



## Delaware Court of Chancery Arbitration Provides Option for Delaware Parties to Resolve Disputes with Foreign Counterparties

*September 14, 2010*

The Delaware Court of Chancery recently adopted rules governing confidential arbitration proceedings of business and technology disputes. The Court designed its arbitration process to be more efficient and less expensive than other alternatives, while at the same time allowing its judges and masters experienced at resolving complex disputes to grant any relief deemed just and equitable. A potentially significant effect is that the new rules would provide litigants access to the expertise of Court of Chancery judges, while alleviating concerns with respect to the enforceability of a judgment awarded by a Delaware Court against a foreign buyer to an M&A transaction, including, in particular, a time-critical injunctive order requiring the buyer to proceed to closing on the closing date.

### **THE COURT OF CHANCERY ARBITRATION RULES**

In April 2009, Delaware legislation expanded the authority of the Delaware Court of Chancery to allow the Court's judges to arbitrate business and technology disputes. In January 2010, the Court established its arbitration procedures by adopting Court of Chancery Rules 96, 97, and 98. The new procedures allow the same experienced judges and masters sitting on the Court to resolve commercial disputes in an efficient and confidential manner.

The following four requirements must be satisfied for a given dispute to be arbitrated under the Court of Chancery's new rules:

- (1) all parties have consented to arbitration by agreement or 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 Delaware; and
- (4) no party is a consumer with respect to the dispute.

Additionally, disputes involving solely monetary damages are eligible for arbitration only if the amount in controversy exceeds one million dollars.

On their face, the rules provide for a speedy resolution of disputes, while at the same time allowing the parties and arbitrator flexibility with respect to arbitration procedures, timing, and the ultimate remedy awarded. The parties may change the rules or adopt additional rules with the consent of the arbitrator.

Of particular note, the rules provide that:

- (1) the petition for arbitration and any supporting documents are confidential and will not be made public unless and until the proceedings are subject to an appeal;
- (2) unless the parties agree otherwise, the preliminary conference shall occur within 10 days after the commencement of the arbitration;
- (3) the arbitration hearing generally will occur not later than 90 days following receipt of the petition;
- (4) the parties shall exchange information necessary and appropriate for the parties to prepare for the arbitration hearing and to enable the arbitrator to understand the dispute, which may include depositions; and
- (5) the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of any applicable agreement of the parties.

The Delaware Supreme Court has the authority to hear appeals of arbitration awards. Fees for the arbitration proceedings include a \$12,000 initial filing fee and a \$6,000 fee for each day or partial day the arbitrator is engaged by the arbitration. The fees are divided equally between the parties.

## IMPLICATIONS

The Delaware Court of Chancery's arbitration rules potentially provide parties with a confidential alternative dispute resolution procedure that maintains all the benefits of Court of Chancery litigation. The new procedures may also provide a significant benefit to Delaware parties (frequently sellers) in resolving business disputes with foreign counterparties (typically buyers) in M&A transactions.

Currently, domestic and foreign parties to a transaction may in principle agree to litigate any disputes in the Delaware Court of Chancery. Nevertheless, there may be uncertainty as to whether the domestic party may be able to enforce the judgment of a Delaware court against the foreign party in that party's home jurisdiction. This is because the United States is not currently a signatory to an international treaty for the reciprocal enforcement of judgments. An alternative course is for the parties to agree to subject disputes to arbitration. Unlike a domestic court judgment, arbitration awards are far more readily enforceable abroad under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Delaware Chancery Court's arbitration rules may give some parties pause. For example, while confidentiality is assured for the arbitration itself, the dispute would become a matter of public record on appeal. In addition, foreign parties in particular may be concerned about the possibility of wide-ranging discovery, including depositions. However, the rules do provide flexibility to the parties and the arbitrator in determining what level of discovery is "necessary and appropriate" based on the circumstances of the dispute. Moreover, discovery will necessarily be circumscribed by the time limit between the filing of the petition and the arbitration hearing. Finally, some parties may have qualms about empowering an arbitrator to

grant any remedy or relief deemed just and equitable. Given the parties' alternative of agreeing to a Delaware Chancery Court litigation in which the Court would also possess broad equitable powers, however, this feature of the arbitration rules is unlikely to turn parties away.

The Court's new arbitration procedures may provide a promising dispute resolution option for transactions between Delaware and foreign counterparties. Arbitration under the Court's rules should alleviate enforceability concerns because the awards should be enforceable in most foreign countries under the New York Convention. Additionally, arbitration under the Court's rules should provide parties the benefits of Court of Chancery judicial expertise, as well as relatively swift and confidential proceedings.

\* \* \*

To access the Delaware Court of Chancery arbitration rules, please [click here](#). For more information about the rules and their implications, please contact any of the members of the Firm's International Arbitration and Dispute Resolution Group.

**New York City:**

Andrew S. Amer  
212-455-2953  
[aamer@stblaw.com](mailto:aamer@stblaw.com)

Mary Beth Forshaw  
212-455-2846  
[mforshaw@stblaw.com](mailto:mforshaw@stblaw.com)

Linda Martin  
212-455-7722  
[lmartin@stblaw.com](mailto:lmartin@stblaw.com)

Robert H. Smit  
212-455-7325  
[rsmit@stblaw.com](mailto:rsmit@stblaw.com)

**Washington, D.C.:**

Peter C. Thomas  
202-636-5535  
[pthomas@stblaw.com](mailto:pthomas@stblaw.com)

**London:**

Tyler B. Robinson  
011-44-20-7275-6118  
[trobenson@stblaw.com](mailto:trobenson@stblaw.com)

*This memorandum is for general informational purposes and should not be regarded as legal advice. Furthermore, the information contained in this memorandum does not represent, and should not be regarded as, the view of any particular client of Simpson Thacher & Bartlett LLP. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda, can be obtained from our website, [www.simpsonthacher.com](http://www.simpsonthacher.com).*

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication.

**UNITED STATES****New York**

425 Lexington Avenue  
New York, NY 10017-3954  
+1-212-455-2000

**Los Angeles**

1999 Avenue of the Stars  
Los Angeles, CA 90067  
+1-310-407-7500

**Palo Alto**

2550 Hanover Street  
Palo Alto, CA 94304  
+1-650-251-5000

**Washington, D.C.**

1155 F Street, N.W.  
Washington, D.C. 20004  
+1-202-636-5500

**EUROPE****London**

CityPoint  
One Ropemaker Street  
London EC2Y 9HU  
England  
+44-(0)20-7275-6500

**ASIA****Beijing**

3119 China World Office 1  
1 Jianguomenwai Avenue  
Beijing 100004  
China  
+86-10-5965-2999

**Hong Kong**

ICBC Tower  
3 Garden Road, Central  
Hong Kong  
+852-2514-7600

**Tokyo**

Ark Mori Building  
12-32, Akasaka 1-Chome  
Minato-Ku, Tokyo 107-6037  
Japan  
+81-3-5562-6200

**SOUTH AMERICA****São Paulo**

Av. Presidente Juscelino Kubitschek, 1455  
São Paulo, SP 04543-011  
Brazil  
+55-11-3546-1000