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## **Delaware's Rapid Arbitration Act: What You Need to Know When Evaluating DRAA Arbitration and Drafting the Arbitration Agreement**



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**T**he Delaware Rapid Arbitration Act (the "DRAA" or the "Act"), which took effect in May 2015,<sup>1</sup> provides a unique mechanism for resolving business disputes on an expedited basis. The DRAA offers a promising alternative to what is oftentimes a lengthy, expensive and resource-draining experience under other arbitral systems. It does that by curtailing litigation that, under other systems, often precedes, accompanies, or follows the arbitration itself, by encouraging streamlined proceedings, and by imposing financial penalties on arbitrators who exceed the 120-day period for arbitration under the Act. The DRAA offers parties that are embroiled in a dispute an enhanced degree of privacy by providing for confidential arbitral proceedings and by limiting challenges to arbitral decisions.

These two features—speed and confidentiality—make arbitration under the DRAA an attractive option for many businesses, including firms in continuing relationships seeking a quick resolution to minimize disruption to their ongoing dealings and parties desiring to avoid the reputational damage that can sometimes accompany public-accessible litigation. Because parties that elect DRAA arbitration will be deemed to have consented to the Act's provisions if they do not contract for other procedures, counsel should carefully study the Act and draft substitute provisions where the Act's provisions do not suit their clients' needs. Outlined below are factors parties should consider in deciding whether

<sup>1</sup> 10 Del. C. § 5801, *et seq.* In addition, the Delaware Supreme Court has adopted rules to govern the procedure in arbitrations under the DRAA (the "Rules"). The Rules are available at <http://courts.delaware.gov/rules/>.

to elect DRAA arbitration and, for businesses that so elect, points to consider when drafting the arbitration agreement.

## I. Points to Consider When Evaluating DRAA Arbitration

To qualify for arbitration under the Act, at least one party to the arbitration agreement must be a business entity that is organized under Delaware law or has its principal place of business in Delaware.<sup>2</sup> In addition, no party to the dispute may be (i) a “consumer,” defined as “an individual who purchases or leases merchandise” (i.e., any objects, wares, goods, commodities, intangibles, real estate or services, other than insurance) “primarily for personal, family or household purposes”<sup>3</sup>; or (ii) a civic, neighborhood, or homeowners association or organization or other similar entity, as defined under the Act.<sup>4</sup>

The following DRAA features enable businesses to resolve disputes more quickly and cost efficiently than typically occurs under other arbitral systems:

- **Elimination of Pre-Arbitration Litigation and Challenges to Interim Orders.** The parties to an arbitration agreement under the DRAA are deemed to have waived objection and consented to (i) the submission exclusively to an arbitrator of issues of substantive and procedural arbitrability; (ii) the exclusive personal and subject matter jurisdiction of an arbitration, the seat of which is Delaware; and (iii) the arbitrator’s power and authority to determine in the first instance the scope of the arbitrator’s remedial authority and to grant relief.<sup>5</sup> In addition, the parties are deemed to have waived the right to (i) seek to enjoin the arbitration and (ii) remove the proceeding to federal court.<sup>6</sup> Those features reduce, if not eliminate, litigation that often delays arbitration and increases costs. Because the DRAA empowers arbitrators to issue interim orders and rulings and the parties waive the right to challenge them, that further streamlines the proceeding.<sup>7</sup>

- **Strict Deadline for Final Award.** Under the DRAA, unless the parties agree to a different period before the arbitrator’s acceptance of the arbitrator’s appointment, the arbitrator must issue the final award within 120 days of acceptance thereof.<sup>8</sup> The 120-day period (or the time otherwise fixed by the parties’ agreement) may be extended by agreement of the parties up to a maximum of 60 days.<sup>9</sup> Thus, unless the parties have set a different period, arbitration will typically take 120 days and no longer than 180 days. One of the Act’s more creative and unique features—designed to ensure rapid resolution and reduced costs—are the financial penalties imposed for a late decision: the arbi-

trator’s fees are reduced by 25 percent if late by 1 to 29 days, by 75 percent if late by 30 to 60 days, and by 100 percent if late by more than 60 days.<sup>10</sup> The DRAA empowers arbitrators to make rulings, to issue orders (and, specifically, to limit the presentation of witnesses and evidence), and to impose sanctions as necessary to conclude the arbitration in a timely and efficient manner.<sup>11</sup>

- **Limited Review of Award.** To assure a more efficient and less expensive process, the DRAA limits any appeal of the final award in several respects. First, a party may appeal a final award directly and only to the Delaware Supreme Court.<sup>12</sup> And, the grounds for overturning an award are limited—the Supreme Court may vacate, modify, or correct a final award only in conformity with the Federal Arbitration Act.<sup>13</sup> Any appeal must be filed within 15 days of the award.<sup>14</sup> If the award is not appealed to the Supreme Court (and if the agreement does not provide for private appeal to an arbitrator), the award is deemed automatically confirmed by the Court of Chancery five business days after expiration of the appeals period.<sup>15</sup>

Arbitrations under the DRAA are confidential.<sup>16</sup> Documents and other matters used in connection with the arbitration are treated as confidential, and the DRAA’s prohibition of challenges to interim orders eliminates an avenue whereby arbitration matters might otherwise become public.<sup>17</sup> Where a final award is appealed to the Delaware Supreme Court, arbitration materials may, however, become a part of the public record to the extent required by the rules or by order of that court.<sup>18</sup>

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### DRAA arbitration will be a superior option for businesses seeking to reduce the time, cost and distraction associated with litigation.

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To summarize, DRAA arbitration will be a superior option for businesses seeking to reduce the time, cost and distraction associated with litigation. It will be particularly attractive to parties in continuing or long-term relationships seeking a prompt resolution that will minimize disruption to their business dealings. The Act’s confidentiality features will appeal to businesses concerned about potential reputational damage that might accompany the public-accessible litigation of a matter, including repeat industry players.

On the other hand, DRAA arbitration may not be optimal for parties anticipating fact-intensive disputes whose resolution will require in-depth discovery; for parties unwilling to forego certain procedures, such as

<sup>2</sup> 10 Del. C. § 5803(a)(2).

<sup>3</sup> 10 Del. C. § 5803(a)(3) (incorporating “consumer” definition contained in 6 Del. C. § 2731).

<sup>4</sup> 10 Del. C. §§ 5803(a)(3); 5801(5).

<sup>5</sup> 10 Del. C. § 5803(b)(2), (3) & (5).

<sup>6</sup> 10 Del. C. § 5803(c)(1) & (2).

<sup>7</sup> 10 Del. C. §§ 5807(a) & (c); 5803(c)(3).

<sup>8</sup> 10 Del. C. §§ 5803(a); 5808(b).

<sup>9</sup> 10 Del. C. § 5808(c).

<sup>10</sup> 10 Del. C. § 5806(b).

<sup>11</sup> 10 Del. C. § 5807(a) & (c).

<sup>12</sup> 10 Del. C. §§ 5809(a); 5803(c)(4).

<sup>13</sup> 10 Del. C. § 5809(c).

<sup>14</sup> 10 Del. C. § 5809(b).

<sup>15</sup> 10 Del. C. § 5810(a).

<sup>16</sup> Rule 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

the right to challenge initially the scope of the arbitration or the arbitrator's interim rulings; or for parties unwilling to forego broader appellate rights. DRAA arbitration may also not be suitable for businesses that perceive a tactical advantage to drawn-out litigation proceedings or businesses that prefer a public proceeding.

## II. Points to Decide When Drafting The Arbitration Agreement

To invoke the DRAA, the parties must reference the "Delaware Rapid Arbitration Act," whether in a dispute resolution provision in the agreement underlying the dispute or in a separate, stand-alone arbitration agreement.<sup>19</sup> The agreement, in whatever form, must be signed by the parties to the arbitration and must provide that it is governed by Delaware law, without regard to conflict of laws principles.<sup>20</sup> The parties may, however, select the laws of a state other than Delaware to govern the agreement's non-arbitration, substantive provisions.<sup>21</sup>

By invoking the DRAA, the parties waive any objection and consent to the Act's procedures.<sup>22</sup> During the pendency of the arbitration, the arbitration agreement may be amended to alter the arbitration procedures, but only with the arbitrator's approval,<sup>23</sup> and the deadline for final award is subject to only limited extension.<sup>24</sup> Therefore, it is important for parties electing DRAA arbitration to understand the Act's provisions and to draft substitute provisions for any that do not suit their goals.

Key points to consider when drafting the arbitration agreement include:

- **Duration of Arbitration.** The DRAA requires the arbitrator to issue a final award within the period fixed by the arbitration agreement or, if no period is fixed, within 120 days of the arbitrator's acceptance of appointment.<sup>25</sup> This deadline is subject to a maximum extension of 60 days.<sup>26</sup> Because the DRAA strictly prohibits any further extension of the time for final disposition, the parties must consider from the outset whether arbitration of the dispute will require longer than the statutory period and, if so, must agree on the alternate time period before the arbitrator accepts appointment.
- **Appointment of Arbitrator.** The Court of Chancery has the power, at a party's request, to appoint an arbitrator upon (*inter alia*) the failure of the agreement to name, or provide a method for selecting, an arbitrator; the failure or inability of a named or selected arbitrator to serve; the inability of the parties to appoint an arbitrator; or the failure of the specified procedure for arbitrator selection.<sup>27</sup> The Court must appoint an arbitrator within 30 days of service of the request for appointment and, unless the parties' agreement provides otherwise, the

Court will appoint a single arbitrator.<sup>28</sup> The Court may only appoint (i) a person named in or selected under an agreement, (ii) a person expert in any nonlegal discipline described in an agreement, or (iii) a member in good standing of the Delaware bar for at least 10 years.<sup>29</sup> Thus, where the agreement does not identify a person or describe an area of expertise, the Court will appoint an experienced Delaware attorney. Parties that desire certainty and control over the selection of the arbitrator should specify the person they wish to serve (and are well-advised to designate and rank alternates, in the event the parties' first selection is unable to serve) or at least should describe the arbitrator's required area of expertise.

- **Scope of Discovery.** The DRAA does not prescribe the scope of permissible discovery, although the Rules require the parties to attempt in good faith to agree to, and obtain the arbitrator's approval of, any agreement concerning pre-hearing exchange of information.<sup>30</sup> If the parties cannot agree, the arbitrator will hear and decide the dispute.<sup>31</sup> Parties that choose to delineate in their agreement the information to be exchanged should consider the Rules' admonition that, given the condensed arbitration timeline, the information should ordinarily be substantially less than that which might be subject to discovery in civil litigation.<sup>32</sup>
- **Arbitrator's Power to Compel Discovery.** The DRAA empowers the arbitrator to compel the attendance of party witnesses and the production of party documentary evidence.<sup>33</sup> Only if the arbitration agreement specifically so provides will the arbitrator have the power to issue subpoenas or commissions to permit document discovery and/or depositions from non-parties.<sup>34</sup> Thus, where non-party discovery may be necessary, the agreement must specify the arbitrator's subpoena powers.
- **Hearing Location.** The hearing need not take place in Delaware and indeed may take place anywhere in the world.<sup>35</sup> Parties desiring to designate a particular location should do so in their agreement; otherwise the arbitrator will set the location.<sup>36</sup> Parties should also specify if the hearing is to be conducted in whole or in part by telephone or other remote electronic communication.<sup>37</sup>
- **Hearing Length.** The hearing will be limited to one day unless the agreement specifies a different period or the arbitrator, in consultation with the parties, sets a different period.<sup>38</sup> Accordingly, if a different length is desired, the agreement should so provide.
- **Conduct of Hearing.** The parties are entitled to be heard, to present evidence, and to cross-examine

<sup>19</sup> 10 Del. C. § 5803(a)(5).

<sup>20</sup> 10 Del. C. § 5803(a)(1) & (4).

<sup>21</sup> 10 Del. C. § 5803(a)(4).

<sup>22</sup> 10 Del. C. § 5803(b)(1).

<sup>23</sup> 10 Del. C. § 5803(a).

<sup>24</sup> 10 Del. C. §§ 5803(a); 5808(c).

<sup>25</sup> 10 Del. C. § 5808(b).

<sup>26</sup> 10 Del. C. § 5808(c).

<sup>27</sup> 10 Del. C. § 5805(a).

<sup>28</sup> 10 Del. C. § 5805.

<sup>29</sup> 10 Del. C. § 5805(b)(2).

<sup>30</sup> Rule 17.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> 10 Del. C. § 5807(b); Rule 18.

<sup>34</sup> *Id.*

<sup>35</sup> Rule 22.

<sup>36</sup> 10 Del. C. § 5807(a); Rule 22.

<sup>37</sup> Rule 22.

<sup>38</sup> *Id.*

witnesses.<sup>39</sup> Parties wishing to limit these rights can agree to do so. Parties desiring strict application of the rules of evidence should so provide; otherwise, the arbitrator will not be obliged to apply the rules strictly (except that the arbitrator must apply applicable law relating to privileges and immunities and settlement communications).<sup>40</sup> In addition, parties should specify if they want to prohibit the making of a stenographic or other record of the hearing; otherwise, the arbitrator is empowered to direct that a record be prepared.<sup>41</sup>

■ **Award Powers.** The DRAA empowers the arbitrator to impose legal or equitable relief and, in a final award, to rule on any relevant issue of law.<sup>42</sup> If parties wish to limit the arbitrator's authority—by, for example, precluding the arbitrator from awarding either certain types of damages (e.g., consequential damages) or equitable relief or from ruling on particular legal issues—they must include the limitation in their agreement.

■ **Fees and Expenses.** Because the DRAA does not provide for an award of attorneys' fees, parties desiring a fee-shifting provision should include that in their agreement. The DRAA does, however, establish that the parties will bear the arbitrator's fees and expenses, together with other expenses incurred in the conduct of the arbitration, as provided in the final award.<sup>43</sup>

■ **Appeals.** The DRAA authorizes an appeal of the final award to the Delaware Supreme Court only, and on limited grounds—that is, to vacate, modify or correct the award in conformity with the Federal Arbitration Act.<sup>44</sup> The parties cannot contractually expand the scope of the Supreme Court's limited review.<sup>45</sup> Because this review creates the possibility that previously confidential arbitration proceedings and materials could become public, parties intent on maintaining confidentiality may wish to consider providing for appeal of a final award to one or more private arbitrators in place of Supreme Court review or eliminating altogether the right to appeal the award.<sup>46</sup>

■ **Rules.** The Rules apply to all DRAA arbitrations. The parties may agree, however, with the arbitrator's consent, to modify any of the Rules or to adopt additional rules, so long as any change is not inconsistent with the DRAA.<sup>47</sup>

To summarize, the DRAA provides an attractive alternative for prompt, efficient and confidential resolution of business disputes. To optimize the experience arbitrating under the DRAA, parties will find it worthwhile to review and, as necessary, contract around the Act's default provisions to suit their individual requirements.

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<sup>39</sup> 10 Del. C. § 5807(a).

<sup>40</sup> Rule 22.

<sup>41</sup> *Id.*

<sup>42</sup> 10 Del. C. § 5808(a).

<sup>43</sup> 10 Del. C. § 5806(b).

<sup>44</sup> 10 Del. C. § 5809(a) & (c).

<sup>45</sup> 10 Del. C. § 5804(a).

<sup>46</sup> 10 Del. C. § 5809(d).

<sup>47</sup> Rules 1 & 3.