



*Mediation In The Delaware
Court of Chancery*



Overview

- FR Description of the Delaware Court of Chancery
- FR Why mediate in Chancery?
- FR What claims can be mediated in Chancery?
 - Technology Disputes: 10 *Del.C.* 346
 - Other Business Disputes: 10 *Del. C.* 347
- FR How to obtain a Chancery mediation
 - *Suggested forum selection language*
- FR Examples of successful Chancery mediations



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Overview of the Delaware Court of Chancery

- FR Leading U.S. Business Court
- FR Limited Jurisdiction – Court of Equity
- FR Trial Court
- FR Sophisticated Business Judges
- FR No Juries
- FR Speedy Decisions
- FR No Punitive Damages



Recent Testimonial Regarding Chancery

 Dave Miclean re recent case in Chancery:

“This is the first experience I have had with Chancery Court in Delaware --- and I very much like the swift justice, pragmatic decision making --- and obviously the good result. It is not often you can get a litigation resolved and your fees paid in a matter of months.”

1/24/07 email



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Why Mediate in Chancery?

- FR Sophisticated Mediators
- FR Speedy
- FR Cost Effective
- FR Confidential
- FR Flesh Out Parties' Positions
- FR Judicial View of Parties' Positions



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§ 346 Technology Disputes

The Court of Chancery shall have power to mediate and jurisdiction to hear and determine technology disputes when:

- ❖ (1) The parties have consented to the jurisdiction of or mediation by the Court of Chancery **by agreement or by stipulation**;
- ❖ (2) At least one party is a “**business entity**”;
- ❖ (3) **At least one party** is a business entity formed or organized under the laws of **Delaware** or having its principal place of business in this State;
- ❖ (4) **No party is a "consumer"**, as defined in 6 Del. C. § 2731, with respect to the technology dispute; and
- ❖ (5) In technology disputes involving solely a claim for monetary damages, the amount in controversy is **no less than \$1,000,000**.



“Technology Dispute” Defined

- ❖ A "**technology dispute**" means a dispute arising out of an agreement and relating primarily to: [a] the purchase or lease of computer hardware; the development, use, licensing or transfer of computer software; [b] information, biological, pharmaceutical, agricultural or other technology of a complex or scientific nature that has commercial value, or the intellectual property rights pertaining thereto; [c] the creation or operation of Internet web sites; [d] rights or electronic access to electronic, digital or similar information; or [e] support or maintenance of the above.
- ❖ “The court shall **interpret the term “technology dispute” liberally** so as to effectuate the intent of this section to provide an **expeditious** and **expert** forum for the handling of technology disputes involving parties who have agreed to resolve their disputes in the Court of Chancery.”



 **3 Choices:**

Parties who have agreed to resolve their technology disputes in the Court of Chancery, may seek to have the Court of Chancery:

- a. Mediate the dispute only;
- b. Mediate the dispute initially, and if that fails, adjudicate the dispute; or
- c. Adjudicate the dispute.



§ 347 Business Dispute Mediation

- ❖ **Same 5 prerequisites** for mediation of technology disputes (agreement of the parties, one of which is a DE entity, damages > \$1m, not a “consumer” dispute)
- ❖ Section 347 is intended to encourage the Court of Chancery to include complex corporate and commercial disputes, including technology disputes, within the ambit of the business dispute mediation rules. The Court of Chancery should **interpret a business dispute broadly** to effectuate that intention.



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How to Obtain a Chancery Mediation

- ❖ *Wait until your client is sued and then hope that the plaintiff agree to mediate; or*
- ❖ *Proactively include a Chancery forum selection provision in your transactional documents when one of the parties is a Delaware corporation or has a PPB in Delaware*



Sample forum selection clause:

Each party hereto irrevocably agrees that any dispute arising out of or related in any way to this agreement shall be submitted in the first instance to **[mediation, mediation then litigation, or litigation]** pursuant to the provisions of 8 *Del. C.* §§ 346 and 347 in the Court of Chancery of the State of Delaware. If the Delaware Court of Chancery lacks jurisdiction under 8 *Del. C.* §§ 346 and 347 to resolve the dispute **[either by mediation or litigation]**, then such dispute shall be brought in the appropriate court in the State of Delaware, and each of the parties hereto hereby (i) irrevocably submits with regard to any such dispute for itself and in respect to its property, generally and unconditionally, to the exclusive personal jurisdiction of the Delaware courts in the event that any dispute arises out of this Agreement or any transaction contemplated hereby, (ii) agrees that it will not attempt to deny or defeat such personal jurisdiction by motion or leave from any such court in Delaware; and (iii) agrees that it will not bring any action relating to this Agreement or any transaction contemplated hereby in any court other than the aforesaid courts.



What documents are required?

- ❖ **First**, the parties must enter into a written consent and order of mediation that identifies the issues to be mediated.
- ❖ **Second**, a petition for mediation identifying the issues to be mediated and amount in controversy (if damages are sought).
- ❖ **Third**, a mediation statement, not to exceed 15 pages, may be required. This should describe the parties, provide an overview of the facts and law, and describe prior settlement discussions, if any. The mediator may request opening and reply statements totaling 15 pages instead.
- ❖ Every document is Confidential; nothing is publicly filed, but goes by hand delivery to the mediator. Other trolls can't find out.
- ❖ Delaware counsel is required on the documents and at mediation.



What are the costs?

- ❖ *A \$5,000 mediation fee must be submitted with the petition for mediation*
- ❖ *A \$2,500 fee is payable for each day the Chancellor, a Vice Chancellor or the Master in Chancery is engaged in mediation.*
- ❖ *These fees are divided equally among the parties.*



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Our recent experiences illustrate how effective
Chancery mediations can be.
