



May 2011

[www.ssd.com](http://www.ssd.com)

## Delaware Adopts New Arbitration Rules for Significant Business Disputes

In a widely applauded move by the Delaware Court of Chancery, the court adopted new arbitration rules providing a new alternative for resolving significant business disputes outside of the normal litigation process (Delaware Court of Chancery, "Order Adopting Court of Chancery Rules 96, 97 and 98" (Jan. 5, 2010)). The new rules establish a voluntary arbitration process intended to provide potential litigants a faster and more cost effective means of resolving complex business disputes without formal litigation, while providing a finality that is not available through private mediation. Moreover, unlike other arbitration mechanisms, the new rules afford access to the Delaware Court of Chancery's deep experience and expertise in dealing with complex business issues. Delaware companies and those dealing with them should consider the benefits afforded by the new voluntary arbitration rules as an alternative means of resolving business disputes in circumstances where they are available.

### Eligibility

Participation in the court's arbitration process is completely voluntary, and there is no requirement that the parties have a pending action before the Court of Chancery in order to be eligible for arbitration. The eligibility requirements under the new rules include the following: (1) the parties must have consented to arbitration by the Court of Chancery; (2) at least one party must be a business entity; (3) at least one party must be organized under Delaware law or have its

Founded in 1890, Squire, Sanders & Dempsey has lawyers in 36 offices and 16 countries around the world and now includes the nearly 500 lawyers from leading UK legal practice Hammonds. With one of the strongest integrated global platforms and our longstanding "one-firm firm" philosophy, Squire Sanders provides seamless [legal counsel worldwide](#).

### Contacts:

[Frank M. Placenti](#)  
+1.602.528.4004

[Nicholas Unkovic](#)  
+1.650.843.3238  
+1.415.954.0275

[Joseph C. Weinstein](#)  
+1.216.479.8426

[Jae W. Park, Jr.](#)  
+1.602.528.4181

Squire Sanders emphasizes quality, efficiency and alignment with client goals as core standards. Our [Partnering for Worldwide Value](#)<sup>®</sup> initiative is focused on continuously improving our service delivery to maximize the value of our services to clients. Squire Sanders wholeheartedly endorses the Association of Corporate Counsel's Value Challenge<sup>®</sup> and encourages and manages development and implementation of processes and tools to continually improve staffing and pricing

principal place of business in Delaware; (4) no party can be a consumer; and (5) in the case of disputes involving solely a claim for monetary damages, the amount in controversy must be at least US\$1 million.

### **Speedy Resolution**

Perhaps one of the greatest advantages offered by the new arbitration program is the expeditious review and resolution of disputes. The rules specify that a preliminary conference must be held within 10 days of the petition being filed to address procedural matters and to schedule a hearing. A hearing is required to be scheduled within 90 days of filing the petition (unless otherwise agreed to by the parties).

### **Court of Chancery Arbitrator**

The Delaware Court of Chancery is internationally recognized and respected for its expertise and experience in handling complex commercial disputes. Under the new arbitration rules, the parties will have access to this expertise, as the arbitrator hearing the case will be a permanent member of the Court of Chancery. Accordingly, access to the Delaware Court of Chancery's members should make the arbitration program an attractive alternative to private arbitration.

### **Procedural Flexibility**

The new rules provide potential litigants with maximum procedural flexibility by permitting the parties to tailor the procedures and scope of the arbitration to fit the needs of the parties. Although the rules provide basic guidance on the prehearing "exchange of information," the parties are expected to negotiate and agree on the scope of prehearing discovery and other procedural matters. As a general matter, the new rules provide certain procedures, but the parties are permitted (with the consent of the arbitrator) to use as many or as few of these procedures as agreed upon by the parties. Some of these issues can and should be established before the parties elect arbitration.

### **Confidentiality**

Like almost all private forms of voluntary arbitration (but unlike lawsuits filed in the Court of Chancery), arbitration proceedings carried out under the auspices of the court's arbitration rules will be entirely confidential. While most actions brought in the Court of Chancery are subject to the "open courts" provision of the Delaware constitution, only parties or their representatives may attend the arbitration hearing, and

models, training and resource optimization, knowledge management and more.

Squire Sanders publishes on a number of other topics. To see a list of options and to sign up for a mailing, visit our [subscription page](#).

Beijing • Berlin • Birmingham  
Bratislava • Brussels • Budapest  
Cincinnati • Cleveland • Columbus  
Frankfurt • Hong Kong • Houston  
Kyiv • Leeds • London • Los Angeles  
Madrid • Manchester • Miami  
Moscow • New York • Northern Virginia  
Palo Alto • Paris • Phoenix • Prague  
Rio de Janeiro • San Francisco  
Santo Domingo • São Paulo  
Shanghai • Tampa • Tokyo  
Warsaw • Washington DC  
West Palm Beach |  
Independent Network Firms:  
Beirut • Bogotá • Bucharest  
Buenos Aires • Caracas  
La Paz • Lima • Panamá  
Riyadh • Santiago

all supporting documents filed in connection with an arbitration proceeding will remain confidential.

While confidentiality is often highly prized, some parties may not favor the confidentiality accorded to arbitration proceedings depending on the circumstances of the dispute. For example, in a dispute between a financial sponsor (e.g., private equity firm, hedge fund or similar entity) and a target company in the context of an M&A transaction, the target company may believe the potential damage to the reputation of the buyer that fails to close a transaction may provide for greater certainty of closing. Conversely, a financial sponsor might find the confidentiality restrictions to be very useful in protecting its reputation in the marketplace. It should be noted that the Delaware Supreme Court has not yet adopted rules relating to the confidentiality of appeals.

### **Cost Effectiveness**

The costs associated with the court's arbitration program provide a competitive alternative to litigation and most private arbitration. The Court of Chancery charges a flat fee of US\$12,000, which covers all proceedings up to, and including, a one-day final hearing. If the final arbitration hearing cannot be completed in one day, the parties will be charged US\$6,000 for each additional day.

### **Accessing the Court of Chancery's Arbitration Program**

After a dispute arises and assuming the parties agree, potential litigants may file a joint petition with the Court of Chancery requesting the court's arbitration services. However, if arbitration is the preferred mode of dispute resolution, the parties should consider placing specific contractual language into their agreements stipulating that disputes will be resolved pursuant to the Delaware Court of Chancery's arbitration program (as is often done for AAA arbitration clauses).

If you have any questions regarding the Delaware Court of Chancery's new arbitration rules or their application to your business activities, please contact your principal Squire Sanders lawyer or one of the lawyers listed in this alert.

---

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

All Rights Reserved  
2011

This email was sent by Squire, Sanders & Dempsey  
1 E. Washington St., Suite 2700, Phoenix, AZ 85004, USA

We respect your right to privacy – [view our policy](#)

[Manage My Profile](#) | [One-Click Unsubscribe](#) | [Forward to a Friend](#)

Squire, Sanders & Dempsey (US) LLP is part of the international legal practice Squire, Sanders & Dempsey which operates worldwide through a number of separate legal entities. Please visit [www.ssd.com](http://www.ssd.com) for more information.