Delaware's Bold Plan To Become The World's Arbitration Hub

By **Matt Chiappardi**

Law360, Wilmington (May 15, 2015, 2:46 PM ET) -- By adopting unheard of measures such as docking the pay of arbitrators who take too long to make a decision, Delaware aims to challenge some of the world's leading arbitration venues with an ambitious but untested program designed to quickly and discreetly resolve corporate disputes.

The Delaware Rapid Arbitration Act was signed into law last month by Gov. Jack Markell and was drafted with input from First State judicial heavyweights Chief Justice Leo E. Strine Jr. and Chancellor Andre G. Bouchard, who heads the Chancery Court where some of the nation's highest-octane business disputes are fought.

The law replaces a prior program that was swamped with criticism for using sitting judges for the closed-door proceedings and was struck down by the Third Circuit as unconstitutional.

Under the new program, the current bench can't be part of the arbitrator selection pool, but proponents say that like the previous one, it is designed to solve perceived problems that the traditional arbitration process has become too slow, cumbersome and expensive. The state hopes it will offer businesses an attractive alternative to other dispute resolution forums such as the American Arbitration Association or well-traveled overseas venues in London and Singapore.

"Delaware fully intends to compete with the big arbitration tribunals by offering a world-leading arbitration alternative," said Gregory V. Varallo of Richards Layton & Finger PA, who was part of the working group that put the law together. "This was designed consciously to

return arbitration to the goal of getting really swift and rapid results. Arbitration has come to look more and more like litigation, and you wind up getting the worst of all worlds."

To address the issue, arbitrators under the program, whether operating solo or in a three-person panel, must render a decision within 120 days of accepting the appointment, unless the parties previously agreed to a longer time frame. The end-date can be extended only once by 60 days.

The program can be used only for corporate — not consumer — disputes, and businesses are not allowed to include it as a mandatory dispute resolution forum in their bylaws or certificates of incorporation. Parties would both have to agree beforehand to the process, which could be incorporated into engagement letters with business clients.

To ensure speed, the program includes what Varallo called a "hammer clause" that will reduce arbitrators' fees if they fail to make a decision after the deadline and could eliminate them altogether if they take too long.

According to Widener University School of Law professor of corporate and business law Lawrence A. Hamermesh, the fee docking provision is unique and stands to have the most impact in quickening the process.

"It's not going to be a device for arbitrators to be inertially inclined," Hamermesh said. "The real effect is that a quality arbitrator is going to kick butt and make sure they get it done."

The law also essentially keeps the court out of decisions regarding the scope of proceedings, evidence and the nature of awards, allowing arbitrators broad powers — if the parties previously agree — to rule on such issues without the need to have the decision certified by a

judge.

There's also a limited appeal process, with any challenges going directly to the Delaware Supreme Court, where they would become public, with information being redacted only if it met the criteria under regular litigation. The justices would be able only to affirm or deny an award, or to correct a math error in calculations, Varallo said.

Hamermesh says that many of these ideas are cutting-edge, with the fee reduction in particular never having been tried before.

He says the program has all the ingredients to shake up an arbitration process that can sometimes take years to conclude. But the question will be if it offers enough of an advantage to pull users away from other venues.

"The only real issue is just how much better this will be than traditional arbitration," he said. "It was created to address the problem of arbitration having lost its soul."

Delaware already aggressively markets itself as an advantageous place for businesses to organize, leaning heavily on the reputation the Chancery Court has cultivated as one of the world's premier places to litigate corporate battles.

It's the state's hope that the streamlined process, which can take place anywhere in the world so long as one of the parties is a Delaware entity, will eventually make the First State just as much of a go-to destination for non-court disputes between big businesses.

Varallo says Delaware is eyeing in particular businesses with a South American connection that might not be able to easily pursue arbitration in Europe and Southeast Asia, and some First State corporate practitioners say they already have clients that are hoping

to make use of the program.

“I had a couple clients, and in particular one large financial institution, who wanted to incorporate the old arbitration program into their agreements and were rather upset when the old arbitration program was struck down as unconstitutional by the federal courts,” said Brian M. Rostocki of Reed Smith.

The old program, signed into law in 2009, had sitting judges arbitrating business disputes of more than $1 million beyond the view of the public and the press. It was challenged three years later by the Delaware Coalition For Open Government on the grounds it ran afoul of the First Amendment's right of access to the courts.

U.S. District Judge Mary McLaughlin **struck it down** in August of that year, saying it smacked of a “secret judicial proceeding,” and the Third Circuit **upheld her ruling** in 2013.

The program was dealt its final blow when the U.S. Supreme Court **declined to review** the rulings in 2014.

The new program has met with much less resistance, and the attorney who represented the coalition, David L. Finger of Finger & Slanina LLC, said that it solves the constitutional problem with the prior law.

“I don’t see it as having any constitutional issues,” Finger said. “They’ve done away with sitting judges as arbitrators. There’s no issue with public access to the judiciary.”

The program won't be right for every dispute, however. Valuation and testifying expert Boris Steffen, managing director at corporate restructuring firm Gavin/Solmonese, identified some issues that might dissuade a company from diving in head first, such as wanting to resolve a dispute that requires intense fact discovery.

But in those cases, Steffen said the program would essentially "self-select," and sophisticated businesses wouldn't use it for matters for which it's not appropriate.

"It will be a calculated risk," Steffen said. "You'll lose out on extensive discovery, but you may want that in exchange for speed."

The same cost-benefit analysis would apply to the shorter appeal process. Companies may opt for fewer eyes to review the results, in the interests of swift resolution, Steffen said.

Proponents of the new law acknowledge that it's not designed to fit just any type of corporate dispute, but they say it would be particularly useful for companies that already have an ongoing business relationship and don't want to see it marred by a lengthy court fight.

Whether the law will catch on and fulfill Delaware's lofty goals remains to be seen, but the First State's bar remains optimistic that the state has crafted a tool that's going to at the very least attract more business their way.

"Adding this to Delaware's arsenal will certainly elevate it and put Delaware even more on the map than it already is," said Chancery Court litigator Michael C. Holmes of Vinson & Elkins LLP. "I think this will be something parties would use, but as with anything new, some people will take a wait and see approach." --

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