Delaware Innovates to Create a World-Class Arbitration Regime

Posted by Yaron Nili, Co-editor, HLS Forum on Corporate Governance and Financial Regulation, on Thursday March 19, 2015

Editor's Note: The following post comes to us from Greg Varallo, Director and Executive Vice President at Richards, Layton & Finger. This post is part of the Delaware law series, which is cosponsored by the Forum and Corporation Service Company; links to other posts in the series are available here.

On March 11, 2015, the Delaware State Bar Association gave its formal approval to HB 49, which was filed yesterday in the Delaware Legislature. If passed by the Legislature, the bill, which bears the title the Delaware Rapid Arbitration Act, will establish Delaware as a cutting-edge seat for business arbitrations. Building on the best of the state's earlier experiment with judicially annexed arbitration, the new legislation was crafted with extensive consultation and input from constituencies around the US and internationally. One thing became clear as a result of those consultations: businesses and their advisors are alarmed at the marked drift in arbitration practice away from timely, efficient dispute resolution.

HB 49 responds to that concern in a number of ways. Arbitrations brought under the Act must be completed within 120 days of the arbitrator accepting appointment. On unanimous consent of the parties and the arbitrator, the timeline can be extended once to 180 days, but only once. Arbitrators who do not issue final awards face reductions in their fees depending upon how late their final award is issued.

Likewise, the legislation sharply limits the jurisdiction of the courts to determine arbitrability, assigning the "procedural vs. substantive arbitrability" fight to the sole discretion of the arbitrator.

Finally, the arbitrator's final award is "deemed confirmed" by the mere passage of time, and challenges to the final award are venued directly in the Delaware Supreme Court, effectively skipping the trial court level of review**.** Unless altered by contract, such challenges proceed under the narrow Federal Arbitration Act standard of review.

The Act may not be used to resolve disputes with "consumers" and may only be invoked against parties who actually sign an agreement to arbitrate that explicitly names the Act. One of the parties must be a Delaware business entity, although it need not be located in Delaware. There is no amount in controversy requirement. Enabling forms and model rules are in the works, and likely to be available broadly by the time the Act becomes law.

"One of the major challenges for emerging economies is to get business disputes resolved with the real world speed that commerce demands. The ability the new DRAA will give to parties to have the actual arbitration held, for example, in Sao Paolo or Buenos Aires, while having the Delaware courts ensure the speed and integrity that the statute guarantees will meet an important need for parties conducting international business," said Chico Müssnich, senior partner of Barbosa, Müssnich & Aragão, one of Brazil's and Latin American's major corporate law firms.

Hearings have already been scheduled in the Legislature, and it is likely that the Act, which has broad bipartisan support in the Legislature and the strong support of the Judicial and Executive branches of government, will become law in relatively short order.

A copy of HB 49 is available here. Stay tuned.