



THE DELAWARE COURT OF CHANCERY OFFERS NEW ARBITRATION PROCEDURES FOR CONFIDENTIAL, EFFICIENT RESOLUTION OF SIGNIFICANT BUSINESS DISPUTES

As of February 1, 2010, the Delaware Court of Chancery is offering a voluntary binding arbitration process as a new alternative means of resolving complex business disputes.¹ The arbitration program adds to the court's successful mediation program (established in 2003) to continue the state's goal of "preserv[ing] Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters."² With the arbitration program, the Court of Chancery promises a much speedier resolution than is afforded by a full trial, while providing a finality not available through the mediation process. And by offering the expertise of the world's most respected business court in a confidential setting,

the program also serves as a competitive alternative to private arbitration. The framework established by the Court of Chancery for its voluntary arbitration program makes it an attractive option for companies seeking alternative means of effectively and efficiently resolving business disputes.

ELIGIBILITY

While many court-sponsored arbitration programs have been targeted at smaller cases in an effort to reduce the strain on a court's docket, this program is aimed specifically at the large, complex corporate and commercial cases in which the Court of Chancery has established expertise. The program, then, is designed less as a tool for improving the court's efficiency and more as a competitive alternative to privately run arbitration services.

¹ See Delaware Court of Chancery, "Order Adopting Court of Chancery Rules 96, 97 and 98" (Jan. 5, 2010), available at http://courts.delaware.gov/Rules/?Chancery96-97-98_020110.pdf; 10 Del. C. § 349.

² H.R. 49, 145th Gen. Assembly (Del. 2009).

Toward these ends, eligibility for the court's arbitration proceedings is limited to business disputes in which at least one party is a business entity formed or organized under Delaware law or having its principal place of business in the state, and in which neither party is a consumer. In cases involving claims solely for monetary damages, the amount in controversy must exceed \$1 million.

Participation in the arbitration process is entirely voluntary and is open to all eligible parties. There is no requirement that the parties have a pending action before the Court of Chancery or any other court before filing for arbitration.

EXPERT ARBITRATORS

The arbitrator hearing the case will be a permanent member of the Court of Chancery—either a Chancellor, Vice Chancellor, or Master in Chancery—appointed by the Chancellor. Thus, the same expertise that makes the Delaware Court of Chancery an attractive forum in which to litigate complex corporate and commercial disputes will make the court's arbitration program an equally appealing option.

SPEEDY RESOLUTION

Perhaps the greatest perceived advantage of arbitration over trial is the promise of a speedy resolution to the dispute. The Court of Chancery's arbitration program contains rules designed specifically to accomplish this important goal. Under its procedures, once a petition is filed by the parties, a telephonic preliminary conference will be held within 10 days to address initial substantive and procedural matters and to schedule a hearing. The arbitration hearing itself will generally be held within 90 days of filing.

FLEXIBLE PROCEDURES

The Court of Chancery, which has traditionally taken a flexible approach to court procedure, promises to offer even greater flexibility in its arbitration proceedings. The arbitration rules provide for a prehearing "exchange of information" to give the parties and the arbitrator sufficient information to understand and resolve the dispute. The parties may opt out of this process, with the caveat that the arbitrator may still require the submission of additional information. Thus, while the ordinary discovery procedures of Court of Chancery Rules 26 through 37 (including document production, depositions, and the use of experts) still expressly apply to the arbitration proceedings, the parties, with the consent of the arbitrator, will have the ability to use as much or as little of these procedures as they see fit.

APPEALABILITY

One key benefit of arbitration proceedings carried out under the auspices of the Delaware Court of Chancery is that the decision immediately carries the force of a judicial order. Either party has the right to appeal directly to the Delaware Supreme Court to enforce or vacate the arbitration order. The parties, however, may stipulate that the Court of Chancery's decision will be nonappealable.

CONFIDENTIALITY

Like private forms of voluntary arbitration, but unlike traditional actions brought in the Court of Chancery, these arbitration proceedings will be entirely confidential. While most actions brought in the Court of Chancery are subject to the open courts provision of the Delaware constitution, this provision does not apply to the new arbitration proceedings. The proceedings will remain confidential unless either party decides to appeal the arbitrator's decision to the Delaware Supreme Court. In the case of an appeal, the parties will have to file the record of the arbitration proceeding with the Supreme Court pursuant to its rules.

COST

The fees associated with the arbitration program include \$12,000 for filing the petition and \$6,000 for each day of the arbitration hearing. The fees are divided equally between the parties. These rates are only slightly higher than those charged in the Court of Chancery's mediation program, and they are competitive with, if not lower than, rates charged by private arbitration forums for disputes of this nature and size.

HOW TO TAKE ADVANTAGE OF THIS PROGRAM

There are two ways in which parties wishing to make use of the Court of Chancery's arbitration process may do so. They may, of course, jointly decide to file a petition once a dispute arises. A better solution, however, is to insert specific contractual language into agreements stipulating that any dispute arising from the agreement will be resolved through the Court of Chancery's arbitration program, as is frequently done for AAA arbitration clauses. An example of such language is as follows:

In the event a dispute shall arise between the parties to this [Agreement], it is hereby agreed that the dispute shall be referred to the Delaware Court of Chancery pursuant to Delaware Court of Chancery Rules 96 through 98 for a final, binding [and nonappealable] arbitration of that dispute.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

John Q. Lewis

+1.216.586.1005

jqlewis@jonesday.com

Louis A. Chaiten

+1.216.586.7244

lachaiten@jonesday.com

Nicholas B. Wille

+1.216.586.7270

nwille@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.