

# “What keeps you up at night?”

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## Delaware Court of Chancery proposes arbitration rules for all “business disputes”

By Whitney W. Deeney

Recently, the Delaware Court of Chancery (“Court of Chancery” or “Court”) proposed rules which, if adopted, will establish arbitration procedures allowing any member of the Court to act as an arbitrator in a business dispute. To companies in the midst of such disputes, this option may prove an extraordinarily valuable alternative to trial. Arbitration before the Court of Chancery may quickly become very popular, particularly in light of the Court’s reputation as the preeminent forum for resolution of corporate contests and for its expeditious proceedings.

Alternative dispute resolution in the form of mediation has been used for some time under the Court of Chancery’s Rules 93-95 and 174. Mediation has been highly efficient for both the Court and the participating parties and an expeditious avenue for the resolution of business disputes. The proposed arbitration rules will provide access to the same experienced decision-makers and prompt proceedings as found in the mediation process. However, arbitration before a member of the Court will provide greater finality for the parties, and for the Chancery judge or master, more flexibility to craft a remedy or relief that is just and equitable.

The Court of Chancery has statutory authority to arbitrate business disputes. While not defined in the Delaware code, “business disputes” has been interpreted to include commercial, corporate, and technology disputes. The parties must consent to arbitration through contract or through a stipulation to arbitrate. Under the proposed arbitration rules, the parties must satisfy the same requirements as in the mediation process. For example, at least one party must be a business entity (e.g., a corporation, business association, partnership) and a least one party must be a Delaware business entity or have its principal place of business in Delaware. Further, if the dispute involves only monetary claims, the amount in controversy must be at least \$1,000,000. Finally, each party must be represented by Delaware counsel at the arbitration.

The proposed rules preserve the Court of Chancery’s objective of expeditious resolution of disputes. As such, a preliminary conference is required within 10 days of the filing of the petition for arbitration, and the arbitration hearing must be held within 90 days of filing. Also, the arbitration will have an abridged discovery process in which the parties will only exchange the

**“What keeps you up at night?”**

information and documents or conduct the depositions vital to enabling the arbitrator's understanding of the dispute.

Arbitration under the proposed rules will be more confidential than mediation. The petition for arbitration is not entered on the Court's docket. The proceedings are confidential and do not become part of the public record unless the arbitration becomes the subject of an appeal to the Delaware Supreme Court. Accordingly, the dispute need not be part of a case pending before the Court of Chancery for the parties to petition for arbitration. Rather, arbitration can be, but is not required to be, a process completely independent from a pending case. Significantly, the parties can petition for arbitration very early in the dispute, saving attorneys' fees and time.

The costs of arbitration under the Court's proposed rules may be one of the most attractive features to those embroiled in a business dispute. Parties must pay a \$12,000 filing fee for the first day of arbitration and a \$6,000 per day fee for each day thereafter, with all fees to be divided equally among the parties. The fees are comparable to those charged in other arbitration forums and are a fraction of what a trial or settlement discussions would require. Given the experience and expertise of the Court of Chancery and its prompt and efficient proceedings, these fees may encourage a booming arbitration business for the Court. While the rules are yet to be adopted, on January 4, 2010 Chancellor Chandler, perhaps in an effort to expedite utilization of the arbitration rules once adopted, issued a standing order implementing the fee schedule set forth above for the arbitration of business disputes.

When the proposed arbitration rules are adopted, business litigants will have an additional alternative to trial, which will be more efficient and cost effective than the options currently available. Equally important, business litigants will have access to the

expertise and knowledge of the members of the Court of Chancery outside the realm of trial. The proposed rules will also give the members of the Court the authority to craft equitable and binding resolutions to complex commercial, corporate and technology disputes without the need for protracted discovery and costly trials.

A copy of the Delaware Court of Chancery's Proposed Arbitration Rules can be found at [http://www.saul.com/common/publications/PDF\\_2182.PDF](http://www.saul.com/common/publications/PDF_2182.PDF).

A copy of the Court's Standing Order of January 4, 2010 can be found at <http://courts.delaware.gov/forms/download.aspx?id=42348>.

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