⁶DEL. CODE ANN. tit. 6, § 7714 (1995).

²⁷DEL. CODE ANN. tit. 6, § 7713 (1995).

²⁸DEL. CODE ANN. tit. 6, § 7714(b) (1995).

²⁹DEL. CODE ANN. tit. 6, § 7714(a) (1995).

³⁰DEL. CODE ANN. tit. 6, § 7705 (1995).

certificate obtains the right to include in any contract a provision which invokes the terms of the Delaware ADR Act.³¹ In addition, the party who signs such a contract is then required to follow the terms of the Delaware ADR Act.³² Second, any party who has filed such a certificate may be required to mediate any dispute by another party, even if that other party is not a signatory to a contract that invokes the Delaware ADR Act.³³ Thus, the filing of a certificate is a commitment to mediation, even if the parties have not made an agreement to mediate.

The certificate is a simple document. It need only contain the name of the person or entity filing it, an address for notice purposes, and a statement by the filing party agreeing to be bound to follow the provisions of the Delaware ADR Act and submitting to the jurisdiction of any court requiring participation in ADR.³⁴ This commitment to ADR is unequivocal in that it is not possible, under the Act, to limit the type of disputes subject to mediation,³⁵ with the exception of a threshold jurisdictional amount of \$100,000.³⁶ Conversely, the certificate may be revoked by filing a certificate of revocation.³⁷ The revocation is effective upon filing, except with respect to disputes arising under contracts that require ADR and were entered into prior to the filing of the certificate of revocation.³⁸

Electing coverage under the Delaware ADR Act is simple and straightforward, but there are some practice pointers that should be considered. For example, the certificate provides for an address where notice of the mediation is to be sent.³⁹ The location identified in the certificate then becomes one possible site for the mediation to take place, the others being the entity's state of incorporation or domicile.⁴⁰ Thus, careful selection of a notice address will allow businesses to save time and money by limiting the available locations where the mediation may occur, particularly if the business plans to handle its mediations in-house.

³¹DEL. CODE ANN. tit. 6, § 7703(b) (1995).

³²*Id.*

³³DEL. CODE ANN. tit. 6, § 7703(a) (1995).

³⁴DEL. CODE ANN. tit. 6, § 7704(a) (1995).

³⁵DEL. CODE ANN. tit. 6, § 7704(b) (1995).

³⁶DEL. CODE ANN. tit. 6, § 7702(b) (1995). There are other exceptions to the ADR Act for certain types of disputes already subject to expedited treatment in the Delaware Court of Chancery. *See id.* (exempting procedures under DEL. CODE ANN. tit. 8, §§ 211, 215, 225 (1995)).

³⁷DEL. CODE ANN. tit. 6, § 7707 (1995).

³⁸*Id.*

³⁹DEL. CODE ANN. tit. 6, § 7704(a)(2) (1995).

⁴⁰DEL. CODE ANN. tit. 6, § 7709(b) (1995).

In addition, the statute does not prohibit parties from including in their contracts language which reinforces the obligation to mediate. For example, a contract may provide that any parties to a contract who refuse to comply with the Delaware ADR Act must pay the attorney's fees of any other party in litigation if the non-compliant party is unsuccessful in that litigation. Because such a contractual provision is not a double-edged sword (the party seeking mediation does not have to pay attorney's fees, even if it loses), this type of contract provision could strongly influence businesses to choose to mediate before litigating.

B. *Selecting the ADR Specialist*

In the past, one of the principal obstacles that parties to ADR proceedings have had to overcome was the selection of the mediator or arbitrator. The Delaware ADR Act avoids this problem by providing a clear methodology for this selection.⁴¹ Under section 7709, there are two primary ways to select an ADR Specialist.⁴² The method of selection, however, will depend on whether the mediation is occurring inside or outside the State of Delaware.⁴³

With respect to mediations in Delaware, the party initiating a proceeding will pick a panel of three mediators located in Delaware.⁴⁴ The names of these three candidates must then be included within the notice of intent to mediate.⁴⁵ If the three chosen mediators are rejected

⁴¹DEL. CODE ANN. tit. 6, § 7709 (1995). Although this section dictates the procedure for choosing a mediator, it further empowers the parties to employ an agreed upon method, different than that stated in the Act. *Id.* § 7709(b).

⁴²*Id.* § 7709(a)-(b). The Delaware ADR Act refers to the mediator as an "ADR Specialist." *Id.* The terms mediator and ADR Specialist will be used interchangeably through this section.

⁴³DEL. CODE ANN. tit. 6, § 7709(c) (1995).

⁴⁴*Id.* § 7709(a). Section 7709 states in pertinent part:

In the case of ADR proceedings that are to be held in the State of Delaware, the party who initiates the proceedings shall select a panel of three ADR Specialists in Delaware to be considered by the parties. Unless the parties otherwise agree in writing, the ADR Specialist shall thereafter be chosen in accordance with procedures set forth in subsections (c)-(f) below.

Id.

To qualify as an ADR Specialist, a person must complete an approved training course of at least 25 hours in civil dispute resolution *or* be an attorney with a minimum of five years experience. DEL. CODE ANN. tit. 6, § 7708(a)-(b) (1995).

⁴⁵*Id.* § 7709(c). Section 7710 of the Act requires that a written notice of intent to mediate be sent to all other parties to the dispute. *Id.* § 7710. The possible ADR Specialists are then identified in this as well as the fact that the dispute is subject to the Act and the nature of the dispute to be mediated. *Id.* Although this notice should be sent to all interested parties,

by the other parties to the dispute, then an ADR Specialist will be chosen by the ADR Administrator of the Superior Court of the State of Delaware.⁴⁶

In disputes to be mediated outside the State of Delaware, the person invoking the mediation similarly chooses a panel of three qualified mediators.⁴⁷ However, these three candidates must be from the state in which the other party is either: (1) incorporated or domiciled, or (2) from the jurisdiction where the other party resides.⁴⁸ In the second instance, the party's residence is determined by the address on the ADR certificate filed with the Delaware Secretary of State.⁴⁹ If none of the mediators suggested are acceptable, an ADR Specialist will be selected under the existing rules of the jurisdiction where the ADR proceedings are to occur.⁵⁰ If no such rules exist, the mediator will be selected by the American Arbitration Association.⁵¹

In order to limit the expenses of the parties, the Delaware ADR Act restricts the amount of compensation which may be charged by the ADR Specialist.⁵² Unless the parties otherwise agree, the ADR Specialist may charge his normal hourly rate of compensation for a maximum of ten hours preparation time and one day of mediation.⁵³ The parties can

failure to notify such a person does not prohibit the ADR proceedings from ensuing between the parties who did receive notice. *Id.* Upon receipt of this notice, the parties have 14 days to either choose or reject the candidates stated as ADR Specialists. DEL. CODE ANN. § 7709(d)(i)-(ii) (1995). The rejection or acceptance of a mediator must be given in writing to the party invoking mediation. *Id.* If more than two parties are participating in the ADR proceedings, the ADR Specialist is the candidate chosen by a majority of the parties. *Id.* § 7709(d)(ii). If a tie occurs, the party initiating the mediation will choose between the candidates who are tied. *Id.*

⁴⁶DEL. CODE ANN. tit. 6, § 7709(f) (1995).

⁴⁷DEL. CODE ANN. tit. 6, § 7709(b)(A)-(B) (1995). Section 7709(b)(A) refers to mediation involving only two parties while § 7709(b)(B) refers to mediation which involves more than two disputants. *Id.* Both provisions are identical substantively. *Id.*

⁴⁸DEL. CODE ANN. tit. 6, § 7709(b)(A)-(B) (1995).

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.* § 7709(f).

⁵²DEL. CODE ANN., tit. 6, § 7713(a) (1995).

⁵³*Id.* Section 7713(a) states:

The ADR Specialist shall be reimbursed for all reasonable out-of-pocket expenses. The ADR Specialist shall be compensated on the basis of the Specialist's regular hourly fees for professional services for time spent during the day of the actual ADR proceeding and for any subsequent continuation of the proceedings agreed to by the parties. In addition to this compensation for the actual ADR proceeding, the ADR Specialist may charge for up to 10 hours spent in preparing for the ADR proceeding, unless the parties agree to additional preparation time.

agree that the mediator will continue after one day to assist them in reaching a settlement. This continuance may occur if the one day mediation has resolved many issues and seems likely to lead to a global settlement of the dispute. However, in such a case, the parties should be careful about their agreement with the mediator so that they will clearly understand any charges for additional services rendered.⁵⁴

C. *The Mediation Process Under the Delaware ADR Act*

One of the problems with ADR in the past was the absence of a defined process.⁵⁵ While certain mediation procedures were widespread, parties did not have to follow these common practices unless the parties agreed on them. Thus, absent such an agreement, the parties were left without procedures to invoke. Lawyers, who were then required to agree on procedure, ran the risk of additional expense and delay.

The Delaware ADR Act resolves this problem by providing specific mediation procedures.⁵⁶ The Act permits the parties to agree to different procedures,⁵⁷ but the existence of a statutory base line avoids protracted arguments over agreements to use alternative procedures.

Under the Act, the ADR Specialist schedules mediation to occur within sixty days of her appointment.⁵⁸ Under section 7710, the ADR

Id.

If the parties choose to employ a compensation rate other than that dictated by the Act, such an agreement must be in writing and signed by all the parties. *Id.* § 7713(d).

⁵⁴The ADR Specialist may require the parties to advance fees prior to the actual mediation. DEL. CODE ANN. tit. 6, § 7713(b) (1995). Unless otherwise agreed, the fees are to be divided among the parties to the proceedings on a pro rata basis. *Id.* § 7713(c). The ADR Specialist also has the right to triple damages in any litigation to recover her reasonable fees and expenses, together with attorney's fees and other costs incurred in such litigation. DEL. CODE ANN. tit. 6, § 7719(c) (1995). The ADR Specialist is given immunity equivalent to that of a judicial officer sitting in a Court with jurisdiction over the subject matter and the parties involved in a dispute. DEL. CODE ANN. tit. 6, § 7717 (1995).

⁵⁵DEL. SEN. BILL NO. 151, 138th GEN. ASS., 1st Sess. (1995) (enacted). The synopsis of this bill stated that mediation is not used as frequently as it could be because no set procedures exist for its use or enforcement. *Id.*

⁵⁶*Id.* The purpose of this Act is "to provide a means to resolve business disputes without litigation and to permit parties to agree, prior to any disputes arising between them, to utilize alternative dispute resolution techniques if a dispute occurs." DEL. CODE ANN. tit. 6, § 7701(b) (1995).

⁵⁷*Id.* § 7714. Section 7714 allows the parties to employ different procedures for mediation as well as giving the mediator the discretion to modify the procedure set forth in the Act. *Id.*

⁵⁸DEL. CODE ANN. tit. 6, § 7712 (1995). Section 7712 further provides that the ADR Specialist notify the parties of her acceptance of the position and her expected compensation rate. *Id.*

proceedings commence when written notice of intent to mediate is sent to the parties to the dispute.⁵⁹ Unless the parties otherwise agree, the mediation is held in the office of the ADR Specialist.⁶⁰ The Act further provides that notice of the mediation may be given to additional parties, even if those parties have not agreed to participate in mediation.⁶¹ Upon receipt of this notice, these third parties have the option of choosing to participate in the proceeding.⁶² As there is a high success rate in mediations, third parties would be well advised to carefully weigh their choice. A nonparticipating party, for example, runs the risk of becoming the "target" of any settlement by the other parties.

Prior to the mediation session, each party is required to submit a statement of its position in the dispute and such supporting documents as it deems appropriate to all other parties and the ADR Specialist.⁶³ This statement must be sent at least seven days prior to the start of mediation and it cannot exceed twenty-five pages in length.⁶⁴ When the mediation commences, each party is given one hour to present its position to the ADR Specialist, while in the presence of the other parties.⁶⁵ After that presentation, the mediator may permit the other parties one hour to question the presenting party.⁶⁶ After all the parties have made their initial presentations and have been subject to questioning, the mediator meets with each party separately or with all the parties as a group (as the mediator determines is appropriate) in an attempt to reach a settlement.⁶⁷

The Delaware ADR Act further requires that each party be represented at the mediation by either its chief executive officer or some other person authorized to act on behalf of the company by that party's

⁵⁹DEL. CODE ANN. tit. 6, § 7710 (1995).

⁶⁰*Id.* § 7712.

⁶¹DEL. CODE ANN. tit. 6, § 7711 (1995).

⁶²*Id.* If a party elects to participate in the ADR proceeding, selection of the ADR specialist marks their choice and serves as an agreement by the party to be bound by the provisions of the ADR Act. *Id.*

⁶³*Id.* § 7714(a).

⁶⁴*Id.*

⁶⁵DEL. CODE ANN. tit. 6, § 7714(b) (1995). The parties' presentation can be made by counsel, through witnesses, or "by any other means that is reasonable under the circumstances." *Id.*

⁶⁶*Id.*

⁶⁷DEL. CODE ANN. tit. 6, § 7714(c) (1995). The ADR Specialist determines whether it is more conducive to meet with the parties separately or as a group. *Id.* This meeting lasts either until the dispute is resolved or the end of the business day. *Id.* Once an agreement is reached, the ADR Specialist will continue to discuss the resolution with parties until the specialist is informed that the discussions are at an "impasse." DEL. CODE ANN. tit. 6, § 7714(d) (1995).

governing body.⁶⁸ The authorized representative is required to have settlement authority⁶⁹ and is directed to report back to the governing body concerning the mediation.⁷⁰ The purpose of this provision is to make sure that the mediation focuses on the business realities of the parties and is not driven by the egos of the litigators.

The designation of a client representative may present some problems for large businesses. Generally, the more knowledgeable the representative is concerning the particular business, the better. Still, it is more advantageous for the representative to have as much knowledge as possible about the particular transaction in dispute. Large corporations, however, with multiple operating divisions, are not likely to have a single individual who can appropriately represent the corporation in every mediation. No one person will have the time, experience or inclination to fill the role of permanent client representative. This problem can be avoided however if the governing body of the corporation selects a single person, such as the company's general counsel, and gives him the authority to appoint other client representatives for specific mediations. The statutory language appears broad enough to permit this practice.

Unless the parties otherwise agree, a mediation under the Delaware ADR Act is very much like a mini-trial, with witnesses, cross-examination, and demonstrative exhibits. The quality of a party's presentation and the cross-examination of the other party will have a direct impact on the terms of any settlement of the dispute. This is particularly true because each party will be communicating directly with an opposing senior officer who has the authority to make settlement decisions. Thus, mediation under the Delaware ADR Act is not designed for the meek or the unprepared. While it is true that no settlement will be reached unless a party agrees to it, a mediation session generates considerable pressure to settle. Additionally, even if no settlement is reached, the discussions from the mediation session will continue to influence any subsequent attempts to settle.

If a settlement is reached, the Delaware ADR Act requires that the terms of the agreement be put in writing.⁷¹ This writing may be prepared by the mediator or, upon agreement of the parties, the parties themselves

⁶⁸DEL. CODE ANN. tit. 6, § 7718 (1995). The representatives are in addition to the counsel. *Id.* Authorizations allowing representatives must be in writing and such representatives must also file a written authorization to attend with the ADR Specialist. *Id.*

⁶⁹*Id.* The representative is not required to reveal the extent of her settlement authority to the mediator or the other parties. *Id.*

⁷⁰*Id.*

⁷¹DEL. CODE ANN. tit. 6, § 7715 (1995).

can prepare the settlement agreement.⁷² Again, prior consideration as to who will draft the agreement and when it will be drafted is recommended. Frequently, parties will be able to reach an agreement on the basic points of a settlement. However, for a variety of reasons, the settlement may be very complex and if a settlement agreement is reached at the end of a long day of mediation, it is likely that weary drafters may omit or improperly describe some important points. On the other hand, reaching a basic agreement that is subject to a more detailed subsequent written agreement always leaves open the possibility that the settlement will fall apart when the lawyers start to argue about how to document the final version. Again, careful planning is the best way to minimize these problems.

Prior to the mediation, each party should have a clear idea of the terms they find essential to a possible settlement. A well-prepared party should have those settlement terms in writing prior to the mediation session. For example, if the settlement is to include agreements not to compete, to preserve trade secrets and to indemnify against third party claims, then those provisions should be drafted in advance. This type of advanced preparation will allow a detailed agreement to be reached at the mediation session, when the parties will be more likely to compromise on language used to carry out a settlement.

One could argue, however, that it is advisable to allow some time to pass before a final settlement agreement is put in writing and executed. The benefits of delay, however, should not be overvalued because most "bad" settlements are still better than the results of litigation. The parties are advised to retain the mediator to iron out difficulties, if any, with the settlement document. The prospect of going before a mediator for this type of "adult supervision" is a strong incentive for parties to resolve such problems on their own.

D. *Miscellaneous Provisions*

Finally, the Delaware ADR Act addresses various issues that frequently arise in mediation proceedings. Under the Act, the actual mediation session is confidential.⁷³ Further, any memoranda submitted, statements made, or notes or materials of either the mediator or any party are not subject to discovery or introduced into evidence in any subsequent

⁷²*Id.*

⁷³DEL. CODE ANN. tit. 6, § 7716 (1995).

proceedings.⁷⁴ This provision encourages the parties to be as open as possible during the course of the mediation.

The Delaware ADR Act is designed so as not to prejudice the position of any party in the subsequent litigation of their dispute. Commencing ADR under the Delaware Act tolls the statute of limitations until fourteen days after the mediation session is concluded.⁷⁵ Thus, parties who choose to mediate need not fear the loss of their right to file suit. Additionally, any party may commence litigation and thereby terminate the mediation process at any time.⁷⁶ A party may be penalized for such conduct,⁷⁷ but the litigation will proceed unimpeded. Although it may seem inconsistent to allow litigation to go forward when mediation is required, the prohibition of litigation would actually be inconsistent with the consensual nature of mediation. Mediation is meaningless if the participants have no intention of resolving their dispute. To require the parties to participate in such an empty exercise runs counter to the purpose of the Delaware ADR Act itself, which is to promote timely, low cost dispute resolution.

VI. CONCLUSION

The Delaware ADR Act is a first step to providing meaningful alternatives to traditional litigation and arbitration of business disputes. Given the very low comparative cost of mediation and its success in the past, the Delaware ADR Act should be very attractive to businesses. Parties who agree in advance to mediate any dispute that may arise will not be demonstrating any weakness in their positions by mediating. Rather, the agreement to mediate will only be a recognition of the fact that litigation is not the only appropriate course in resolving disputes.

⁷⁴*Id.*

⁷⁵DEL. CODE ANN. tit. 6, § 7720 (1995).

⁷⁶DEL. CODE ANN. tit. 6, § 7721 (1995).

⁷⁷*Id.*