

RICHARDS, LAYTON & FINGER

The Practitioner's Guide to the Delaware Rapid Arbitration Act



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**STATE OF DELAWARE
DEPARTMENT OF STATE**

Delaware has long been recognized as the preeminent authority on corporate law. The State's General Corporation Law, as well as its advanced modern statutes for alternative entities, provides companies with the stability and flexibility they need to manage their affairs. For more than a century, Delaware legal professionals have worked together to craft and fine-tune this sophisticated collection of business statutes to address the evolving needs of the business community.

The Delaware Rapid Arbitration Act reflects this commitment to serve the State's corporate citizens in a thoughtful and collaborative manner. Responding to the call for alternatives to the existing arbitration regimes, the Act provides an innovative arbitration process that builds on the best practices of leading international arbitration chambers to offer a brand new option for efficient and binding resolution of business disputes.

This handbook provides the first in-depth discussion of the nuances and the practical application of the Act, and serves as a guide for businesses and counsel to understand the opportunities the new Act provides.

It is our hope that this legislation will provide an effective mechanism for the speedy, efficient, and fair resolution of business disputes, regardless of the nature of the problem and the location of the parties.



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Secretary of State
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Introduction

In April 2015, Delaware Governor Jack Markell signed into law one of the most highly specialized arbitration statutes ever passed: the Delaware Rapid Arbitration Act (hereafter the “Act” or the “DRAA”). The Act, a response to the request by Delaware’s corporate citizenry for a modern and useful arbitration statute, is the work of an interdisciplinary team of arbitration practitioners from Delaware, New York, Washington and abroad, led by Delaware’s Chief Justice Leo E. Strine, Jr., Delaware’s Chancellor Andre G. Bouchard and Delaware’s Secretary of State Jeffrey Bullock.

Developed through extensive consultation with leading U.S. and foreign arbitration specialists, the Act is intended to capture the best practices of the leading international arbitration chambers while also addressing key complaints about arbitration voiced by Delaware’s corporate citizenry. The Act was built upon Delaware’s earlier (now enjoined) experiment with prompt, confidential court-annexed arbitration, preserving the best features of that experiment and adding to its strengths in several ways. While respecting the parties’ contractual decisions throughout, the Act also innovates to make commencing an arbitration a speedy and inexpensive process, accelerates the arbitration itself to ensure a swift resolution, does away with confirmation proceedings altogether, and provides for either contractual appeals or challenges directly to the Delaware Supreme Court.

The Act is not designed to preempt more “traditional” arbitration proceedings. Indeed, the drafters of the Act understood what the practitioner needs to understand most clearly: arbitration under the Act is a speedy, specialized proceeding for prompt and confidential business dispute resolution. It is not suitable to parties who are not willing to move to speedy resolution of a dispute. Nor is it suitable to parties seeking to retain “optionality” in arbitral proceedings,

such as the right to challenge the scope of the arbitrator's authority, slow the proceedings with interim challenges to the arbitrator's rulings, or grind the proceedings to a halt with motions and other disputes.

Instead, those who opt to proceed under the Act do so with a clear understanding that their arbitrator, whether selected by the parties or appointed by Delaware's Court of Chancery, will have broad powers to rule on the scope of the arbitration itself as well as on his or her own authority. The arbitrator will have the authority to grant a full panoply of injunctive and other remedies and, unless the parties contract for a broader appeal, will be subject to only the most limited standard of review in any challenge. In short, those who determine to proceed under this Act do so with the understanding that they are asking for prompt and efficient resolution of their disputes, and that they will get such resolution with only minimal review of the arbitrator's decisions. Delaware's "rapid" arbitration statute is meant to be just that.

In response to comments from general counsel of large companies based around the world, the Act returns arbitration to its long-lost roots: speedy, efficient and binding resolution of disputes, stripping away the various mechanics of delay that have built up over the last 50 years of practice. Make no mistake: the DRAA is not for the faint of heart or for those who would seek to use disproportional leverage to their favor in the event of a dispute. Instead, the Act is designed to address resolution of disputes where the parties most need no-nonsense and swift resolution (for example, in the case of ongoing business relationships that can't abide drawn-out litigation).

The purpose of this handbook is to assemble in one place what the practitioner needs to know to proceed under the Act, including the dispute resolution forums necessary to invoke the DRAA, practical guidance based on the authors' direct experience with the prior Delaware arbitral regime, and insight into the drafting of the Act and the Model Rules that accompany it.

Background to the DRAA

In many ways the Act is the second generation of modern thinking in Delaware regarding efficient arbitration-based dispute resolution. Of course, for years Delaware has had its own version of the Uniform Arbitration Act,¹ but it was not until 2009, under the leadership of former Chancellor William B. Chandler, III, of the Delaware Court of Chancery, that the state moved beyond the Uniform Act's approach to such proceedings and began to innovate with court-annexed arbitration. Understanding this initial experiment is important to understanding the Act, as the Act was built on the success of that first set of alternative dispute resolution experiments.

Delaware's Experiment with Judicial Arbitration

In 2009, Delaware's General Assembly passed the state's first modern experiment with arbitration, 10 *Del. C.* § 349, titled *Arbitration Proceedings for Business Disputes*. The statute was simple: it provided that any Delaware-formed business entity could, by agreement, consent to arbitrate matters confidentially before a sitting member of the Delaware Court of Chancery, a court widely recognized as the leading business law court in the United States. The idea animating the statute was even simpler: to offer Delaware's business citizens the very best of the Delaware judicial system in confidential arbitral proceedings for the speedy and efficient resolution of business disputes between sophisticated business entities. No longer would parties who chose arbitration be faced with arbitrators' noted tendency to "split the baby."

¹ 10 *Del. C.* § 5701, *et seq.*

Instead, the arbitrator was a sitting judge, schooled in making decisions and moving on. As passed, the legislation also provided that any proceeding to “vacate, stay or enforce” an order of the Court in an arbitration proceeding would be filed directly with the Delaware Supreme Court, which Court was expressly required by statute to “exercise its authority in conformity with the Federal Arbitration Act.”²

Soon after the statute was enacted, the Court of Chancery adopted rules for proceedings under the statute. Most important among these rules was Rule 97(e), providing for the arbitration hearing to “generally” occur within 90 days of the parties’ filing of their petition to arbitrate. Thus, through its rules implementing the new legislation, the Court dealt with the second most prevalent critique of arbitration: it simply takes too long to get to resolution when the decision makers are paid by the hour.

Notwithstanding that any new experiment in dispute resolution often takes years to play out—parties first learn about and then include clauses triggering the new forum’s arbitration in their commercial agreements, only to reach arbitration years later when a serious dispute threatens to disrupt their business relationship—Delaware’s experiment was met with widespread interest and prompt adoption. Thus, in the first year that the Chancery Court Rules were in place, no fewer than six different arbitrations were filed on the confidential “arbitration only” docket of the Court, and all were finally resolved by either the assigned judicial arbitrator or the parties themselves.

As the parties pushed forward with their arbitrations under the new regime, a number of practical lessons were learned. For example, while the Chancery Court Rules provided for final resolution of all arbitrations within 90 days of the initial conference, for most of the newly filed arbitrations that time period was simply too truncated. Thus, in two of the more complex of the first wave of arbitrations, the parties, by stipulation, extended the time for final resolution to 120 days. The first of these resulted in a ruling from the arbitrator within the extended time frame, and the second settled two days into the final hearing. In another matter, however, the parties had agreed to submit their disputes without discovery or live witnesses, and were able to resolve their limited legal issues well within the 90 days provided under the rules.

Likewise, as the Court became attuned to the needs of parties to arbitration proceedings, the Court’s Rules Committee was tasked with amending the rules to ensure that parties to arbitrations had a workable and efficient set of rules to

2 10 *Del. C.* § 349(c).

govern their proceedings. For example, as initially adopted, the rules promulgated by the Court for arbitrations merely piggybacked on certain (but not all) of the Chancery Court Rules, leaving much discretion to the arbitrator. But experience showed rather quickly that the failure to include Rule 15 (pertaining to amendments) and Rule 45 (relating to third-party subpoenas), among others, gave rise to some practical issues.³

Likewise, the first parties to go to final award in an arbitration were uncertain of precisely how to go about confirmation of that final award, absent some public proceeding in the Court, while still maintaining the confidential nature of the proceedings. The direction from the Court was interesting: the Vice Chancellor who had acted as arbitrator to decide the matter would simply “change hats” and exercise his judicial authority as Vice Chancellor to confirm his own award and direct its entry on the record of the Court as an enforceable judgment.

But before experience with the regime was able to lead to a more tailored set of rules or to the first appellate proceedings under the new regime, the federal government intervened to put an end to the state’s developing experiment in arbitration.

The Federal Government Halts Delaware’s Experiment

Delaware Coalition for Open Government, Inc. v. Strine,⁴ which challenged the state’s arbitration program under the First Amendment to the U.S. Constitution, was filed and served on the defendants (the five members of the Court of Chancery) on the very day that the Court held its first hearing under the new regime. The suit began in the U.S. District Court for the District of Delaware, where all the members of the Court recused themselves. The District Court, with a judge from the Eastern District of Pennsylvania presiding by designation, granted judgment on the pleadings, striking the statute in its entirety (notwithstanding that such relief had not been asked for by anyone) on grounds that the proceedings were effectively trials, and trials (at least criminal trials) had historically been open to the public.⁵

On appeal to the U.S. Court of Appeals for the Third Circuit, a three-judge panel wrote three separate opinions. Notwithstanding the lower court’s decision to grant broader relief than requested or to strike down a state statute in its entirety,

3 See, e.g., Varallo, Rollo & Zeberkiewicz, *Chancery Arbitrations After Year One: Annotated New Form*, ABA Section of Litigation, Commercial & Business (Aug. 16, 2012).

4 894 F. Supp. 2d 493 (D. Del. 2012).

5 *Id.*

and even though federal jurists around the country routinely engage in non-public ADR of pending civil disputes, usually through mediation, the first of the three opinions determined that the District Court's ruling should be upheld on the basis that the so-called "reason and experience" test suggested that civil trials had historically been open to the public and that arbitrations, while sometimes confidential, had also been held publicly from time to time. The lead opinion also took issue with the fact that the proceedings were conducted by sitting judges in a courthouse.

The concurring opinion found no fault with sitting judges acting as arbitrators, but concurred in the judgment invalidating the statute on the basis that the public had a right of access to such proceedings, based on a less than clear historical record. The sole dissenter, Judge Jane Roth, forcefully defended the state's experiment and took issue with the historical record as related by the other members of the panel in their "experience and logic" analysis.⁶

The state's writ of certiorari to the United States Supreme Court, although supported by various amici, was not able to attract sufficient support on the Supreme Court, effectively ending the state's innovative experiment with confidential, judicially annexed arbitration.⁷ Interestingly, the Third Circuit's judgment, which now stands as the law of (at least) that circuit on the subject of public access to judicial proceedings conducted in courthouses, seems not to have shut down the federal courts' constructive use of private ADR before magistrate judges and others to resolve so many of the matters initially filed in those courts.

Lessons Learned from Round One

Delaware learned several lessons from its initial experiment with court-annexed confidential arbitration. First, as made clear by the lack of action by the U.S. Supreme Court, using sitting judges for confidential arbitrations is simply not possible. But since one of arbitration's key benefits is confidentiality, it seemed to make no sense to continue the program utilizing judges to conduct public arbitration proceedings. Indeed, given the flexible approach to proceedings in the Court of Chancery, few doubt that consenting parties to a publicly filed civil action in that Court could simply consent to truncate their matter and apply for early scheduling, effectively replicating the efficiency benefits of arbitration in a civil case. For example, there is no clear reason why parties to a Chancery Court action

6 733 F.3d 510 (2013).

7 *Strine v. Delaware Coalition For Open Government, Inc.*, 134 S. Ct. 1551 (2014).

could not simply stipulate that neither party would take more than five depositions without court order on good cause shown, both would waive their rights to file substantive motions, and both would join in approaching the Court to set a final trial in 120 days.

Moreover, notwithstanding the enormous benefits of having arbitrations decided by sitting judges, the obvious downside to using currently serving judges is that the parties to the proceeding are required to come to the judges to arbitrate, rather than enjoy the benefits of an arbitration in the parties' locale.

Finally, the developing practice of attempting to eliminate unnecessary road blocks by having the arbitrator merely "change hats" and enter judgment as a member of the Court of Chancery, while useful, had not yet been sufficiently worked out to ensure the elimination of the ancillary proceedings that have become customary in arbitrations. Thus, nothing in the Court's rules or the statute itself dealt with the possibility of proceedings to enjoin the arbitration; similarly, nothing determined the scope of the arbitrator's authority under the body of common law developed around the distinction between "procedural" and "substantive" arbitrability. Likewise, as noted above, the regime had not existed for sufficient time to test the appellate experience in the Delaware Supreme Court.

Thus, by the time of the federal dismantling of Delaware's experiment, the state had learned that confidentiality was a *sine qua non* to a successful arbitration regime, that the place of an arbitration could matter, and that more work was needed to ensure that the typical collateral challenges to an arbitration proceeding were eliminated. At the same time, experience showed that a 90-day resolution track was perceived as useful to those using arbitration, even if more-complicated matters typically required a bit more than three months to resolve.

CHAPTER 2

Delaware Innovates to Create the Rapid Arbitration Act

Soon thereafter, the state returned to innovating to meet the needs of its constituents. In his first State of the Judiciary address in June 2014, new Chief Justice Strine made clear that a revised arbitration regime was a top priority of the judiciary, and that he anticipated legislation being introduced in the General Assembly's 2015 session.

Problems Identified in Traditional Arbitration

Delaware's efforts to build the next generation of a world-leading arbitration regime were undertaken with a series of consultations around the world to identify the needs of Delaware's constituencies interested in ADR and how those needs could best be met. Representatives of the state met with companies and practitioners in the U.S. and abroad to evaluate the need for an improved arbitration scheme. Experts in international arbitration practicing in London, Singapore and the U.S. were consulted. Leading in-house counsel in various industries and academics with an interest in arbitration and ADR were consulted, as were corporate practitioners from across the country.

As a result of months of such consultations, the working group developing the statute identified a number of problems that seemed to pervade more traditional arbitration. While ADR advocates have always promised prompt and efficient resolution of disputes, the feedback from arbitration practitioners suggested that arbitration practice differs significantly from expectations.

Curiously, one of the biggest complaints heard throughout the consultation process related to speed. Arbitrations, once thought of as a highly efficient short cut to final resolution of complex business disputes, have become every bit as slow and laborious as some court actions. This appears to have resulted from two identifiable trends: each party's desire to preserve its own optionality and, in some cases, the arbitrator's perceived desire to maximize his or her personal return.

The first trend manifests itself at the outset of many arbitrations. In circumstances where an agreement to arbitrate does not name an arbitrator or clearly define a type of arbitrator on which the parties can reasonably (and promptly) agree, the parties often seek judicial aid to appoint the arbitrator. In one matter in which the authors were involved, for example, the arbitration agreement provided for an "appraiser" to value a series of complex and valuable businesses in a joint venture dissolution. When the parties were unable to agree on who that appraiser should be, months of civil litigation followed in which the issue was whether an appraiser was an investment banker or a recognized member of one or more of the professional appraisal associations. In another matter, after the accounting firm chosen by the parties' contract as their arbitrator declined the appointment, the parties spent almost a full year negotiating the retention of a suitable replacement firm.

Even where an arbitrator is identified in the parties' agreement or is easily agreed on, the law in many jurisdictions allows parties who have committed to arbitration to access the courts, either before or during the arbitration. Thus, a body of complex common law has grown around issues identified as "substantive" and "procedural" arbitrability, with one category of questions to be determined by a court and the other by the arbitrator. In almost all cases where such a dispute arises, however, parties who have already agreed to arbitrate quickly find themselves subject to often extensive judicial proceedings to determine whether an arbitration should go forward, who should decide the parameters of that arbitration, and what those parameters will be.

Likewise, the need to "confirm" an arbitral award presents yet another opportunity to slow the ultimate resolution of the matter and involves a new decision maker in the mix. Where the confirming court does not closely hew to the Federal Arbitration Act scope of review, confirmation proceedings may become mini-adjudications of already arbitrated issues.

Thus, the first identified series of trends—parties' desire to preserve optionality—manifests itself at numerous points along what should otherwise

be a truncated timeline and tends to cause that timeline to become elongated, with concomitant expense associated with the drawing out of the dispute. Certainly, if the parties to a contract anticipate resolution of their dispute in three months, taking a year to identify the arbitrator is not likely to lead to the bargained-for resolution.

The second identified trend is the universal human desire to maximize one's own interests. Based on feedback from the state's consultations, it appeared that the subtle influence of self-interest—both on the part of practitioners and of arbitrators—may also tend to extend arbitrations. Unlike public judges who get paid no more in longer disputes, private arbitrators often face the opposite situation. While the blame for what has become widely recognized as an unduly elongated process cannot rest wholly on the professionals who administer that process, arbitrators cannot escape some degree of responsibility for the gradual mutation of the arbitration process.

In addition to these trends towards delay, inefficiency and cost, Delaware's consultation process also suggested as a concern the lack of a sufficiently independent pool of decision makers. In addition, in many cases the parties wished to appoint specialized arbitrators for their matters who, while highly knowledgeable about an industry, might lack training in law. For example, many transactional disputes involving "true ups" or post-closing adjustments selected accounting or other financial arbitrators. But, to the extent that such parties were not also law-trained, when called on to apply the law selected by the parties, such specialized arbitrators often found themselves outside their own expertise and largely without any reliable way to navigate the often difficult legal issues presented by the parties.

Thus, the state's constituencies identified several basic challenges, the solutions to which were perceived as making any arbitral regime more useful and thus likely to be used. Those were: (1) a return to truly speedy resolution of disputes in arbitration without undue costs or distractions, (2) access to an independent appellate body expert in the law and willing to limit challenges to the narrow scope of the Federal Arbitration Act, and (3) the ability to utilize non-law-trained experts as arbitrators without losing the ability of such arbitrators to assess and apply the law where appropriate and necessary.

Solutions Implemented in the DRAA

The working group that drafted the DRAA was informed by this feedback and focused on finding working solutions to each of the challenges presented.

Offering solutions to each identified challenge, the DRAA implements a number of new approaches in arbitration that make the statute unique among national and international arbitration regimes.

First, the Act provides for a truncated “summary” proceeding before the Delaware Court of Chancery to select an arbitrator where such selection was not made in the agreement to arbitrate.⁸ By statute, this proceeding must be concluded no more than 30 days after its initiating filing is served, and the jurisdiction of the Court is highly limited.

Second, the Act eliminates the “optionality” problem by divesting the courts of jurisdiction to hear and decide any issue concerning arbitrability or the scope of issues to be arbitrated. Instead, the Act vests the arbitrator, and only the arbitrator, with the power and authority to decide such issues. Thus, the body of law relating to whether an issue presented at the outset is “substantive” or “procedural” does not apply to arbitrations under the Act, and neither party can seek to disrupt the commencement of a DRAA arbitration by running into court.

Third, the Act vests the arbitrator with power to enjoin any conduct of a party to the arbitration and divests the courts of power in this regard after an arbitrator is appointed,⁹ thus avoiding the need for parallel proceedings to compel or enjoin arbitration. The answer selected by the Act is simple: if a decision is needed, bring the matter to the arbitrator and the arbitrator will decide it quickly and finally.

Finally, the Act provides that, absent an agreement otherwise, all matters must be finally determined within 120 days of the arbitrator’s acceptance of appointment (which deadline may be extended to 180 days, but no longer, by unanimous consent of the parties). Furthermore, the Act imposes a financial penalty on an arbitrator who does not decide the matter within the allotted time frame: the forfeiture of the arbitrator’s fees. The Act solves the second identified issue relating to the availability of appeal by making challenges to the arbitrator’s final award available directly to the Delaware Supreme Court in accordance with the limited standards set forth in the Federal Arbitration Act, eliminating any intermediate level of review. The Act also provides that the parties may waive any right to challenge or appeal the arbitrator’s final award by agreement or, where the parties wish to maintain confidentiality or allow more searching review, they may proceed with an arbitral appeal.

⁸ See Chapter 5.

⁹ The Court of Chancery retains power to issue injunctions in aid of arbitration only until the arbitrator is appointed and accepts appointment.

The Act also allows the parties to an arbitration agreement to select an arbitrator not trained in law to resolve their dispute. Thus, financial specialists, accountants or industry experts may be selected and appointed as arbitrators. In such circumstances, the arbitrator may retain a lawyer to decide any legal issue arising during the course of the proceeding. While the expert arbitrator will render the final award in the arbitration, to the extent that the arbitration requires the resolution of legal issues, the retained lawyer (subject to the arbitrator's determination) may exercise the full power of the arbitrator to render decisions on such issues of law. Arbitrators who use this option may wish to rule directly (based on their counsel's advice) to avoid any possible foreign enforcement issues arising from such rulings.

In short, the Act directly addresses and resolves each of the major issues identified by the statute's constituencies as problems or issues arising in more traditional arbitration proceedings. The drafters of the Act recognize that some of these solutions may lead to fewer rather than more DRAA arbitrations. Nevertheless, Delaware opted for a regime that is responsive to concerns expressed by arbitration constituencies in an effort to revitalize arbitration as an efficient, speedy and meaningfully different dispute resolution choice.

An Overview of the DRAA

The Overriding Principle of Freedom of Contract

Delaware's jurists have often described the state as "contractarian" in the sense that Delaware takes seriously both the importance of allowing parties the freedom to contract as they see fit and the obligation to enforce those contracts as written when disputes arise.¹⁰ Delaware's statutes often expressly include a statement of policy intended to give "maximum effect to the principle of freedom of contract."¹¹ The Act continues that strong policy preference for private ordering and freedom of contract, expressly stating that the "policy" of the Act is "to give maximum effect to the principle of freedom of contract and to the enforceability of agreements."¹²

In particular, the Act leaves to the parties decisions such as who should be the arbitrator, whether the matter should be decided by one arbitrator or a panel of arbitrators, the rules that will govern the arbitration, whether the parties will be allowed to gather and present evidence before the arbitration hearing, whether that evidence-gathering process will extend to third parties, the scope of the arbitrator's power to make final awards, the place and timing of the proceedings, and the nature of the challenge or appeal (if any) from the arbitrator's final award. By allowing the parties a high degree of freedom to contract, the Act is intended to provide a flexible platform for highly customized proceedings; of course, the Act also contains a series of default provisions where the parties choose not to

¹⁰ See, e.g., *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *12 (Del. Ch. July 11, 2011).

¹¹ E.g., 6 *Del. C.* § 18-1101(b).

¹² 10 *Del. C.* § 5811.

customize. As is the case in many other areas of Delaware law, however, the Act purposefully elevates private ordering above the imposition of “one size fits all” statutory mandates and is best understood as a broadly enabling statute.

The Overriding Importance of Speedy, Efficient and Private Dispute Resolution

If one theme pervades the Act, it is the intent to create an arbitral regime with the potential to put an end to protracted arbitration proceedings. Described in Chapter 2, Delaware’s consultation process revealed a perception that arbitration had become bogged down in procedural gamesmanship and had become just as slow-moving and expensive as litigation.

The Act also offers the important benefit of privacy in the resolution of disputes. Parties to disputes often prefer not to have the fact of their disputes become public. For example, venture capital firms whose purpose is to invest in promising start-up companies tend to prefer not to become publicly identified with litigation against their investees, given the competition among such firms for new investments. Of course, there are many other examples, but all point in the same direction: disputing parties need a speedy, efficient and private form of dispute resolution.

Qualifying Disputes

The Act is to be used primarily to resolve business disputes. Thus, by its terms, the Act is not applicable to any dispute with a “consumer,” as that term is defined in the Delaware statutes.¹³ Similarly, the Act may not be used to resolve disputes involving homeowners’ associations, a prohibition to ensure that the Act may not be used unfairly in such circumstances.¹⁴ Unlike Delaware’s prior arbitration statute, however, the DRAA does not contain any monetary thresholds. Thus, parties may use the Act to seek non-monetary relief or a declaration as to how a particular contract provision is to be interpreted.

To invoke the Act, the parties must have a written agreement signed by the parties to the arbitration. The agreement to arbitrate must be governed by Delaware law (regardless of the law governing the broader contract), and the agreement must expressly refer to the Act by name.¹⁵ Likewise, one of the parties to

¹³ 10 *Del. C.* § 5803(a)(3).

¹⁴ *Id.*

¹⁵ 10 *Del. C.* § 5803(a).

the arbitration must either have its principal offices in Delaware or be a Delaware-organized entity—either a corporation, limited liability company, partnership or other Delaware-chartered business entity.¹⁶ Importantly, the Delaware-chartered entity need not actually do business in the state. Nor does the statute preclude the formation of a special purpose Delaware entity for purposes of utilizing the statute. Put differently, nothing in the Act would preclude the ability of a non-Delaware entity from forming a Delaware subsidiary to enter into a contract for the express purpose of availing the parties to that contract of the benefits of the Act.

Likewise, although the requirement that the parties to the arbitration sign the agreement to arbitrate would preclude the use of the Act to resolve intra-corporate governance disputes with non-signing stockholders, the parties to a stockholders' agreement or an LLC operating agreement in a private-company context could well agree to resolve governance disputes under the Act, provided only that all parties must sign the agreement containing the DRAA arbitration provisions.

Doing Away with the Initial Round of Disputes: Procedural and Substantive Arbitrability Reserved for the Arbitrator

As noted in Chapter 2, the Act includes a number of approaches designed to build speed and efficiency back into arbitration. One way the Act accomplishes this goal is to eliminate that typical initial round of litigation before arbitration, where one party seeks relief in court to determine which issues are properly subject to arbitration and which are not. The Act makes clear that the arbitrator, and not the court, has sole jurisdiction to determine such questions. By statute, therefore, any dispute with respect to the scope of what is to be arbitrated is vested solely with the arbitrator, thus effectively eliminating initial court skirmishes over the scope of the arbitration.

Empowering the Arbitrator: Extremely Limited Extra-Arbitral Injunctions

Another common round of litigation often occurs at the outset of an arbitration when one party attempts to enjoin the other from proceeding with an arbitration, typically on the theory that the dispute is not covered by the contract's arbitration clause. Such proceedings often slow the pace of dispute resolution and involve the parties in public litigation when they have bargained for private arbitration, working against the strong policy in favor of rapid and efficient

¹⁶ *Id.*

final resolution of controversies. The Act addresses the issue by divesting courts of the power to enjoin an arbitration altogether.

While the Act authorizes the Court of Chancery to issue an injunction “in aid of arbitration,” the Court may only do so for the period before the arbitrator accepts appointment. Moreover, this limited grant of jurisdiction can only be used in a way that does not “divest the arbitrator of jurisdiction or authority.”¹⁷ Thus, by limiting the jurisdiction of the Court and empowering the arbitrator, the Act is designated to avoid the delays associated with the pre-arbitration skirmishes that have become commonplace.

Doing Away with the Confirmation Process: Deemed Confirmation

In addition to eliminating pre-arbitration litigation, the Act also accelerates the final resolution of disputes by removing another layer of delay between award and finality. It does so by eliminating the confirmation process.

In many jurisdictions, an arbitrator’s final award must be converted to a final judgment of the court to commence enforcement or collection proceedings. This is typically accomplished through the filing of a civil action to confirm the arbitral award as a judgment of the court. Although the grounds on which a party may challenge confirmation are limited by the Federal Arbitration Act, this proceeding can still take additional time and effort and, by definition, will always delay the finality of arbitration proceedings.

The Act does away with this layer of review (which in many cases is simply another time-consuming obstacle to a prompt final resolution) by providing that the arbitrator’s final award is “deemed to have been confirmed” on the fifth business day following the period in which the parties may file a challenge to the Delaware Supreme Court or invoke the jurisdiction of a private appellate arbitration panel.¹⁸ Thus, if the agreement to arbitrate waives appellate challenge or review, the arbitrator’s final award is deemed confirmed by the mere passage of time and without the need for confirmation proceedings in the trial court. In many cases, this could truncate the path to final resolution of arbitrated disputes by as much as several months.

¹⁷ 10 *Del. C.* § 5804(b).

¹⁸ 10 *Del. C.* § 5810.

Access to the Delaware Supreme Court for Limited Challenges; Arbitral “Appeals”

The Act expedites final resolution and deals with the subject of interim challenges to the arbitrator’s rulings and orders simply: it prohibits them. Thus, any party to a DRAA arbitration is deemed by the Act to waive the right to challenge an interim ruling or order of an arbitrator.¹⁹

Similarly, the Act permits parties who have sufficient confidence in the arbitration process to waive the right to challenge the arbitrator’s final award.²⁰ In such cases, the arbitrator’s final award, which is “deemed confirmed” by the Act, will be the final step in the arbitration.

Where the parties wish to preserve the right to challenge the arbitrator’s award, however, they may take such a challenge directly to the Delaware Supreme Court, without the need to first engage in a challenge before the trial court. The intent of this direct challenge process is clear: the Act seeks to accelerate the process to prompt and speedy final resolution. Under the DRAA, a challenge before the Delaware Supreme Court must be filed within 15 days of the issuance of the arbitrator’s final award.²¹

Notably, the Delaware Supreme Court’s jurisdiction is limited; it may only “vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.”²² While the DRAA permits the parties to opt for private appellate arbitration in their contract, under no circumstances can the parties validly contract to expand the scope of a challenge before the Delaware Supreme Court, since that Court’s jurisdiction is expressly limited by the Act.

The Act also provides parties with a third alternative: a private “appeal” to one or more appellate arbitrators. Such “appeals” are solely creatures of contract, so the parties may choose as broad or as narrow a scope of review as they wish.

19 10 *Del. C.* § 5803(c)(3).

20 10 *Del. C.* § 5809(d)(1).

21 10 *Del. C.* § 5809(b).

22 10 *Del. C.* § 5809(c).

Commencement of Arbitration under the DRAA

Particularly given the many concessions that the DRAA requires, in an effort to maintain speed and efficiency, the statute contains provisions that seek to ensure that the parties who invoke the Act actually intend to do so. Thus, to qualify under the DRAA, an arbitration agreement must satisfy a number of specific requirements.

The Parties Must Specifically Agree to Arbitrate Pursuant to the DRAA

Arbitrations under the DRAA move quickly and require the parties to waive a number of procedural protections. Accordingly, the DRAA mandates that the parties make a specific and unequivocal choice to arbitrate under the DRAA.

The DRAA requires that the parties enter into—and sign—a written agreement to submit to arbitration under the DRAA.²³ It also requires that this arbitration agreement include “an express reference to the ‘Delaware Rapid Arbitration Act.’”²⁴ In other words, the agreement must specifically state the name of the Act; an implicit reference, such as “the parties agree to a rapid arbitration under Delaware law,” does not suffice.

These three requirements (a written agreement, signed by the parties to the arbitration, with an express reference to the DRAA) are designed to ensure that no person may be drawn into an arbitration under the DRAA without that person’s

²³ 10 *Del. C.* § 5803(a).

²⁴ 10 *Del. C.* § 5803(a)(5).

knowledge and consent. For example, stockholders of a corporation may not be forced to submit to arbitration of corporate disputes under the DRAA by a provision in the corporation's charter or bylaws, unless those documents are actually signed by the stockholders—which should only happen in a private-company context. The requirement of a signed written agreement with express reference to the DRAA allows for clear evidence of a party's agreement to be bound by the DRAA. This is significant, because the DRAA imposes a strict regime on the parties.

To ensure the rapidity of arbitrations under the Act, the DRAA exacts from parties a number of concessions: parties to arbitration agreements under the DRAA are deemed to have consented to (1) the arbitration procedures set forth in the DRAA; (2) the exclusive jurisdiction of the arbitrator to determine issues of substantive and procedural arbitrability; (3) the exclusive personal and subject matter jurisdiction of an arbitration, regardless of the location of the arbitration; (4) the exclusive personal and subject matter jurisdiction of the Delaware courts for the limited purposes set forth in the DRAA; and (5) except as set forth in the arbitration agreement, the arbitrator's authority to determine the scope of the arbitrator's remedial authority and to grant any appropriate relief.²⁵ The first and fifth concessions assist in the smooth functioning of the arbitration. The second is important in that it prevents a typical delaying tactic in which the party defending against an arbitration files suit in a court to enjoin an arbitration on the ground that some issue in the arbitration is not arbitrable. This second concession ensures that only the arbitrator—and not any court—has jurisdiction to determine such issues and therefore prevents parties from seeking such injunctions once an arbitrator has accepted appointment. The third and fourth concessions ensure that no party to an arbitration agreement under the DRAA may contest jurisdictional issues in the arbitration or in the Delaware courts (if a proper proceeding is brought in the Delaware courts). The fourth concession also ensures that parties to an arbitration agreement may not contravene the provisions of the DRAA or seek delay by bringing suit in a court outside of Delaware. Only the Delaware courts, which are likely to interpret the DRAA as originally intended, have jurisdiction—and then only limited jurisdiction—to address the few judicially cognizable issues under the DRAA.

The DRAA also provides that parties to an arbitration agreement have waived a number of rights.²⁶ Among those waived rights are (1) the right to seek

²⁵ 10 *Del. C.* § 5803(b).

²⁶ 10 *Del. C.* § 5803(c).

injunctions of any arbitrations under the DRAA; (2) the right to remove to a federal court any court proceeding under the DRAA; (3) the right to appeal an arbitrator's interim awards; (4) the right to appeal an arbitrator's final award, except under the limited grounds available in the DRAA; and (5) the right to challenge the propriety of an arbitration, except under the limited grounds available in the DRAA. As noted above, the first waiver ensures that no party to an arbitration agreement under the DRAA can defeat the rapid nature of the arbitration by seeking to enjoin it. The second waiver also prevents delay of the expedited proceedings in the Delaware courts (and reinforces the consent to exclusive jurisdiction in the Delaware courts) by ensuring that parties may not seek to remove those proceedings to the federal courts. The third, fourth and fifth waivers reinforce the DRAA's procedures for challenging the final arbitration award by limiting the parties' ability to appeal or challenge an arbitration except as specifically set forth in the DRAA.

Although the DRAA generally allows the parties to an arbitration to amend their arbitration agreement, it does impose one important limitation. While an arbitration is pending, the parties may only amend their arbitration agreement to alter the procedures of the arbitration with the arbitrator's approval.²⁷ This provision contemplates that the parties to an arbitration might agree to modifications of their chosen arbitration procedure that they did not anticipate before the arbitration began. But to prevent the parties to an arbitration from springing an unanticipated procedural change on the arbitrator, these modifications must be approved by the arbitrator. Nonetheless, the DRAA will not allow the parties (even together with the arbitrator) to circumvent the statute's strict arbitration time limit by amending their arbitration agreement. That is, during the pendency of the arbitration, an arbitration agreement "may not be amended so as to alter the time set forth in § 5808(b)."²⁸

The Parties Must Choose Delaware Law to Govern the Arbitration Agreement

The DRAA specifically provides that an arbitration agreement is valid and enforceable when that agreement "provides that it shall be governed by or construed under the laws of [the State of Delaware], without regard to principles

²⁷ 10 Del. C. § 5803(a).

²⁸ *Id.*

of conflict of laws.”²⁹ This provision ensures that the Delaware courts will be construing Delaware law in any expedited proceedings under the DRAA.

Nevertheless, the DRAA grants significant flexibility to the parties. It specifically provides that, although Delaware law must apply to the arbitration agreement, the DRAA does not require that “the laws of [the State of Delaware] govern the parties’ other rights, remedies, liabilities, powers and duties.”³⁰ In other words, parties may enter into a comprehensive joint-venture agreement that chooses New York law to govern a particular aspect of their relationship (for example, licensing provisions) that is enforceable in the New York courts, but chooses Delaware law to govern the joint venture’s management provisions, which are enforceable only in an arbitration under the DRAA. So long as the arbitration agreement itself is governed by Delaware law, it satisfies the DRAA, regardless of which jurisdiction’s law governs the other portions of the agreement.

An Arbitrable Dispute Must Involve a Business Dispute and at Least One Delaware Entity

Given the stringent requirements and significant waivers imposed on arbitration parties under the DRAA, the statute is designed to protect those who do not intend—or do not wish—to arbitrate under the statute’s provisions. As noted above, the DRAA requires that the parties to an arbitration have signed a written agreement to arbitrate including an express reference to the DRAA. The DRAA also provides another protection against contracts of adhesion: under the DRAA, no party to an arbitration agreement may be “a consumer, as that term is defined in § 2731 of Title 6.”³¹ The referenced statute defines a consumer as “an individual who purchases or leases merchandise primarily for personal, family or household purposes.”³² Therefore, business entities are generally prohibited from using the DRAA to impose arbitration on individuals who do business with them. As noted above, the signature requirement eliminates the possibility that stockholders of public companies will be forced to arbitrate intra-corporate disputes under the Act. Likewise, the Act prohibits its use in arbitrations with homeowners’ associations, a prohibition designed to protect against the potential for perceived abuses in that area.³³

29 10 *Del. C.* § 5803(a)(4).

30 *Id.*

31 10 *Del. C.* § 5803(a)(3).

32 6 *Del. C.* § 2731(1). As defined in that provision, merchandise includes “any objects, wares, goods, commodities, intangibles, real estate or services, other than insurance.” *Id.* § 2731(3).

33 10 *Del. C.* § 5803(a)(3). Specifically, the Act provides that no party to an arbitration agreement under

The DRAA is also designed, in part, to provide an additional service to Delaware business entities. Accordingly, one of the parties to any arbitration agreement under the DRAA must be “a business entity, as that term is defined in § 346 of [Title 10], formed or organized under the law of [the State of Delaware] or having its principal place of business in [the State of Delaware].”³⁴ The term “business entity” is defined broadly to include “a corporation, statutory trust, business trust or association, a real estate investment trust, a common-law trust, or any other unincorporated business, including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or a limited liability company.”³⁵ Regardless of its form, the business entity must either be organized under Delaware law or, if organized under the law of a state other than Delaware, have its principal place of business located in Delaware.

The Arbitrator Must Be Chosen, Either in the Agreement, by the Parties or by Delaware’s Court of Chancery

Before any arbitration may commence, an arbitrator must accept appointment as such.³⁶ But before that, some person must be chosen as the arbitrator. Here, as elsewhere, the DRAA permits significant flexibility to the parties.

First, the parties may name a person in the arbitration agreement as an arbitrator.³⁷ In other words, a specific individual (for example, “Judge Jones”) or a specific entity (for example, “ABC Accounting Co.”) may be named in the agreement. While this approach may provide some level of certainty in the identity of the arbitrator, it might also cause problems if the arbitrator so selected is unable or unwilling to fill the role. Not only should the potential arbitrator’s consent be sought before naming an arbitrator in an agreement, but the parties should also consider addressing such future problems (for example, “Judge Jones or, if Judge Jones is unable or unwilling to serve, Attorney Smith”).

Second, the parties may provide a method in the agreement under which an arbitrator may be selected.³⁸ This method could simply provide a procedure

the DRAA may be an “organization,” defined to include: “a civic association, neighborhood alliance, homeowners maintenance corporation, homeowners maintenance association, common interest community, as defined in [25 *Del. C.* § 81-103], or other similar entity charged with or assuming the duties of maintaining the public areas, open space, or common facilities within a residential development or community.” 10 *Del. C.* § 5801(5).

34 10 *Del. C.* § 5803(a)(2).

35 10 *Del. C.* § 346(b).

36 10 *Del. C.* § 5808(b).

37 10 *Del. C.* § 5801(3).

38 *Id.*

for choosing arbitrators (for example, “each party will choose an arbitrator, and those two arbitrators will choose a third”). A different method could list qualifications that constrain the parties’ choices in the event of a dispute (for example, “the arbitrator must be a Delaware lawyer who has practiced in the area of real estate law for at least five years”). While providing a method to select an arbitrator may allow for more flexibility in the event of a future arbitration, the method itself could also cause additional disputes.

Third, the parties may simply appoint an arbitrator, even if their agreement does not specify the identity of the arbitrator or provide a method under which an arbitrator may be chosen.³⁹ This consensual appointment by the parties may occur at any time before the arbitrator accepts appointment, and it need not be contemplated by the arbitration agreement itself.

Fourth, if the parties did not or cannot agree on an arbitrator (or if the agreed-on arbitrator cannot or will not serve), the Court of Chancery of the State of Delaware is specifically empowered to appoint an arbitrator.⁴⁰ This procedure is addressed in detail in Chapter 5.

³⁹ *Id.*

⁴⁰ 10 *Del. C.* § 5805.

CHAPTER 5

The Proceeding to Appoint an Arbitrator

If the parties to a DRAA arbitration are unable to agree on an arbitrator, or if the agreed-on arbitrator refuses to serve, the Act provides a mechanism by which an arbitrator is appointed. In keeping with the DRAA's emphasis on speed, this mechanism—which involves a proceeding in the Delaware Court of Chancery—is designed to operate in an expedited fashion.

The Prerequisites for an Appointment Proceeding

Under the DRAA, the Court of Chancery of the State of Delaware has exclusive jurisdiction to appoint an arbitrator (or arbitrators) in five situations: “(1) the consent of all parties to an agreement, (2) the failure or inability of an Arbitrator named in or selected under an agreement to serve as an Arbitrator, (3) the failure of an agreement to name an Arbitrator or to provide a method for selecting an Arbitrator, (4) the inability of the parties to an agreement to appoint an Arbitrator, or (5) the failure of a procedure set forth in an agreement for selecting an Arbitrator.”⁴¹ Each of those five situations is discussed in more detail below.

First, the parties to an arbitration agreement can, for any reason they see fit, seek the assistance of the Court of Chancery in appointing an arbitrator. That is, even when the arbitration agreement names a specific arbitrator, if the parties

41 10 *Del. C.* § 5805(a).

all decide that they would prefer to seek a different arbitrator, they may seek the Court's assistance under this provision.

Second, if the parties have chosen an arbitrator—either by naming that arbitrator in the arbitration agreement or by selecting the arbitrator through a method specified in the agreement—but the arbitrator refuses or is unable to serve, the parties may seek appointment by the Court. This mechanism could apply if, for example, a specified firm dissolves or a specified person becomes ill. It could also apply if a conflict, such as a post-agreement representation by the arbitrator of one of the parties, arises after the agreement, or if an arbitrator decides that he or she is unable to complete the arbitration in the statutory time frame (for example, if the arbitrator has pre-existing obligations that would make a determination within 120 days impracticable).

Third, if the parties did not set forth in their arbitration agreement any provision regarding the identity of the arbitrator, the DRAA provides a mechanism by which the Court of Chancery can appoint an arbitrator. That is, if the parties neither identified a specific arbitrator nor provided any mechanism by which an arbitrator could be selected, they may apply to the Court to appoint one.

Fourth, if any party is unable or refuses to assist in the process of appointing an arbitrator, any other party may apply to the Court of Chancery for assistance. This provision ensures that no party may be deprived of its right to a rapid arbitration by an opposing party's delay or recalcitrance.

Fifth, if the procedure set forth in an arbitration agreement fails for some reason, any party may petition the Court of Chancery. That is, if it later is determined that the provision in an arbitration agreement is unworkable or ambiguous, or if the selection criteria are too narrow (or too broad), the parties are not without recourse.

The Appointment Proceeding

As provided in the DRAA, an appointment proceeding in the Court of Chancery begins with a petition in a new case or an application in an existing case.⁴² The petition (or application) need not be complex, but it should (1) include reference to the parties' arbitration agreement, (2) attach the agreement as an exhibit, and (3) set forth the specific reason(s) in Section 5805(a) that jurisdiction exists. Under the Chancery Court Rules, each petition must be verified.⁴³

⁴² 10 *Del. C.* § 5805(a).

⁴³ Ct. Ch. R. 3(aa).

Service of the petition in a new case must comply with the Chancery Court Rules applicable to any new proceeding, but an application in an existing case may simply be served as would any other papers in that case.⁴⁴ The responding party has five business days in which to respond to the petition or application by filing an answer.⁴⁵ Nevertheless, no answer is required under the Chancery Court Rules, and no dispositive motions are allowed.⁴⁶ Given the intended simplicity of an appointment proceeding, the Court will not expect the responding party to respond formally unless some allegation in the petition or application must be challenged.⁴⁷ Further, the responding party may not raise counterclaims or cross-claims in response—this limited proceeding is restricted to the appointment of an arbitrator.⁴⁸

Within seven business days after the petition (or application) is served—or within three business days after an answer is served, whichever is later—the parties must file with the Court “a joint list of persons that are qualified and willing to serve as an Arbitrator” under the DRAA.⁴⁹ The timing of this joint list may be altered by the Court of Chancery.⁵⁰

Under the DRAA, each party to the proceeding may propose no more than three persons.⁵¹ To avoid any potential bias or advantage to either side’s proposed arbitrator, the list filed with the Court may not indicate which party proposed which person (although either party may file the letter).⁵² Nothing in the statute or the Chancery Court Rules prohibits a party from providing summary background information regarding the proposed persons if such information would be helpful to the Court (and the Court may later request such information if it is not provided).

As a practical matter, if the parties find, when compiling their list of potential arbitrators, that they have each chosen the same arbitrator, the parties may discontinue the proceeding and simply appoint their mutual choice.⁵³ Otherwise, the parties will be responsible for ensuring that their proposed arbitrators are

44 Ct. Ch. R. 96(b). At the point this handbook went to press, the DRAA-related Chancery Court Rules described here were under consideration but not yet formally adopted. The authors anticipate that the rules will be adopted shortly.

45 Ct. Ch. R. 96(c).

46 Ct. Ch. R. 96(c).

47 For example, if a person not party to an arbitration agreement is named in the suit or the allegations in the petition are simply false, an answer might be appropriate so that the Court can address the situation.

48 Ct. Ch. R. 96(c).

49 Ct. Ch. R. 96(c).

50 Ct. Ch. R. 96(c).

51 10 *Del. C.* § 5805(a).

52 Ct. Ch. R. 96(c).

53 See 10 *Del. C.* § 5801(3) (providing that an arbitrator may be “appointed by the parties to an agreement”).

willing and able to serve in that role, and they should take into account both the limitations imposed by the DRAA and any provisions of the arbitration agreement bearing on the selection of an arbitrator.

Under the DRAA, the Court of Chancery may only appoint “(i) a person named in or selected under an agreement, (ii) a person expert in any non-legal discipline described in an agreement, or (iii) a member in good standing of the Bar of the Supreme Court of [Delaware] for at least 10 years.”⁵⁴ Thus, the Court of Chancery’s options are somewhat constrained, further promoting a speedy determination. The first category includes those persons specifically referenced in an agreement, and will typically apply if the parties simply cannot agree as between two people or firms named in the agreement. The Act’s reference to persons “selected under an agreement” also allows the Court to appoint an arbitrator pursuant to specific selection criteria set forth in an arbitration agreement. For example, if the agreement provides that the arbitrator shall be an “independent accounting firm of at least 10 accountants, located in New York City,” the Court may choose from among proposed accounting firms matching those criteria. The second category is similar; it allows the parties to provide in their agreement and propose to the Court, for example, a “financial” or “accounting” expert as an arbitrator. If the arbitration agreement is silent, or if the parties do not propose persons in the categories set forth in an agreement, the Court of Chancery may simply appoint a senior Delaware lawyer. This third, catch-all provision ensures that the Court has the power to appoint a known quantity when none of the parties’ other proposed candidates seems ideal.⁵⁵

Once the list has been submitted, the choice of arbitrator is made by the Court of Chancery. As a general matter, unless the Court otherwise orders, the parties will not be entitled to take discovery in an appointment proceeding.⁵⁶ The Court of Chancery must appoint the arbitrator within 30 days after the petition (or application) is served.⁵⁷ The arbitrator so appointed is endowed with the same power and authority as if that person had been specifically named in an arbitration agreement.⁵⁸ If the arbitration agreement does not specify otherwise, the Court of Chancery will appoint only a single arbitrator.⁵⁹

54 10 *Del. C.* § 5805(b).

55 For this reason, a party might choose to propose at least one senior Delaware lawyer as a possible arbitrator, no matter the criteria set forth in the arbitration agreement.

56 Ct. Ch. R 96(d).

57 10 *Del. C.* § 5805(b).

58 10 *Del. C.* § 5805(b).

59 10 *Del. C.* § 5805(b).

In making its appointment decision, the Court of Chancery may “take into account (1) the terms of an [arbitration] agreement, (2) the persons proposed by the parties, and (3) reports made under § 5806(d) of [the DRAA].”⁶⁰ As noted above, the Court may choose to appoint an arbitrator in accordance with the terms of the arbitration agreement or may simply appoint a senior Delaware lawyer—even if not named by the parties as a proposed arbitrator. In making its determination, the Court of Chancery may consider any reports made to the Register in Chancery under Section 5806(d) concerning an arbitrator’s failure to issue a final award within the time specified by statute. Essentially, the Court of Chancery’s discretion is unbounded in this proceeding, and the Court’s decision is not appealable to the Delaware Supreme Court.⁶¹ If the parties wish to retain control over the appointment of their arbitrator, they would be well advised to address the issue fully in their arbitration agreement.

60 10 *Del. C.* § 5805(b).

61 10 *Del. C.* § 5804(a)(1).

Sample Form: Petition to Appoint an Arbitrator

The specifics of any petition to appoint an arbitrator will depend on the exact circumstance in which the petition arises, but the following is a sample petition.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

[PETITIONER],)
Petitioner)
v.) C.A. No. _____ - ____
[RESPONDENT],)
Respondent.)

VERIFIED PETITION FOR APPOINTMENT OF ARBITRATOR

Petitioner, upon knowledge as to its own conduct and upon information and belief as to all other matters, by and through its undersigned attorneys, alleges its Verified Petition for Appointment of Arbitrator as follows:

1. Petitioner and Respondent are parties to an agreement dated January 1, 2016 (the “Agreement”), which includes a written agreement to arbitrate. A true and correct copy of the Agreement is attached hereto as Exhibit A.
2. A dispute has arisen between Petitioner and Respondent under the terms of the Agreement, which provides that the dispute must be resolved under the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the “DRAA”).
3. Section 10.1 of the Agreement provides that any DRAA arbitration would proceed before John Smith, Esq., but Mr. Smith has informed Petitioner and Respondent that he is unable to serve as an Arbitrator for any DRAA arbitration.

COUNT I

Appointment of Arbitrator Under 10 *Del. C.* § 5805

4. Petitioner repeats and realleges the allegations set forth in the preceding paragraphs as if fully set forth herein.
5. Petitioner and Respondent have a dispute that must be arbitrated under the DRAA.
6. The Arbitrator named in the Agreement is unable to serve as an Arbitrator.
7. Therefore, Petitioner seeks the appointment of an Arbitrator under 10 *Del. C.* § 5805(a)(2).

WHEREFORE, Petitioner respectfully requests that this Court enter an order:

A. Appointing an Arbitrator; and

B. Granting such other and further relief as the Court deems just and proper.

[SIGNATURE BLOCK]

Sample Form: Letter Providing List of Proposed Arbitrators

As noted above, the joint list containing the proposed arbitrators may be filed by any party, but it may not indicate which party proposed which person.

[Court of Chancery]

Re: *Petitioner v. Respondent*, C.A. No. 9999-CC

Dear Chancellor:

I write on behalf of the parties to the above-captioned action pursuant to Chancery Court Rule 96(c) to provide a joint list of persons that are qualified and willing to serve as an Arbitrator in the parties' impending arbitration under the Delaware Rapid Arbitration Act. The proposed persons are set forth below in alphabetical order. Exhibit 1, enclosed herewith, contains further information regarding each such person.

AAA Accounting Firm, Inc.
BBB & Co. Accountants
Jane Doe, Esq.
John Smith, Esq.

If Your Honor should have any questions, counsel are available at the Court's convenience.

Respectfully submitted,

CHAPTER 6

The Arbitration

Although the DRAA preserves a great deal of contractual freedom for the parties to agree in advance to different rules and requirements, both the default provisions created by the statute and the limitations on the parties' ability to contract around the statute are designed to promote the speedy and private resolution of arbitral proceedings.⁶² The statute sharply restricts the parties' ability to use the court system to delay or interfere with arbitral proceedings,⁶³ provides an expedited process for securing appointment of an arbitrator if the parties cannot agree,⁶⁴ and requires the arbitrator to decide the matter finally within 120 days of accepting appointment under threat of a substantial financial penalty.⁶⁵

The Powers of the Arbitrator

Perhaps the most significant grant of power to the arbitrator in the DRAA is the power to determine all issues of arbitrability. A party that agrees to arbitration under the DRAA is deemed by statute to have consented to submit all issues of substantive and procedural arbitrability exclusively to the arbitrator.⁶⁶ This provision eliminates litigants' ability to seek a determination from a court as to the scope of the arbitration. It also precludes litigants from challenging the

62 See 10 Del. C. § 5802.

63 See 10 Del. C. § 5803(c)(1)-(3); see also 10 Del. C. § 5804(b) (“[N]o court has jurisdiction to enjoin an arbitration.”).

64 See 10 Del. C. § 5805.

65 See 10 Del. C. § 5806(b).

66 See 10 Del. C. § 5803(b)(2).

arbitrator's rulings on arbitrability in an arbitral appeal or an appeal to the Delaware Supreme Court. This provision of the DRAA is mandatory and not subject to alteration by agreement of the parties.

The parties may modify or eliminate by agreement the arbitrator's powers to determine the scope of his or her remedial authority and to grant any legal or equitable remedy the arbitrator deems appropriate.⁶⁷ Unless the parties do so in their agreement, however, the arbitrator is empowered to "make such rulings, including rulings of law, and [to] issue such orders or impose such sanctions as the arbitrator deems proper to resolve an arbitration in a timely, efficient and orderly manner."⁶⁸

The statute authorizes the arbitrator to oversee the progress of the arbitration case and to control the presentation of evidence at the arbitration hearing. The arbitrator has the power to administer oaths and to compel the appearance of witnesses and the production of documents and other forms of evidence, unless the arbitration agreement otherwise provides.⁶⁹ But the arbitrator lacks the power to issue subpoenas or to award commissions to permit depositions to be taken, unless the arbitration agreement confers those powers. If subpoena power is granted, and the respondent to a subpoena refuses to comply, the arbitrator may seek enforcement of that subpoena by the Court of Chancery.⁷⁰

The arbitrator's interim rulings—including arbitrability determinations, determinations of the scope of the arbitrator's remedial authority, and interim equitable relief and sanctions—cannot be appealed or challenged.⁷¹ The final award may be challenged or appealed only through the statute's appeal process, discussed in Chapter 8.

Non-Lawyer Arbitrators and the Arbitrator's Ability to Appoint Counsel

The DRAA does not impose mandatory qualifications on the arbitrator. The arbitrator need not be a lawyer and need not have experience or expertise in any particular field, unless the parties otherwise agree.

The DRAA therefore gives the parties significant flexibility to choose an arbitrator (or a panel of arbitrators) with the specialized knowledge necessary to

67 See 10 *Del. C.* § 5803(b)(5).

68 See 10 *Del. C.* § 5807(c).

69 See 10 *Del. C.* § 5807(b).

70 See 10 *Del. C.* § 5804(b)(3); Ct. Ch. R. 97(b).

71 See 10 *Del. C.* § 5803(c)(3).

resolve complex or technical disputes fairly. For example, parties to a merger agreement may wish to submit disputes over an earn-out provision for arbitration by an accountant. Parties to intellectual property licensing arrangements may wish to require that the arbitrator have expertise in the relevant field of intellectual property.

The process for selecting an arbitrator—whether by agreement of the parties or by application to the Delaware Court of Chancery—is described in Chapter 5. The Court of Chancery has the authority to appoint a non-lawyer as arbitrator only if the person is named in or selected under the parties’ agreement or if the person is “expert in any non-legal discipline described” in the parties’ agreement.⁷² If the parties’ agreement fails to impose qualifications of this nature for the arbitrator, the Court will appoint a senior member of the Bar of the Supreme Court of the State of Delaware as arbitrator.⁷³

The arbitrator has the authority to retain appropriate counsel in consultation with the parties.⁷⁴ Although the arbitrator must consult with the parties in choosing appropriate counsel, both the decision to retain counsel and the choice of counsel rest ultimately with the arbitrator and cannot be blocked by the parties.

Counsel retained by the arbitrator may make rulings on issues of law if the arbitrator so requests, and (if the arbitrator so determines) those rulings shall be the arbitrator’s rulings.⁷⁵ In making such a ruling, the arbitrator may wish to consider whether to rule directly, based on counsel’s advice, to avoid unexpected extra-territorial enforcement issues.

The Ability to Preserve—or Abandon—U.S. Style Discovery

The burdens and costs of discovery in the U.S. civil litigation system are well known. Under Federal Rule of Civil Procedure 26 and parallel provisions in most states’ civil litigation rules, discovery may be had into any non-privileged matter that is relevant to any party’s claim or defense. Discovery of documents, including electronically stored information, frequently involves significant burdens of time and money. Although U.S. courts are empowered to limit the use of discovery to prevent disproportionate burden, the scope and cost of discovery are often major drivers of parties’ litigation strategy and settlement decisions.

⁷² See 10 Del. C. § 5805(b).

⁷³ See *id.*

⁷⁴ See 10 Del. C. § 5806(c).

⁷⁵ See 10 Del. C. § 5806(c).

The DRAA is silent as to the scope of permissible pre-hearing discovery, leaving that issue entirely to the parties and (if the parties cannot agree) the arbitrator. The DRAA empowers the arbitrator to oversee the discovery process and to make any interim orders or rulings he or she deems necessary to determine what evidence and what witnesses will be presented at the hearing.⁷⁶ Practically, unless the parties agree before the arbitration begins to a deadline substantially longer than the 120-day default period, the scope of discovery in an arbitration under the DRAA will likely be more circumscribed than what might be expected if the same dispute was litigated in a U.S. civil court on a non-expedited basis. Moreover, unless the parties agree to allow third-party discovery, the arbitrator will not have the authority to issue subpoenas or award commissions.⁷⁷

The Ability to Tailor the Proceedings by Agreement

Consistent with the DRAA's express policy of allowing maximum effect to the principle of freedom of contract,⁷⁸ the Act leaves the parties free to adopt procedures appropriate to their particular disputes. Provided that they do so before the arbitrator accepts his or her appointment, the parties may agree to any time limit for the arbitration, whether longer or shorter than the 120-day period provided by statute. They may impose parameters on the scope of pre-hearing discovery or forgo discovery altogether. The parties may agree to forgo cross-examination of witnesses or to limit the scope of the evidence that may be presented at the hearing. They may limit the legal issues on which the arbitrator may rule.⁷⁹

The parties, by agreement before the arbitrator's appointment, may limit the forms of final relief the arbitrator may award.⁸⁰ They may, for example, agree to a "high/low" or "baseball" format for the arbitration. They may limit the arbitrator to making a monetary award or preclude the arbitrator from doing so. But the DRAA does not permit the parties to limit the forms of interim relief that the arbitrator may award, ensuring that the arbitration proceeds in a timely and efficient manner.⁸¹

The parties may agree to vary the DRAA's default pattern of a single prompt appeal to the Delaware Supreme Court limited solely to the grounds for vacation,

⁷⁶ 10 *Del. C.* § 5807(a).

⁷⁷ 10 *Del. C.* § 5807(b).

⁷⁸ See 10 *Del. C.* § 5811.

⁷⁹ See 10 *Del. C.* § 5808(a).

⁸⁰ See 10 *Del. C.* § 5808(a).

⁸¹ See 10 *Del. C.* § 5807(a), (c).

modification or correction set forth in the Federal Arbitration Act.⁸² The parties may instead agree to waive appellate review or to permit appellate review by an arbitral tribunal.⁸³ The DRAA does not forbid the parties from expanding or constricting the scope of review by an arbitral appellate tribunal.⁸⁴ But the parties are not free to vary the jurisdiction of the Delaware Supreme Court, which is fixed in the statute.

The parties also may agree to fee-shifting arrangements. The DRAA's default rule permits the arbitrator to impose the arbitrator's fees and expenses (including the fees of any counsel retained by the arbitrator) in any manner in the final award, subject to the non-waivable fee reductions in case of a late award.⁸⁵ The DRAA does not affect the default American Rule requiring each party to bear the fees and expenses of its own counsel. But the statute does not prohibit the parties from agreeing that the losing party will bear the arbitrator's fees and expenses, the victorious party's counsel fees or both.

Basic Procedural Requirements of the Arbitration

The arbitrator is expected to adhere to baseline standards of due process in conducting the arbitration, absent an agreement to the contrary by the parties. The arbitrator is empowered to select a time and place for a hearing or adjourned hearing, which may take place anywhere in the world.⁸⁶ Parties to an arbitration have a right to be heard, to present relevant evidence, and to cross-examine witnesses appearing at a hearing.⁸⁷ But if a party has been duly notified of the hearing and fails to appear or to participate, the arbitrator has the power to resolve the arbitration on the basis of the evidence presented at the hearing.⁸⁸

These rights, however, are subject to the arbitrator's authority to determine what evidence and which witnesses will be presented at the hearing and to limit the hearing presentations so as to enable resolution within the time limit,⁸⁹ as well as to the arbitrator's powers to make rulings of law, issue orders and impose sanctions as the arbitrator may deem proper to resolve the arbitration in a timely, efficient and orderly manner.⁹⁰ The arbitrator's use of these powers is not

82 See 10 Del. C. § 5809(c).

83 See 10 Del. C. § 5809(d).

84 See *id.*

85 See 10 Del. C. § 5806(b).

86 See 10 Del. C. § 5807(a).

87 See *id.*

88 See *id.*

89 See *id.*

90 See 10 Del. C. § 5807(c).

reviewable in court on an interim basis.⁹¹ Thus, the arbitrator's exercise of authority to shape the procedure is subject to review only after a final award is made and then, under the default scheme of the DRAA, only on grounds that would suffice to order vacation, modification or correction of an arbitral award under the Federal Arbitration Act.

Statutory Time Limits to Complete the Arbitration

The DRAA requires the arbitrator to render a final award within 120 days of acceptance of appointment, unless the parties otherwise agree to a different time period before the arbitrator accepts appointment.⁹² With the arbitrator's concurrence, the parties may extend that deadline by unanimous consent for up to 60 days, but no longer.⁹³ Nevertheless, the statute does not limit the parties' ability to agree to a longer period before the arbitration begins.

If the arbitrator does not render a final award within the required time, the statute imposes a reduction in the arbitrator's fees.⁹⁴ If the final award is delivered late, but less than 30 days late, the arbitrator's fees are reduced by 25 percent. If the final award is delivered between 30 and 60 days late, the arbitrator's fees are reduced by 75 percent. If the final award is more than 60 days late, the arbitrator loses 100 percent of the fee. In addition, an arbitrator who makes a late final award is required by statute to self-report this late award to the Court of Chancery.⁹⁵ As noted in Chapter 5, this report may be considered in any future proceeding to appoint an arbitrator.

The statutory reduction in fees—the “hammer” that seeks to force the arbitrator to decide the matter in a timely fashion—is not waiveable by the parties. Although the parties may agree before the arbitration begins to alter the time when a final award will become untimely,⁹⁶ once that time is established by the arbitrator's acceptance of appointment, the parties are limited to a maximum aggregate extension of 60 days by unanimous written consent.

The only exception to the statutory reduction in fees is that the arbitrator may petition the Court of Chancery for a summary determination that “exceptional circumstances exist such that the reductions ... should be modified or

91 See 10 *Del. C.* § 5803(c)(3).

92 10 *Del. C.* § 5808(b).

93 10 *Del. C.* § 5808(c).

94 See 10 *Del. C.* § 5806(b).

95 10 *Del. C.* § 5806(d).

96 See 10 *Del. C.* § 5806(b).

eliminated.”⁹⁷ The statute expressly places on the arbitrator the burden of showing by “clear and convincing evidence” that these exceptional circumstances exist.⁹⁸ The “clear and convincing evidence” standard has been described in other contexts as “evidence that produces an abiding conviction that the truth of the contentions is ‘highly probable.’”⁹⁹ The twin requirements of showing “exceptional circumstances” and doing so by “clear and convincing evidence” are designed to ensure that the Court’s intervention is sought and received only in rare and truly exceptional circumstances.

97 See 10 Del. C. §5806(b).

98 *Id.*

99 *In re Bailey*, 821 A.2d 851, 863 (Del. 2003).

The Final Award

Unless the parties resolve their dispute before the arbitration is complete, the end result of a DRAA arbitration will be a final award by the arbitrator. Part of Delaware’s commitment to a prompt arbitral procedure is automatic confirmation of the final award and a simple procedure to obtain a judgment on the final award.

The Final Award

Under the DRAA, the term “final award” refers only to the award designated as final by the arbitrator.¹⁰⁰ The arbitrator may enter interim orders or other rulings during the pendency of the arbitration,¹⁰¹ but those do not qualify as the final award under the DRAA.

The final award “must be in writing and signed by an Arbitrator.”¹⁰² Although the DRAA does not specifically provide that a final award must set forth the arbitrator’s reasoning for the decision, the parties may provide in their arbitration agreement for a reasoned final award. A final award must also include a form of judgment for entry under Section 5810 of the DRAA.¹⁰³ This requirement ensures that all parties are on notice of the judgment that may be entered (similarly, the Act requires that the arbitrator provide a copy of the final

100 10 *Del. C.* § 5801(4).

101 10 *Del. C.* § 5807(c).

102 10 *Del. C.* § 5808(a).

103 *Id.*

award to every party in the arbitration).¹⁰⁴ As addressed in Chapter 6, the final award must be issued by the statutory deadline.¹⁰⁵

Unless the parties have provided otherwise in their arbitration agreement, the final award may provide for legal or equitable relief, such as damages and/or injunctions.¹⁰⁶ The final award may also include rulings on issues of law, if the arbitrator considers such rulings relevant and necessary, although the parties may provide in their agreement that the arbitrator may not make such legal rulings.¹⁰⁷

Confirmation of a Final Award

As discussed in Chapter 8, the parties may provide for appellate review by an arbitrator or panel of arbitrators or for a challenge under the standards of the Federal Arbitration Act to the Delaware Supreme Court.¹⁰⁸ Assuming that no appellate review is sought, the DRAA provides for deemed confirmation of the final award on the fifth business day after the time period for a challenge expires.¹⁰⁹ Unlike other arbitration regimes, the DRAA expressly disallows a proceeding to confirm an arbitrator's final award. Instead, that final award is deemed confirmed automatically by the simple passage of time. Any challenge to a final award must be taken within 15 days of the issuance of a final award,¹¹⁰ so the final award will be deemed to be automatically confirmed five business days after that date. If the parties' arbitration agreement provides for no appellate review, the final award is deemed to have been confirmed by the Court of Chancery five business days after the final award is issued.¹¹¹

This streamlined procedure ensures that the parties need not take any additional steps to confirm the final award, but the efficiency of the procedure also renders impractical post-issuance corrections or modifications of a final award. If the parties wish to preserve the opportunity to seek modification or reargument of a final award before it is automatically confirmed, they might agree to a procedure in which the arbitrator issues a draft final award, gives the parties notice and a brief time in which to challenge specific factual or legal findings, and then issues a final award after considering the parties' challenges.

104 *Id.*

105 *See also* 10 *Del. C.* § 5808(b)-(c).

106 10 *Del. C.* § 5808(a).

107 10 *Del. C.* § 5808(a).

108 10 *Del. C.* § 5809.

109 10 *Del. C.* § 5810(a).

110 10 *Del. C.* § 5809(b).

111 10 *Del. C.* § 5810(a).

Entry of Judgment on a Final Award

Because confirmation of the arbitrator's final award is automatic, the prevailing party should need to approach the Delaware courts only once to obtain a final judgment on the final award. The identity of the relevant court will depend on the nature of the final award.

If the final award is solely for money damages, entry of judgment will be accomplished in the Delaware Superior Court.¹¹² The procedure is set forth in the DRAA: the prevailing party may make application to the Superior Court, and the Prothonotary will enter a judgment on the Superior Court's judgment docket in conformity with the final award (and with the form of judgment included with the final award).¹¹³ Once the final judgment is entered, it has the same force and effect as if it had been entered by the Superior Court; it also "is a lien on all the real estate of the debtor in the county, in the same manner and as fully as judgments rendered in the Superior Court are liens, and may be executed and enforced in the same way as judgments of the Superior Court."¹¹⁴

For all other final awards, the judgment may be entered in the Court of Chancery.¹¹⁵ Either party—although it would likely be the prevailing party—may commence the Chancery proceeding to enter judgment.¹¹⁶ The commencing party must file a verified petition in the Court of Chancery pursuant to Chancery Court Rule 3, and the petition must be accompanied by a copy of the final award from the arbitration.¹¹⁷ No defendant need be named in the petition, but service of the petition must be made on the other parties to the arbitration under the method of service prevailing in the arbitration.¹¹⁸ The proceeding is designed to be swift; no answer may be filed, and no discovery may be taken.¹¹⁹ Once the Court of Chancery is satisfied that the requirements of Section 5810 of the DRAA have been met, "final judgment shall be entered forthwith."¹²⁰ Once the final judgment is entered, it "has the same effect as if rendered in an action by the Court of Chancery."¹²¹

112 10 *Del. C.* § 5810(c).

113 10 *Del. C.* § 5810(c).

114 10 *Del. C.* § 5810(c).

115 10 *Del. C.* § 5810(b).

116 Ct. Ch. R. 97(d)(2).

117 Ct. Ch. R. 97(d)(2).

118 Ct. Ch. R. 97(d)(2).

119 Ct. Ch. R. 97(d)(3)-(4); 10 *Del. C.* § 5810(b).

120 Ct. Ch. R. 97(d)(5).

121 10 *Del. C.* § 5810(b).

Sample Form: Petition for Entry of Judgment in the Court of Chancery

The petition for entry of judgment in the Court of Chancery should be a simple document, since the proceeding for entry of judgment is designed to be prompt.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ARBITRATION OF)
[PETITIONER]) C.A. No. _____ - ____
)

VERIFIED PETITION FOR ENTRY OF JUDGMENT

Petitioner, upon knowledge as to its own conduct and upon information and belief as to all other matters, by and through its undersigned attorneys, alleges its Verified Petition for Entry of Judgment as follows:

1. Petitioner is the prevailing party in an arbitration under the Delaware Rapid Arbitration Act. A true and correct copy of the final award in that arbitration (the “Final Award”) is attached hereto as Exhibit A. The Final Award includes a monetary award as well as equitable relief in the form of a permanent injunction.
2. The Final Award was entered on January 5, 2016, and no challenge was taken of the Final Award. Pursuant to 10 *Del. C.* § 5810(a), the Final Award is deemed to have been confirmed on January 27, 2016.

COUNT I

Entry of Judgment Under 10 *Del. C.* § 5810

3. Petitioner repeats and realleges the allegations set forth in the preceding paragraphs as if fully set forth herein.
4. Therefore, Petitioner seeks the entry of judgment under 10 *Del. C.* § 5810(b). WHEREFORE, Petitioner respectfully requests that this Court:
 - A. Enter final judgment according to the Final Award attached hereto as Exhibit A; and
 - B. Grant such other and further relief as the Court deems just and proper.

[SIGNATURE BLOCK]

Sample Form: Affidavit for Entry of Judgment in Superior Court

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR [COUNTY]**

PETITIONER,)
Plaintiff/Judgment Creditor,)
v.) C.A. No. _____ - ____
RESPONDENT,)
Defendant/Judgment Debtor.)
)
)

AFFIDAVIT OF [ATTORNEY], ESQUIRE

STATE OF DELAWARE)
[COUNTY]) SS.
)

BE IT REMEMBERED that, on this 3rd day of February, 2016, personally appeared before me, a Notary Public for the State and County aforesaid, [Attorney], attorney for Petitioner, who being by me duly sworn did depose and say as follows:

1. This judgment action stems from a judgment deemed confirmed by the Court of Chancery of the State of Delaware pursuant to the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5810(a).

2. Defendant in the arbitration was Respondent. Respondent is now a judgment debtor.

3. Plaintiff in the arbitration was Petitioner. Petitioner is now a judgment creditor.

4. The arbitrator issued a final award against judgment debtor on January 5, 2016, and it was deemed confirmed by the Court of Chancery on January 27, 2016.

5. Attached as Exhibit A is a true and correct copy of the confirmed final judgment.

6. Each of the foregoing facts is true to the best of my knowledge, information, and belief.

[NOTARY]

[SIGNATURE BLOCK]

Appellate Review of the Final Award

The DRAA provides the parties with three options for review of the arbitrator's final award. The parties may agree in advance that there will be no appeal from the final award or that arbitral appellate review will be available.¹²² If the parties do not elect one of these two options, the default third option applies, and the final award may be challenged on limited grounds before the Delaware Supreme Court.¹²³ Parties to an agreement to arbitrate under the DRAA are deemed to have waived their right to appeal or challenge the arbitrator's final award, except pursuant to one of these three options permitted by the Act.¹²⁴

The statute expressly divests the Delaware Supreme Court of jurisdiction to hear appeals on orders ancillary to a DRAA arbitration that may be entered by the Delaware Court of Chancery. Specifically, the Supreme Court lacks jurisdiction to hear an appeal from an order of the Court of Chancery appointing an arbitrator, granting or denying an arbitrator's application for fees notwithstanding a failure to deliver a timely final award, granting or denying an application for an injunction in aid of arbitration, or granting or denying an order enforcing a subpoena.¹²⁵

¹²² See 10 *Del. C.* § 5809(d).

¹²³ See 10 *Del. C.* § 5809(a).

¹²⁴ See 10 *Del. C.* § 5803(c)(4).

¹²⁵ See 10 *Del. C.* § 5804(a); *cf.* 9 U.S.C. § 16 (describing scope of appeal from orders relating to arbitrations conducted under the Federal Arbitration Act).

The Default Option:

Public Challenge Before the Delaware Supreme Court

If the parties do not elect to waive all appeals or to allow an arbitral appeal, then the parties have the right to challenge the final award in a proceeding before the Delaware Supreme Court.¹²⁶ Under the Act, the grounds for a challenge are limited to the grounds for obtaining vacation, modification or correction of an arbitral award under the Federal Arbitration Act (the “FAA”).¹²⁷ The statute does not authorize the parties to agree to plenary appellate review by the Delaware Supreme Court; if the parties desire plenary review, or any scope of review broader than the limited challenge procedure, they must agree to arbitral appellate review.

The FAA permits a court to vacate an arbitral award: (1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption in the arbitrators, or any of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.¹²⁸

The FAA permits modification or correction of the award: (1) where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award; (2) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; and (3) where the award is imperfect in matter of form not affecting the merits of the controversy.¹²⁹ The FAA permits a court to “modify and correct the award, so as to effect the intent thereof and promote justice between the parties.”¹³⁰ The Delaware Supreme Court has characterized the standard as one of the narrowest standards of review in American jurisprudence and has looked to federal cases under the FAA to interpret the Delaware Uniform Arbitration Act, which contains a similar standard for obtaining vacation, modification or correction of an arbitral award.¹³¹

¹²⁶ See 10 *Del. C.* § 5809.

¹²⁷ 9 U.S.C. §§ 1, *et seq.*

¹²⁸ 9 U.S.C. § 10(a).

¹²⁹ 9 U.S.C. § 11.

¹³⁰ *Id.*

¹³¹ See, e.g., *SPX Corp. v. Garda*, 94 A.3d 745, 750 (Del. 2014).

A challenge under the DRAA has a speed advantage over the appeal process from an arbitral award under the FAA or parallel provisions in the laws of many states, including Delaware. Under the FAA, the Delaware Uniform Arbitration Act and many similar state laws, an application to vacate, modify or correct an arbitral award is directed to a trial court, the decisions of which may be reviewed on appeal. The FAA directs such applications to the federal district court in the district where the arbitral award was rendered,¹³² and authorizes appeals to the circuit court from the district court's orders, including orders vacating, modifying or correcting the arbitral award.¹³³ Similarly, Delaware's Uniform Arbitration Act¹³⁴ directs applications to modify, correct or vacate an arbitral award to the state's trial courts and authorizes appeals from certain of those orders to the Delaware Supreme Court.¹³⁵ In contrast, a challenge to an arbitral award under the DRAA lies directly in the Delaware Supreme Court.¹³⁶ The reduction of post-arbitration litigation to a single proceeding in a single court should reduce the delay and cost associated with judicial proceedings ancillary to an arbitration. A challenge to a final award issued in a DRAA arbitration must be filed within 15 days of issuance of the final award.¹³⁷

Parties considering whether to allow an arbitral award under the DRAA to be challenged in the Delaware Supreme Court should bear in mind that a challenge before the Delaware Supreme Court is presumptively a public proceeding. Article I, Section 9 of the Delaware Constitution provides that the courts "shall be open."¹³⁸ Oral arguments of cases before the Delaware Supreme Court are usually open to the public. The Court usually makes audiovisual recordings of such arguments and makes those recordings available to the public over the Internet. Documents filed on the docket are also usually available to the public through a subscription service and through a public access terminal maintained by the Court.¹³⁹

Although the Supreme Court and other Delaware state courts possess and exercise discretionary authority to restrict public access to judicial proceedings and records in some instances,¹⁴⁰ parties considering how to frame an agreement

132 See 9 U.S.C. §§ 10-11.

133 See 9 U.S.C. § 16.

134 10 *Del. C.* §§ 5701, *et seq.*

135 See 10 *Del. C.* §§ 5702, 5714, 5715, 5719.

136 10 *Del. C.* § 5804(a).

137 10 *Del. C.* § 5809(b).

138 Del. Const. art I, § 9.

139 See Del. Supr. Ct. R. 10.2(7).

140 See Del. Supr. Ct. R. 10.2(5), (9).

to arbitrate under the DRAA should be prepared for the possibility that some or all of the record of the challenge proceeding in the Delaware Supreme Court will be made available to the public.

Private Arbitral Appeals

The parties may instead choose to provide for appeal through a second arbitral process; indeed, they should do so if they desire to preserve the option of appellate review on any grounds more wide ranging than those permitted by the FAA and the DRAA. Litigants should also consider agreeing to an arbitral appeal if they desire certainty that the record compiled in the arbitration will not become public, because the record filed as part of a challenge to the Delaware Supreme Court may become public, in whole or in part. The DRAA does not address or restrict the scope of an arbitral appeal, thereby leaving the parties free to provide for plenary review, minimal review for procedural fairness, or review by any other standard the parties may choose.

Parties considering allowing an arbitral appeal should consider a number of substantive and procedural factors in setting up their agreements. An arbitral appeal is subject to many of the same rules as an initial-level arbitration under the DRAA, raising many of the same issues for parties framing an agreement. Nevertheless, the DRAA does not provide specific guidelines for arbitral appeal, requiring the parties to take a more active role in shaping the process in their agreement.

The parties should consider carefully their choice of an appellate arbitrator or arbitral panel. As at the initial arbitration stage, the parties may choose to specify an individual, group or organization to serve as appellate arbitrator, or may provide for a method of selecting an appellate arbitrator or panel. They may specify a neutral panel or a panel composed of neutrals and non-neutrals. They may specify an arbitrator or panel with expertise in designated subjects.

The DRAA empowers the Court of Chancery to appoint an appellate arbitrator or appellate arbitral panel, on application by a party, if the parties' agreement provides for arbitral appellate review.¹⁴¹ As at the initial stage, the Court's involvement is not necessary if the parties agree on the selection of the appellate arbitrator and the appellate arbitrator agrees to serve. The procedures for securing appointment of an appellate arbitrator or panel from the Court are the

141 10 *Del. C.* § 5809(d); *see also* Chapter 5.

same as those for securing appointment of a trial-level arbitrator or panel.¹⁴² As at the initial arbitration stage, the Court will appoint a single arbitrator unless the parties' agreement provides otherwise.¹⁴³

The parties should consider the structure and scope of the record on appeal and make appropriate provision for transcription of the proceedings and preservation of the briefs, exhibits and other papers before the trial-level arbitrator. The parties should think about whether, and at whose request, additional rounds of briefing or oral argument will be permitted.

The parties should also provide explicitly for any restrictions on the scope of review. Should the appellate tribunal be empowered to review the initial arbitrator's decisions as to scope of remedial authority?¹⁴⁴ Should the appellate tribunal be limited to vacating, modifying or correcting the award, as the Delaware Supreme Court would be on a challenge, or should the appellate tribunal engage in a broader review? Should the appellate tribunal be limited to considering only certain subject matters or awarding only certain types of relief? To the extent the parties desire anything other than FAA review, the appeal provisions in the arbitration agreement should so provide.

The parties should also consider the time frame surrounding an appellate arbitration. Although the statute aims to secure the prompt and efficient resolution of the matter and enforces promptness by reducing or eliminating the arbitrator's fees in case of a tardy final award, the DRAA does not include provisions relating to the timeliness for appeal, which are left to the parties' contract.

If the parties provide for arbitral appeal, then the appellate arbitrator or panel has authority to order confirmation of a final award and to trigger the deemed-confirmation provisions of the statute.

Preparing the Record for a Challenge in the Delaware Supreme Court or for Arbitral Appeal

An arbitral tribunal is not a court of record. For that reason, litigants and their counsel should think in advance about the need to prepare a record for a potential challenge to the Delaware Supreme Court or for an appeal to an arbitral tribunal. The DRAA does not of itself oblige the arbitrator to explain the basis for the final award (*i.e.*, to make a reasoned award). The statute does not require preparation

¹⁴² See 10 Del. C. § 5805.

¹⁴³ See 10 Del. C. § 5805(a).

¹⁴⁴ See 10 Del. C. § 5803(b)(5)(a) (arbitration agreement may vary default rule that initial-level arbitrator determines scope of remedial authority subject to challenge).

of a stenographic or other record of the arbitration hearing, nor retention of the papers, exhibits and other materials submitted to the arbitrator. Indeed, the DRAA does not preclude the parties from agreeing—for reasons of confidentiality, cost or otherwise—that the proceedings will not be recorded, that the arbitrator need not issue a reasoned award, and that the papers submitted to the arbitrator cannot be used as part of the record on an appeal or challenge. If the parties elect not to prepare a record or preserve the sources from which a record can be compiled for challenge or appeal, then a challenge or appeal may become more difficult to sustain as a practical matter.

If the parties elect to conduct the arbitration under the Model Rules,¹⁴⁵ the arbitrator will consult with the parties at a preliminary hearing regarding whether a stenographic or other official record of the proceedings will be maintained.¹⁴⁶ An arbitrator under the Model Rules will maintain a record of all pleadings and other papers submitted,¹⁴⁷ and may (unless the parties agree otherwise or the agreement to arbitrate otherwise provides) direct preparation of a stenographic or other record of the arbitration hearing.¹⁴⁸ The cost of preparing the record, if any, may be allocated in advance by the agreement to arbitrate or it may be awarded as part of the final award by the arbitrator.¹⁴⁹

The DRAA provides that “the record on the challenge is as filed by the parties to the challenge in accordance with the Rules of the Supreme Court.”¹⁵⁰ At present, the Supreme Court has not promulgated special rules regarding compilation of the record for purposes of a challenge. This leaves the parties free to agree to the scope of the record on a challenge. However, parties should be aware that the Rules of the Delaware Supreme Court permit parties to a civil appeal to stipulate to omit portions of the trial court from the record on appeal, provided that either the Supreme Court or the trial court may override the stipulation and order any or all of the omitted materials to be transmitted to the Supreme Court.¹⁵¹ In the absence of special rules governing the record on a

145 At the time this handbook went to press, the Model Rules described in Chapter 10 and included in this handbook, which had been drafted by the authors and submitted to the courts for consideration, had not yet been adopted as “official” default rules for DRAA arbitrations. It is possible that the courts eventually will adopt the Model Rules or promulgate different rules. In any event, until official rules are promulgated, parties to an arbitration under the Act may choose to use these Model Rules to govern their arbitration by agreement.

146 See Model Rule 4.

147 See Model Rule 13.

148 See Model Rule 22.

149 See Model Rule 25.

150 10 *Del. C.* § 5809(b).

151 See *Del. Sup. Ct. R.* 9(c).

challenge to the final award in a DRAA arbitration, parties should be aware of the possibility that the Supreme Court may apply this rule and Section 5809(a) of the Act to direct preparation and submission of portions of the record that the parties may have agreed to omit.

Waiver of Appeals

The DRAA authorizes the parties to include in their agreement to arbitrate a provision that there will be “no appellate review of a final award.”¹⁵² A mutual election to forgo appellate review of the final award may speed final resolution of the dispute, reduce cost and eliminate optionality that the parties’ counsel might otherwise choose to preserve.

By choosing to waive all appeals, the parties agree to forgo potential proceedings to vacate, modify or correct the final award. If there is to be no appellate review, then the arbitrator’s final award is deemed confirmed, and may be reduced to a judgment in the Delaware state courts, on the fifth business day following its issuance.¹⁵³

¹⁵² 10 *Del. C.* § 5809(d)(1).

¹⁵³ 10 *Del. C.* § 5810(a); *see* Chapter 7.

Drafting the Agreement to Arbitrate

It is often the case that drafters of a complex commercial agreement quickly agree that they want to provide for alternative dispute resolution. But because planning for breakdowns in a commercial relationship often takes a back seat while the parties work on more immediately important promises, ADR provisions in contracts often receive far less thought and careful attention than they should. While it is true that the ADR provision is only utilized when a problem arises in the parties' relationship, it is usually the case that the drafters wish that they had given more careful attention to the ADR clause of the contract when that problem actually does arise.

This chapter provides an overview of the choices that are available to drafters of an ADR provision under the Act, to help non-litigating corporate counsel understand which decisions need to be made under the Act and which can be comfortably left to the statutory defaults. We discuss in detail a series of sample provisions that are included in this handbook and also available on our website¹⁵⁴ in ready-to-use format.

To invoke DRAA arbitration, the Act requires that the parties (1) must have a written agreement to submit a controversy to arbitration, (2) signed by each party to the arbitration, (3) where at least one of the parties is a Delaware business entity,

154 www.rlf.com/DRAA/Clauses.

and (4) none are consumers or homeowners' associations.¹⁵⁵ The agreement to arbitrate itself must be governed by Delaware law, and it must expressly state that the parties intend to proceed under the "Delaware Rapid Arbitration Act."¹⁵⁶ The minimum statutory requirements are addressed further in Chapter 4.

A sample clause setting forth the *minimum* provisions necessary to invoke the DRAA is found at the end of this chapter as Form Agreement I.

The Consequences of Using a Bare Minimum DRAA Clause

There are four principal consequences to using a bare minimum DRAA clause. First, since the parties will not have selected a specific arbitrator or type of arbitrator, either party will have authority to petition the Court of Chancery to appoint an arbitrator after the dispute arises.¹⁵⁷ By statute, that Court will be limited to appointing a senior Delaware lawyer as arbitrator.¹⁵⁸ To the extent that the parties want a specific individual or expert to be their arbitrator, failing to name or describe that individual in the agreement to arbitrate (or in an amendment agreed to by all parties) leads to the statutory default.

Second, using a bare minimum clause will preclude the arbitrator, once appointed, from authorizing third-party discovery, unless all parties agree to amend the agreement to arbitrate to authorize the issuance of process to third parties and the arbitrator approves of the amendment.¹⁵⁹

Third, using a bare minimum clause will allow either party to challenge the final award of the arbitrator before the Delaware Supreme Court, but only subject to the limited review otherwise provided under the Federal Arbitration Act. This default provision carries with it the possibility that at least *the fact* of the parties' otherwise confidential arbitration will become public when a challenge is filed in the Delaware Supreme Court. Moreover, unless that Court grants confidential treatment to specific confidential business information as part of the appellate process, the likelihood exists that information beyond the mere fact of the parties' dispute may also become public during the course of the challenge before the Delaware Supreme Court. Of course, the Act provides several alternatives to a public challenge, but the failure to contract for one of these alternatives results in all parties to the arbitration having a default right to a public challenge in the Supreme Court.

¹⁵⁵ 10 *Del. C.* § 5803(a).

¹⁵⁶ *Id.*

¹⁵⁷ See Chapter 5.

¹⁵⁸ 10 *Del. C.* § 5805(b)(iii).

¹⁵⁹ 10 *Del. C.* § 5807(b); see also 10 *Del. C.* § 5803(a).

Fourth, a bare minimum clause does not provide for any specific rules to govern the arbitration. If the Delaware Supreme Court so specifies, the Model Rules (discussed in Chapter 10) will govern the arbitration in the absence of a contrary choice in the parties' agreement.

Customizing the Agreement: Annotated Checklist of Options in the Agreement to Arbitrate

The Act gives drafters of a commercial agreement a great degree of flexibility to tailor the nature and scope of any arbitration that is held to resolve a dispute under their agreement. The extent of that flexibility is detailed in the checklist below, identifying matters that the Act specifically allows the parties to customize in their contract. Where appropriate, the checklist is annotated to explain or expand upon the nature of the options available.

The Checklist

Contract point: The name ("John Smith") or description ("Big Four Accounting Firm") of the arbitrator or type of arbitrator desired.¹⁶⁰

Annotation: As noted above, the failure to identify an arbitrator by name or other description will lead to the default appointment of a senior Delaware attorney as arbitrator, unless the parties are able to agree on an arbitrator before the Court of Chancery appoints one. Where the parties are unable to agree on the name of a specific individual whom they intend to act as arbitrator, at least a general description of the nature of the arbitrator whom they wish to have appointed should be included. That description could be as broad as "a certified public accountant currently in practice with more than 10 years of experience" or "a petroleum reserves engineer."

Contract point: Whether the parties desire to proceed before one or more than one arbitrator.¹⁶¹

Annotation: Where the agreement to arbitrate is silent, the Act provides that the Court of Chancery will appoint a single arbitrator. Thus, if the parties wish to proceed before a panel of three arbitrators, they will need to specify that in their agreement.

¹⁶⁰ 10 Del. C. § 5801(3).

¹⁶¹ *Id.*

Contract point: If multiple arbitrators are indicated, whether they are required to act unanimously (default rule is action by a majority).¹⁶²

Contract point: Whether the parties wish to conduct their arbitration pursuant to the Model Rules or a different set of rules.¹⁶³

Annotation: No one set of rules is required for all arbitration proceedings, in the sense that there is one set of court rules that apply in all civil actions filed in a particular court. We have drafted, and at press time the courts of Delaware were considering whether to promulgate, a set of Model Rules as the default rules for use in DRAA arbitrations where the parties did not expressly select other rules.¹⁶⁴ These rules are available at www.rlf.com/DRAA/ModelRules. If the Delaware Supreme Court so specifies, these Model Rules will apply to all DRAA arbitrations unless the parties choose to proceed under a different set of rules of their choice, including rules promulgated by other arbitral fora.¹⁶⁵

Contract point: Whether the arbitrator's fees and expenses may be split other than as set forth in the final award.¹⁶⁶

Annotation: The Act provides that, absent agreement of the parties, the fees and expenses of the arbitrator are to be taxed as provided in the final award. To the extent that parties wish to vary this default rule, they must do so in the agreement to arbitrate.

Contract point: The time and place for the arbitration hearing itself.¹⁶⁷

Annotation: While the seat of the arbitration is Delaware, the arbitration itself may be conducted at any place in the world agreed to in advance by the parties. Barring such agreement, the time and place of the arbitration hearing is determined by the arbitrator.

Contract point: Whether the parties to the arbitration are entitled to be heard, present evidence and cross-examine at the final hearing.¹⁶⁸

Annotation: The default rule under the Act is that, absent agreement to the contrary by the parties, each will be entitled to be heard, present evidence and

¹⁶² *Id.*

¹⁶³ 10 *Del. C.* § 5804(a).

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ 10 *Del. C.* § 5806(b).

¹⁶⁷ 10 *Del. C.* § 5807(a).

¹⁶⁸ *Id.*

cross-examine at the final hearing. While this will undoubtedly be the choice of the vast majority of drafters, there could be disputes for which the parties simply want a technician's answer, without the formality of a full hearing with evidence and examination of witnesses. If the parties choose the DRAA to settle accounting or similar disputes, for example, it may be appropriate to appoint a non-legal expert as arbitrator and to provide expressly that the parties are to present their positions on the issue to the arbitrator without witnesses or evidence, or perhaps only with limited expert evidence. Of course, in many types of contracts it will not be possible to predict in advance what type of dispute may arise, but where the nature of the arbitration is expected to be limited or technical, or where the answer sought is binary, it may be worthwhile to consider drafting to eliminate discovery and/or live witnesses at the final hearing.

Contract point: Whether the arbitrator will be authorized to administer oaths and compel the production of witnesses and documents.¹⁶⁹

Annotation: The Act authorizes the arbitrator to administer oaths and compel discovery from the parties to the arbitration, unless the parties otherwise agree. Absent a desire to ban party discovery, it would generally not be appropriate to alter this default rule.

Contract point: Whether the arbitrator can issue subpoenas and/or commissions to non-parties.¹⁷⁰

Annotation: The drafters should carefully consider whether to empower the arbitrator to require third parties to give discovery in the arbitration. The issuance of subpoenas or commissions to third parties, by definition, will alert persons outside the arbitration to the fact of the proceedings and thus put at risk the confidentiality of the dispute. Without such power, however, it might be the case that third-party accountants, investment banks or other advisors will not be subject to compulsory process during the arbitration. Depending on the issues presented in the arbitration, that result may be a significant detriment to the parties' ability to present their case to the arbitrator.

Contract point: Whether the arbitrator's power to make any award he or she sees fit, including a legal or equitable award, is to be curtailed in any way.¹⁷¹

¹⁶⁹ 10 *Del. C.* § 5807(b).

¹⁷⁰ *Id.*

¹⁷¹ 10 *Del. C.* § 5808(a).

Annotation: The Act provides a great deal of power to arbitrators: the power to define the scope of the arbitration and the power to issue awards of any sort, both legal and equitable. If the parties reasonably anticipate that the disputes likely to arise under their agreement should be cabined, providing for limitations on the arbitrator's power may be appropriate.

Contract point: Whether the arbitrator's power to rule on any issue of law is to be circumscribed or limited in any way.¹⁷²

Annotation: In the event that the drafters intend to utilize the Act to deal with limited technical disputes, it may be appropriate to make clear that the power of the arbitrator is limited to ruling on certain specified disputes or classes of disputes. Where the parties intend to arbitrate only some of the potential disputes that could arise under a commercial agreement but allow other disputes to be litigated, they should clearly spell out that intention on the face of their agreement.

Contract point: Whether the arbitrator's final award will be issued in the default time set in the statute (120 days) or some shorter or longer time.¹⁷³

Annotation: The Act provides that all arbitrators must issue their final award within 120 days of acceptance of appointment, unless the parties unanimously agree with the arbitrator to extend that timeline for 60 additional days. The Act specifically prohibits further extensions, however, *unless the parties provide for a longer period of time in their agreement*. Importantly, the Act is structured to *prohibit* an amendment of the agreement to arbitrate to extend the time for the delivery of the final award once the arbitration begins. Thus, to the extent that the parties believe that their dispute is likely to take more than 120-180 days to finally resolve, they should affirmatively expand the time for the arbitration in their agreement.

Contract point: Whether the parties prefer to waive their right to challenge the arbitrator's final award before the Delaware Supreme Court, or instead whether they prefer to proceed to an appeal before one or more appellate arbitrators and, if so, what the scope of review of such appellate arbitration should be.¹⁷⁴

Annotation: As noted above, absent any provision in the agreement, the statutory default rule is that any party may challenge the final award of the arbitrator on

¹⁷² *Id.*

¹⁷³ 10 *Del. C.* § 5808(b).

¹⁷⁴ 10 *Del. C.* § 5809(d).

the limited bases provided for challenge under the Federal Arbitration Act. If the parties wish to prohibit such a challenge, effectively making the arbitrator's final award the final word in the dispute, they must do so in the arbitration agreement itself. Likewise, if the parties wish to provide for a private appeal or challenge of the arbitrator's final award, either under an FAA-style challenge or pursuant to a broader scope of review such as that utilized in ordinary appeals from civil actions in court, they need to so provide in their agreement to arbitrate.

Form Arbitration Agreements

Form Agreement I provides the "bare minimum" arbitration clause necessary to invoke the Act. As noted above, there are important reasons why the parties would want to use a more detailed form.

Form Agreement II is a "master form," which addresses the potentially important decisions that can be made under the Act and which provides annotations and notes in the text. This master form is a useful instrument to begin crafting an appropriately detailed dispute resolution provision under the Act.

A ready-made "discovery lite" form can be found as Form Agreement III. This form contemplates no discovery by the parties (and no third-party discovery) and the default appeal to the Delaware Supreme Court. As with any form, this should be customized by the parties to reflect their agreements on the scope of the arbitration.

Form Agreement IV is a ready-made "party discovery" form that contemplates discovery of the parties to the arbitration, but not third parties. In addition, this form contemplates the default appeal to the Delaware Supreme Court. As above, this form should be customized to reflect the parties' agreements.

Form Agreement V is a ready-made "full bore" form that contemplates the broadest possible discovery, including third-party discovery and an appeal to a panel of appellate arbitrators, with a scope of review that is as broad as an ordinary appeal from a civil action. Note that this form does not alter the deadline for the arbitrator to issue his or her final award. Where disputes are likely to be fact intensive, those using this form may wish to expand the timeline for the arbitrator's final award. As above, this form should be carefully customized to reflect the parties' actual agreements.

Finally, a word about these forms. The master form is intended to provide drafters with a broad platform on which to add their customized provisions. As should be evident, given the number of customization options provided under the

Act, one could imagine many permutations of ready-made forms that deal with every potential combination of choices. The five forms set forth above represent only five basic types of possible arbitration clauses.

These forms have been circulated widely to leading national and international practitioners. At press time, not all comments had been received and implemented, so it is likely that the forms included in the handbook will be modified over time. The most current version of each of these forms is available for downloading, without charge, at www.rlf.com/DRAA/Forms.

FORM AGREEMENT I
(“Bare Minimum”)

NOTE: As set forth in the text, the arbitration clause that follows contains the bare minimum provisions necessary to invoke the DRAA. This form should be used sparingly, if at all, since it effectively consigns the parties to all of the default provisions of the Act. See Chapter 9, regarding the consequences of using this form.

The parties hereby agree to arbitrate any and all disputes arising under or related to this agreement, including disputes related to the interpretation of this agreement, under the Delaware Rapid Arbitration Act. This provision shall be governed by Delaware law, without reference to the law chosen for any other provision(s) of this agreement.

FORM AGREEMENT II
(“Master”)

Section [_]. Arbitration.

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a “Dispute”) shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the “DRAA”). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the “Arbitration”) in accordance with this Section [_], and each party represents and warrants that it is not a “consumer” as such term is defined in 6 *Del. C.* § 2731. By executing this Agreement, (i) each party hereby waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in subsections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section [_] and that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Model Rules for Arbitration under the DRAA, available at www.rlf.com/DRAA/ModelRules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Model Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Model Rules.¹⁷⁵ To be effective, any departure from the Model Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.¹⁷⁶

(d) The Arbitration shall be presided over by one arbitrator (the “Arbitrator”) who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person’s appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a

¹⁷⁵ The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this subsection (b).

¹⁷⁶ The parties may elect to hold the arbitration in a different location. Note, however, that the “seat” of the arbitration is, by statute, in Delaware.

mutually agreeable replacement arbitrator (the “Replacement Arbitrator”). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.¹⁷⁷

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents. The Arbitrator shall have the power to issue subpoenas and commissions for the taking of documents and testimony from third parties.¹⁷⁸

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.¹⁷⁹

(g) The arbitral award (the “Award”) shall (i) be rendered within [120] days after the Arbitrator’s acceptance of his or her appointment;¹⁸⁰ (ii) be delivered in writing; (iii) state the reasons for the Award;¹⁸¹ (iv) be the sole and exclusive final and binding remedy with respect to the Dispute between and among the parties;¹⁸² and (v) be accompanied by a form of judgment. The Award shall be deemed an

177 The parties may wish to proceed before a panel of arbitrators. In such event, this provision should be changed to reflect the desired number of arbitrators and to state their names or provide the descriptive qualifications.

178 The DRAA empowers the parties to include one, both or neither of the provisions set forth in subsection (e). If the parties wish to proceed without discovery, neither of the sentences in subsection (e) would be included. If they wish to proceed with only party discovery, then only the first sentence would be used. The second sentence would be used only where the parties wished to be able to take discovery from third parties. The Act would also permit the taking of only documentary discovery (as opposed to deposition or other testimony) or, alternatively, only oral testimony (as opposed to documents). The Act contemplates that the scope of discovery is customizable in this agreement, so in all events, this issue should be addressed. The statutory default, which would come into play if this provision was not included in some form, would be for the Arbitrator to be empowered to summon party witnesses and evidence, but not third-party evidence or witnesses.

179 The DRAA provides that the agreement may modify or eliminate the foregoing processes. Elimination may be appropriate in circumstances where the parties agree to present a pure issue of law for resolution, or in circumstances where a narrow, technical issue is the subject of the arbitration.

180 The parties may specify a longer period for the arbitration. If they do not do so, the 120-day period of the DRAA is the default, and such period may be extended by no more than an additional 60 days, and then only upon consent of all parties to the arbitration.

181 A reasoned award is not required by the Act, but may be required by the parties’ contract.

182 The DRAA allows the parties to waive the right to appeal. This provision should only be included if the parties intend to waive appellate rights. Subsection (n) below is included in the event that the parties wish to preserve the right to appeal the Arbitrator’s award, in which case clause (iv) of subsection (g) should not be included.

award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section [_] shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief; provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.¹⁸³

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,¹⁸⁴ and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, any third-party discovery proceedings, including any discovery obtained pursuant thereto, and any decision of the Arbitrator or Award) [NOTE: the parties would eliminate reference to “third party discovery proceedings” in the event that such proceedings were not contracted for in Section e, above], shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; (iv) other employees or agents of the parties with a need to know such information; and (v) any third parties that are subpoenaed or otherwise provide discovery in the Arbitration proceedings, only to the extent necessary to obtain such discovery.¹⁸⁵ In all events, the parties [and any third parties] participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.¹⁸⁶

183 Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

184 This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

185 Clause (v) would be excluded in the event that third-party discovery was not provided for in subsection (e) above.

186 The DRAA permits the parties to direct how costs of the Arbitration are to be borne. Thus, in the event that the parties wish to vary this provision, they should do so here. Such variations could include

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the “Respondent”) is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of *res judicata*, collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section [_], if any amendment to the Act is enacted after the date of this Agreement, and such amendment would render any provision of this Section [_] unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section [_] shall be enforced to the fullest extent permitted by law.

(l) Any challenge to the final award of the Arbitrator shall be brought before the Supreme Court of the State of Delaware within the time frame provided in the DRAA, and pursuant to the Rules of such Court.¹⁸⁷ *[NOTE: The following is an alternative appellate provision in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire a limited scope of appeal in accordance with the FAA.]* Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].¹⁸⁸ The appellate panel may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.¹⁸⁹ *[NOTE: The following is an alternative appellate provision for use in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire that the scope of their appeal be as broad as possible.]* Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].¹⁹⁰ The scope of the appeal shall not be limited to the scope of a challenge under the Federal Arbitration Act, but instead shall be the same as any appeal from a judgment in a civil action filed in court.

a “loser pays” provision or an “arbitrator chooses” provision, which is not prohibited by the DRAA.

187 The DRAA permits the parties to waive appellate review, to proceed with a limited review in the Delaware Supreme Court, or to proceed with a private appellate arbitral review. This provision contemplates a review in the Delaware Supreme Court. In the event it is used, the parties should eliminate clause (iv) of subsection (g).

188 In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one or more senior Delaware lawyers.

189 This provision contemplates a scope of challenge to the Arbitrator’s final judgment limited to the grounds for review of an arbitral award under the Federal Arbitration Act. Parties who wish a broader scope of review may wish to consider the succeeding alternate provision set forth above.

190 In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one or more senior Delaware lawyers.

FORM AGREEMENT III ("Discovery Lite")

NOTE: The following is a draft provision to be used as a starting point for triggering arbitration under the DRAA. The clause omits discovery and limits appeal to a public appeal before the Delaware Supreme Court. This type of provision would likely be useful in resolving disputes where a technical issue, such as an earn-out, is to be resolved by an expert arbitrator. The Act would allow drafters to modify this form to, inter alia, expand discovery rights or change (or eliminate) appellate options.

Section [_]. Arbitration.

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a "Dispute") shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the "DRAA"). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the "Arbitration") in accordance with this Section [_], and each party represents and warrants that it is not a "consumer" as such term is defined in 6 *Del. C.* § 2731. By executing this Agreement, (i) each party hereby waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in subsections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section [_] and that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Model Rules for Arbitration under the DRAA, available at www.rlf.com/DRAA/ModelRules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Model Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Model Rules.¹⁹¹ To be effective, any departure from the Model Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.¹⁹²

¹⁹¹ The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this subsection (b).

¹⁹² The parties may elect to hold the arbitration in a different location. Note, however, that the "seat" of the arbitration is, by statute, in Delaware.

(d) The Arbitration shall be presided over by one arbitrator (the “Arbitrator”) who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person’s appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the “Replacement Arbitrator”). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.

(e) No discovery shall be taken in support of the Arbitration, although each side shall exchange such documents and other information as may be required by this Agreement. In addition, each side shall exchange such additional information as may be directed by the Arbitrator, either on his own motion or on application of any party for good cause shown.

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party. In no event, however, shall witnesses other than employees or experts retained or employed by the parties, or former employees of the parties, be called to testify at the arbitration.

(g) The arbitral award (the “Award”) shall (i) be rendered within 120 days after the Arbitrator’s acceptance of his or her appointment; (ii) be delivered in writing; (iii) be the sole and exclusive final and binding remedy with respect to the Dispute between and among the parties without the possibility of challenge or appeal, which are hereby waived; and (iv) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section [] shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief; provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.¹⁹³

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,¹⁹⁴ and all matters relating thereto

193 Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

194 This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; and (iv) other employees or agents of the parties with a need to know such information. In all events, the parties participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.¹⁹⁵

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the “Respondent”) is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of *res judicata*, collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section [_], if any amendment to the Act is enacted after the date of this Agreement, and such amendment would render any provision of this Section [_] unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section [_] shall be enforced to the fullest extent permitted by law.

195 The DRAA permits the parties to direct how costs of the Arbitration are to be borne. Thus, in the event that the parties wish to vary this provision, they should do so here. Such variations could include a “loser pays” provision or an “arbitrator chooses” provision, which is not prohibited by the DRAA.

FORM AGREEMENT IV
(“Party Discovery”)

Form of DRAA Arbitration Provision (Modest discovery)

NOTE: This form of provision contemplates that the parties will preserve their right to appeal to the Delaware Supreme Court and take limited discovery of each other, but not third parties. This clause might best be used where the parties are in an ongoing relationship, need prompt resolution of their dispute, but prefer to keep entirely private the fact of the dispute, even from third-party advisors, etc.

Section [_]. Arbitration.

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a “Dispute”) shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the “DRAA”). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the “Arbitration”) in accordance with this Section [_], and each party represents and warrants that it is not a “consumer” as such term is defined in 6 *Del. C.* § 2731. By executing this Agreement, (i) each party hereby waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in subsections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section [_] and that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Model Rules for Arbitration under the DRAA, available at www.rlf.com/DRAA/ModelRules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Model Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Model Rules.¹⁹⁶ To be effective, any departure from the Model Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.¹⁹⁷

¹⁹⁶ The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this subsection (b).

¹⁹⁷ The parties may elect to hold the arbitration in a different location. Note, however, that the “seat” of the arbitration is, by statute, in Delaware.

(d) The Arbitration shall be presided over by one arbitrator (the “Arbitrator”) who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person’s appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the “Replacement Arbitrator”). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents.

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.

(g) The arbitral award (the “Award”) shall (i) be rendered within 120 days after the Arbitrator’s acceptance of his or her appointment; (ii) be delivered in writing; (iii) state the reasons for the Award; and (iv) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section [_] shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief; provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.¹⁹⁸

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,¹⁹⁹ and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, including any discovery obtained pursuant thereto, and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and

198 Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

199 This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; and (iv) other employees or agents of the parties with a need to know such information. In all events, the parties participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the "Respondent") is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of *res judicata*, collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section [_], if any amendment to the Act is enacted after the date of this Agreement, and such amendment would render any provision of this Section [_] unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section [_] shall be enforced to the fullest extent permitted by law.

(l) Any challenge to the final award of the Arbitrator shall be brought before the Supreme Court of the State of Delaware within the time frame provided in the DRAA, and pursuant to the Rules of such Court.

FORM AGREEMENT V
(“Full Bore”)

NOTE: This clause has been customized to provide for the maximum permitted discovery, including third-party discovery, and a plenary (and private) appeal. It is best used in matters where the parties expect to need to develop a full record and prefer the need for a “litigation style” appeal.

Section [_]. Arbitration.

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a “Dispute”) shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the “DRAA”). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the “Arbitration”) in accordance with this Section [_], and each party represents and warrants that it is not a “consumer” as such term is defined in 6 *Del. C.* § 2731. By executing this Agreement, (i) each party hereby waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in subsections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section [_] and that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Model Rules for Arbitration under the DRAA, available at www.rlf.com/DRAA/ModelRules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Model Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Model Rules.²⁰⁰ To be effective, any departure from the Model Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.²⁰¹

²⁰⁰ The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this subsection (b).

²⁰¹ The parties may elect to hold the arbitration in a different location. Note, however, that the “seat” of the arbitration is, by statute, in Delaware.

(d) The Arbitration shall be presided over by one arbitrator (the “Arbitrator”) who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person’s appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the “Replacement Arbitrator”). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.²⁰²

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents. The Arbitrator shall have the power to issue subpoenas and commissions for the taking of documents and testimony from third parties.

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.

(g) The arbitral award (the “Award”) shall (i) be rendered within 9 months²⁰³ after the Arbitrator’s acceptance of his or her appointment; (ii) be delivered in writing; (iii) state the reasons for the Award; and (iv) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section [_] shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief; provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.

202 The parties may wish to proceed before a panel of arbitrators. In such event, this provision should be changed to reflect the desired number of arbitrators and to state their names or provide the descriptive qualifications.

203 The Act provides for disposition within 120 days, subject to no more than one agreed-to 60-day extension, unless otherwise provided in the agreement to arbitrate. We have chosen to so provide in light of the scope of the proceedings contemplated in this clause. Should the parties wish a more truncated time frame, then this phrase should be modified.

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,²⁰⁴ and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, any third-party discovery proceedings, including any discovery obtained pursuant thereto, and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; (iv) other employees or agents of the parties with a need to know such information; and (v) any third parties that are subpoenaed or otherwise provide discovery in the Arbitration proceedings, only to the extent necessary to obtain such discovery. In all events, the parties and any third parties participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the "Respondent") is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of *res judicata*, collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section [_], if any amendment to the Act is enacted after the date of this Agreement, and such amendment would render any provision of this Section [_] unenforceable

204 This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

thereunder, such provision shall be excluded and the remaining provisions of this Section [_] shall be enforced to the fullest extent permitted by law.

(l) Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators]. The scope of the appeal shall not be limited to the scope of a challenge under the Federal Arbitration Act, but instead shall be the same as any appeal from a judgment in a civil action filed in court.

Model Rules for Use in DRAA Arbitrations

The DRAA authorizes the Delaware Supreme Court, in consultation with the Court of Chancery, to publish rules for DRAA arbitrations.²⁰⁵ If the Delaware Supreme Court so specifies, the Model Rules will govern the arbitration in the absence of a contrary choice in the parties' agreement.²⁰⁶ A set of Model Rules, designed with the policy goals of the statute in mind, have been prepared and published for the optional use of parties and their counsel.²⁰⁷ The parties remain free to choose or create an alternative set of procedural rules, provided that the rules chosen are not inconsistent with the requirements of the DRAA.

An Overview of the Procedure Envisioned by the Model Rules

The Model Rules (the "Rules") contemplate a process similar in many respects to an expedited court proceeding. Unless the arbitration agreement provides otherwise, a party to a DRAA arbitration "is entitled to be heard, to present evidence relevant to the arbitration, and to cross-examine witnesses appearing at a hearing," subject to the arbitrator's authority to control the order of proof and to proceed to resolve an arbitration in the absence of a duly notified party.²⁰⁸

205 See 10 Del. C. § 5804(a).

206 *Id.*

207 See, e.g., www.rlf.com/DRAA/Model Rules.

208 10 Del. C. § 5807(a); see also Model Rule 8.

Promptly after accepting appointment, the arbitrator will hold a preliminary conference.²⁰⁹ The parties are expected to collaborate in preparing a scheduling order for entry by the arbitrator. The scheduling order sets the date, time and location for the final arbitration hearing and various interim deadlines.²¹⁰ The Rules provide for the parties to exchange pleadings setting forth each party's claims and the factual basis underlying them.²¹¹ The parties then engage in an exchange of information and have an opportunity to seek additional information from third parties.²¹² The exchange of information may take the form of document production, depositions or other forms familiar in the world of litigation.

The Rules do not permit dispositive motion practice unless the arbitrator approves a scheduling order allowing it.²¹³ Instead, the parties proceed directly to a final arbitration hearing, at which the parties have the opportunity to present evidence and cross-examine witnesses.²¹⁴ The arbitrator may allow or require pre-hearing or post-hearing briefing.²¹⁵ The arbitrator then makes a final award in writing.²¹⁶

Application of the Rules (Rules 1, 2, 3)

The DRAA contemplates that, by order, the Delaware Supreme Court may adopt rules that will apply in all DRAA arbitrations, unless the parties agree to different rules.²¹⁷ At the time that this handbook went to press, the Court had not yet adopted the Model Rules or other rules. Even if subsequently adopted as "official" rules, however, the Model Rules, included herein as Appendix I, specify that the parties may agree to adopt additional or different rules with the arbitrator's consent, provided that the amendments or additions may not be inconsistent with the DRAA.²¹⁸

Model Rule 2 provides that, unless the parties agree otherwise, the rules governing an arbitration will be those in effect at the time of the arbitrator's appointment. The arbitrator has the exclusive authority to resolve finally any question as to the rules governing the proceeding, or their interpretation or

209 See Model Rule 16.

210 See Model Rule 4.

211 See Model Rules 12, 14.

212 See Model Rules 17, 18.

213 See Model Rule 16.

214 See Model Rule 22.

215 See Model Rules 21, 23.

216 See Model Rule 24.

217 10 *Del. C.* § 5804(a); Model Rule 1.

218 See Model Rule 3.

application, including any question arising out of an amendment of the Model Rules,²¹⁹ or arising out of an agreement by the parties to alter or add to the Model Rules for purposes of a particular arbitration.²²⁰

Confidentiality (Rule 5)

DRAA arbitrations are designed to be private and confidential proceedings. Model Rule 5 extends confidentiality protection to memoranda and work product in the arbitrator's case files, and to communications made in or in connection with the arbitration that relate to the controversy being arbitrated. The latter protection extends both to statements made at conferences or hearings with the arbitrator and to communications with other parties in the arbitrator's absence. The arbitrator possesses authority under Model Rule 5 to issue orders to protect the confidentiality both of the proceedings and of the documents and other matters used in the arbitration.

Materials subject to the confidentiality obligations of Rule 5 are protected from disclosure in other judicial or administrative proceedings. But the rule does not protect from disclosure materials that were not prepared specifically for use in the arbitration and that are otherwise subject to disclosure. This exception is designed to bar the parties from invoking the arbitration's confidentiality protection to shield unrelated materials improperly from disclosure in other proceedings.

The parties may waive the confidentiality protections by unanimous written consent. They may also, with the arbitrator's consent, agree to confidentiality rules or protections that are tailored to the circumstances of the individual arbitration matter.

Rule 5 provides that materials submitted to the arbitrator, served on the parties, used at an arbitration hearing or conference, or referred to or relied upon in an arbitral award do not become part of the public record. But in the event of a challenge to the Delaware Supreme Court, the record submitted on the challenge may become part of the public record. Parties drafting an arbitration agreement that provides for a challenge to the Delaware Supreme Court should be careful to balance the need for an adequate record to support review for limited purposes with their confidentiality needs. Similarly, parties drafting an agreement that provides for arbitral appellate review should ensure that the appellate tribunal has access to a record adequate for its purpose.

219 See Model Rule 2.

220 See Model Rule 6.

The Arbitrator (Rules 6, 7, 10)

Like the DRAA itself, the Model Rules seek to eliminate the delay and expense of court proceedings over issues of arbitrability by committing all questions of substantive or procedural arbitrability exclusively and finally to the arbitrator.²²¹ The exclusive submission to the arbitrator of questions of arbitrability is statutory²²² and cannot be eliminated by agreement of the parties. The statute permits the parties to impose limits on the arbitrator's discretion to determine the scope of remedial authority, on the scope of review over the arbitrator's exercise of that discretion, and on the scope of the remedial authority itself.²²³

The Model Rules refer to the arbitrator any question of the interpretation or application of the rules governing the arbitration.²²⁴ The Rules also authorize the arbitrator to determine the scope of remedial authority and to grant any interim or final relief the arbitrator deems appropriate. The Model Rules oblige the arbitrator to issue the final award in writing and to sign it, but do not impose a similar obligation as to interim awards or orders.²²⁵

Because the DRAA contemplates that the parties may select an arbitrator who is not a lawyer or who lacks expertise in a legal discipline that is relevant to the matter in dispute (or that the Court of Chancery may select such an arbitrator if the arbitration agreement so provides), both the DRAA and the Model Rules permit the arbitrator to retain counsel.²²⁶ The arbitrator may ask the retained counsel to make rulings of law and to determine that counsel's rulings of law will have the same effect as a ruling of law by the arbitrator.²²⁷ The arbitrator also may retain counsel without asking that counsel to make legal rulings on the arbitrator's behalf; for example, the arbitrator may seek advice on a specialized issue or may retain litigation counsel to secure dismissal of an improperly brought effort to enjoin the arbitration. The fees and costs incurred by retained counsel are chargeable as part of the arbitrator's expenses in the final award.²²⁸

Model Rule 6 gives the arbitrator the power to administer oaths, to compel the attendance of witnesses and the production of documents and other evidence (except as limited by the arbitration agreement), and to make legal and factual

221 See Model Rule 6.

222 See 10 Del. C. § 5803(b)(2).

223 See 10 Del. C. § 5803(b)(5).

224 See Model Rule 6.

225 See Model Rule 24.

226 See 10 Del. C. § 5806(c); Model Rule 25.

227 See 10 Del. C. § 5806(c).

228 See 10 Del. C. § 5806(c).

rulings and issue such orders and sanctions as the arbitrator may deem proper to resolve the arbitration in a timely, efficient and orderly manner. Notably, however, the arbitrator cannot issue subpoenas or award commissions to permit depositions to be taken of witnesses who cannot be subpoenaed, unless the arbitration agreement so provides.²²⁹ Parties who wish to empower the arbitrator to oversee a discovery process that involves third-party discovery should consider granting the arbitrator such authority, and likely should also consider carefully whether the default 120-day deadline for delivery of the final award makes sense for such a dispute.

Rule 7 immunizes the arbitrator from being compelled to testify in other proceedings on matters relating to service as an arbitrator. Unless the parties agree under Rule 5 to waive confidentiality, or agree with the arbitrator's consent to a more limited scope of confidentiality, the arbitrator ordinarily will be unable to provide testimony about the arbitration in other proceedings.

Rule 7 also precludes civil suit against the arbitrator for acts or omissions in connection with the arbitration, subject to exceptions for acts or omissions "in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another." This immunity, which is provided by statute²³⁰ and cannot be waived by the parties' agreement, is similar to that afforded arbitrators in other arbitral regimes.

Finally, Rule 10 discourages *ex parte* communications with the arbitrator concerning the arbitration. The rule recognizes that exigent circumstances may make *ex parte* communication necessary, but requires the party to the communication to make prompt disclosure of the communication to all other parties to the arbitration.

The Parties' Rights to Representation and to Attend Hearings (Rule 8)

As in civil litigation, parties to a DRAA arbitration have a right to be represented by counsel. Parties are required under Rule 8 to give prompt notice of any change of counsel and are not entitled to delay the arbitration as a result of a change of counsel.

Rule 8 also obliges each party to send at least one representative with authority to resolve the matter to the final arbitration hearing, but a party's failure

²²⁹ See Model Rule 6.

²³⁰ See 10 Del. C. § 5806(a).

to comply with this obligation will not delay the arbitration or divest the arbitrator of authority to proceed.

Service of Papers (Rule 13)

Rule 13 contemplates that the arbitrator's scheduling order will specify the manner in which arbitration papers may be served on the arbitrator and the parties or their counsel. The pleadings, any request for pre-hearing exchange of information, any orders of the arbitrator, and any written communication delivered to the arbitrator must be served on all parties to the arbitration. This requirement expands slightly on the normal rule in American litigation, that requests for discovery should be served on the parties but not filed with the tribunal, because the arbitrator will ordinarily be expected to take a more active role in supervising the discovery process than a judge in a non-expedited case might. The arbitrator is required to maintain a record of all pleadings and other papers delivered, but that case file is subject to the confidentiality restrictions of Rule 5.

Appointment and Replacement of the Arbitrator (Rules 9, 11)

The DRAA empowers the Court of Chancery to appoint one or more arbitrators.²³¹ But if the parties are able to agree on an arbitrator or panel of arbitrators (as the arbitration agreement may provide) and the chosen arbitrator or panel is willing to serve, the Court's involvement is not necessary. As discussed in Chapter 5, the parties may, but are not required to, seek by petition (if no litigation is pending) or application (if a case between the parties is already pending before the Court) an order appointing the arbitrator.

The arbitration is commenced, and the deadlines for resolving the matter begin to run, when the arbitrator gives notice of acceptance of appointment.²³² If the arbitrator is appointed by order of the Court of Chancery, then the arbitrator is required to file a notice of acceptance of appointment with the Court and serve it on the parties. If the parties choose an arbitrator without the Court's involvement, then the arbitrator need not file anything with the Court, but must serve the notice of acceptance on the parties. If more than one arbitrator is appointed, then the time periods begin to run upon service of the last arbitrator's notice of acceptance of service.²³³

²³¹ See 10 *Del. C.* § 5805.

²³² See 10 *Del. C.* § 5808(b); Model Rule 9.

²³³ See Model Rule 9.

The Model Rules also contain a provision for replacement of an arbitrator if the arbitrator is unable to continue.²³⁴

Pleadings (Rules 12, 14, 15)

The Model Rules contemplate that the issues for the arbitration will be framed by pleadings, including a complaint, an answer (which may assert affirmative defenses and/or counterclaims) and a reply to any counterclaims.²³⁵ The pleadings are required to give the other parties reasonable notice of the nature of the pleading party's position and the factual basis for the position. The arbitrator has discretion to decline to consider a claim as to which reasonable notice has not been given in the pleadings.²³⁶ The authority granted to the arbitrator implicitly includes the authority to require a party to supplement its pleadings so as to give reasonable notice or to impose sanctions (potentially including judgment for the opposing party) for a failure to give reasonable notice. However, the Model Rules do not permit the parties to engage in motion practice testing the sufficiency of the pleadings without permission from the arbitrator.²³⁷

The complaint is due two business days after the arbitrator accepts appointment, and it should include copies of any litigation pleadings if the matter in dispute is already the subject of litigation. The answer is due five business days after service of the complaint, and any reply is due three business days after service of the answer; the arbitrator may alter these periods.²³⁸

In view of the compact timeline for a DRAA arbitration, the Model Rules limit the parties' ability to amend their pleadings. Any amendment to the pleadings requires the arbitrator's consent.²³⁹ The parties cannot stipulate to allow an amendment without the arbitrator's consent, nor does a party have a right under the Model Rules (as it might in the civil litigation system) to amend before a responsive pleading is served. The Model Rules contemplate that, where a monetary award is sought and the parties do not agree otherwise, the arbitrator will include a date in the scheduling order by which a party may amend its pleading solely by increasing or decreasing the amount of the monetary award sought.²⁴⁰ The arbitrator may include a cut-off date by

234 See Model Rule 11.

235 See Model Rule 12.

236 See Model Rule 14.

237 See Model Rule 16.

238 See Model Rule 12.

239 See Model Rule 15.

240 See Model Rule 15.

which a party may amend its pleading in other respects, but this is left to the arbitrator's discretion.

In keeping with the statutory goal of ensuring prompt and efficient adjudication, the Model Rules do not permit an amendment to the pleadings or a party's failure to serve a timely answer or reply to operate to delay the arbitration.²⁴¹ The arbitrator has discretion to deal with scheduling issues arising from granting a party's request for leave to amend its pleadings, but neither the arbitrator nor the parties can use an amendment as an occasion to extend the statutory deadlines for delivery of the final award.

Order of Proceedings (Rule 16)

A DRAA arbitration normally will proceed through stages similar to those of an expedited trial in the civil court system, subject to the parties' agreement or the arbitrator's decision to alter the procedure. Under Model Rule 16, the arbitrator will convene a preliminary conference as soon as practicable after serving the notice of acceptance of appointment. The preliminary conference is a telephone conference among the arbitrator and the parties, designed to obtain conflict statements from the parties, discuss scheduling matters, and consider whether mediation or some other alternative dispute resolution procedure may be appropriate.²⁴² The preliminary conference ordinarily should take place within 10 calendar days of the arbitrator's acceptance of appointment.²⁴³

As soon as possible after the preliminary conference, the arbitrator should enter a scheduling order.²⁴⁴ Similar to a scheduling order in the civil litigation system, the scheduling order should describe the discovery in which the parties are authorized to engage, the cut-offs for completing fact and expert discovery (if any) and for amending the pleadings, and the deadlines for any written submissions to the arbitrator. The scheduling order should also set a date, time and location for the arbitration hearing, which is the final hearing on the merits. Under Model Rule 4, the arbitration hearing generally should be scheduled no more than 90 days after the arbitrator serves the notice of acceptance of appointment, unless the parties and the arbitrator agree otherwise. The arbitrator has discretion to amend the scheduling order, including discretion to reschedule the arbitration hearing, but cannot by doing so alter the statutory deadlines for delivery of the final award in the statute.

241 See Model Rules 12, 15.

242 See Model Rule 4.

243 See Model Rule 16.

244 See Model Rule 4.

The arbitrator may also convene one or more telephonic preliminary hearings on reasonable notice. The Model Rules do not limit the subjects that the arbitrator and the parties may consider at a preliminary hearing.²⁴⁵ The Model Rules suggest a variety of potential topics, such as framing of the issues through the pleadings and stipulations of fact, the scope and methods of discovery, identification of witnesses for the arbitration hearing, the use of deposition testimony or affidavits in lieu of live witness testimony, and administrative matters relating to the efficient conduct of the arbitration hearing.

Because the arbitration hearing ordinarily will be held within 90 days of the arbitrator's appointment, the Model Rules do not allow the parties to engage in dispositive motion practice, such as motions to dismiss or motions for summary judgment, without the arbitrator's permission.²⁴⁶

The Pre-Hearing Exchange of Information (Rules 17, 18)

The parties will engage in "an exchange of information necessary and appropriate for the parties to prepare for the arbitration hearing and to enable the Arbitrator to understand the dispute, unless the parties agree, with the consent of the Arbitrator, to forego pre-hearing exchange of information."²⁴⁷ Materials exchanged are subject to express confidentiality restrictions. The parties' obligation to make information available for exchange, to the extent agreed by the parties or ordered by the arbitrator, extends to information in the possession of their employees, agents and retained professionals.²⁴⁸ Parties also are expected to make their employees, agents and retained professionals available for deposition without the need for compulsory process, to the extent the scope of information exchange includes depositions.²⁴⁹

The parties and their counsel are expected to attempt in good faith to agree on the scope of the pre-hearing exchange of information, a vital necessity given that a DRAA arbitration conducted under the Model Rules will ordinarily go from appointment of the arbitrator to final hearing on the merits within three months. Unless the parties agree in advance to a substantial extension of the deadline for the final award, full American-style discovery will likely not be practicable.

The DRAA permits third-party discovery, subject to limitations agreed to by the parties or ordered by the arbitrator, but parties framing an agreement to

245 See Model Rule 4.

246 See Model Rule 16.

247 See Model Rule 17.

248 See Model Rule 18.

249 See *id.*

arbitrate should consider carefully the practicalities of potential third-party discovery. On the default schedule calling for a final hearing on the merits within three months and a final award within four, obtaining meaningful third-party discovery, especially from non-cooperative third parties, is likely to be difficult. The DRAA empowers the arbitrator to issue subpoenas or commissions to permit depositions to be taken only if the parties' arbitration agreement so provides.²⁵⁰

Model Rule 17 directs the arbitrator to resolve disputes over the scope of discovery under a "necessary and appropriate" standard, "taking into account the importance of the information to the arbitration, the burden of producing the information and such other factors as the Arbitrator deems relevant." The rule expressly provides that the scope of information exchanged "should ordinarily be substantially less broad than the scope of information that might be subject to discovery in civil litigation."

The arbitrator possesses broad powers to enforce the parties' discovery obligations, including the power to make legal or factual rulings and to impose sanctions for violations of discovery orders.²⁵¹ These powers include the power to compel (as against the parties) the attendance of witnesses and the production of evidence, unless otherwise agreed.²⁵² It may be expected that material breaches of discovery orders may lead to substantial prejudice to an opposing party preparing for a final hearing within three months, and that the arbitrator's remedial discretion will be exercised accordingly.

Dismissal and Settlement (Rules 20, 26)

The Model Rules permit a claimant to withdraw its claims unilaterally before the arbitrator serves notice of acceptance of appointment.²⁵³ Once the arbitrator has accepted appointment, however, a party cannot withdraw from the arbitration without the written agreement of all parties. A party may unilaterally withdraw a claim or counterclaim without prejudice upon written notice to the arbitrator and all parties, but the other parties may apply to the arbitrator within seven calendar days for an order determining that the dismissal of the claim or counterclaim will be with prejudice. The arbitrator will determine such a request finally and exclusively, after allowing the parties an opportunity to be heard on the request.²⁵⁴

250 10 *Del. C.* § 5807(b); *see also* Model Rule 18.

251 *See* Model Rule 17.

252 *See* Model Rule 18; 10 *Del. C.* § 5807(b).

253 *See* Model Rule 20.

254 *See* Model Rule 20.

The Model Rules expressly contemplate that the arbitrator may consider with the parties whether mediation or other efforts to settle may be productive.²⁵⁵ The arbitrator also is required to apply the law of privilege as to communications or statements made in connections with efforts to reach a settlement.²⁵⁶

If the parties succeed in reaching a settlement, they may, but are not required to, ask the arbitrator to set forth the terms of the settlement in a consent award.²⁵⁷ Unless the arbitrator determines, after allowing the parties to be heard on the issue, that the proposed settlement is “unlawful or undermine[s] the integrity of the arbitration,” the arbitrator is required to issue the consent award requested by the parties.²⁵⁸ A consent award is required to contain an allocation of fees and costs, as a final award would.

The Arbitration Hearing (Rules 19, 21, 22, 23)

Unless the parties agree to a different procedure, the arbitration hearing is conducted comparably to a trial in the civil courts, with each party having the opportunity to present relevant evidence and to cross-examine witnesses appearing at the hearing, subject to the arbitrator’s control over the order of proof.²⁵⁹ The parties are entitled to notice of the date, time and place of the arbitration hearing and to appear and be represented by counsel.²⁶⁰ The arbitrator may require witnesses to testify under oath.²⁶¹ But the arbitrator is not obliged to apply the formal rules of evidence strictly, other than those relating to privileges and immunities and to the inadmissibility of settlement communications.

The Model Rules contemplate that the arbitration hearing ordinarily will be limited to a single day. However, the parties’ agreement to arbitrate may specify a longer or shorter period, and the arbitrator may, in consultation with the parties, decide on a different period.²⁶²

The arbitration agreement may specify the location of the arbitration hearing, and the location need not be in the State of Delaware or in the United States of America.²⁶³ If the arbitration agreement does not specify a location, the arbitrator may select the location. Model Rule 22 contemplates the possibility of an

255 See Model Rule 4.

256 See Model Rule 22.

257 Model Rule 26.

258 See *id.*

259 See 10 *Del. C.* § 5807(a); Model Rule 22.

260 See Model Rules 8, 22.

261 See Model Rule 22.

262 See Model Rule 22.

263 See 10 *Del. C.* § 5807(a).

arbitration hearing conducted by telephone or other electronic means, if the arbitration agreement so provides or the parties so agree. Regardless of where the arbitration hearing is held, the seat of the arbitration is the State of Delaware.²⁶⁴

An arbitrator under the Model Rules has the authority to direct preparation of a stenographic or other record of the arbitration hearing, unless the parties' agreement to arbitrate otherwise provides or the parties otherwise agree.²⁶⁵ If a record is prepared, it is to be made available for the use of the arbitrator and the parties.²⁶⁶ Unless the arbitration agreement otherwise provides, the final award should provide for the allocation of the cost of preparing the record.²⁶⁷

Before the arbitration hearing, the parties are required to identify the fact and expert witnesses they intend to call at the hearing and to describe each witness's expected testimony and the expected duration of the testimony. The parties are also required to disclose the exhibits they expect to use at the arbitration hearing, pre-marking them for ease of reference if possible.²⁶⁸ The scheduling order should include deadlines for witness and exhibit disclosures.

The arbitrator may permit or require the parties to submit pre-hearing briefs.²⁶⁹ If pre-hearing briefing is to take place, the scheduling order should give deadlines and provide for the format and maximum length of the briefs. The scheduling order also should state how many pre-hearing briefs each party will submit and whether the briefs will be submitted sequentially or in parallel.

Similar to the provisions for pre-hearing briefing, the arbitrator may allow or require the submission of post-hearing briefing.²⁷⁰ The scheduling order should specify the number, sequence, due dates, format and permissible length of post-hearing briefs.

The Final Award, Fees and Costs (Rules 24, 25)

The Model Rules require the arbitrator to issue a final award in writing and to sign the final award, but they do not expressly require the award to be a reasoned award.²⁷¹ The parties are free to agree in their arbitration agreement that the arbitrator should make a reasoned award, and they should consider doing so if

264 10 *Del. C.* §§ 5803(b)(3), 5807(a); Model Rule 22.

265 *See* Model Rule 22.

266 *See id.*

267 *See* Model Rule 25.

268 *See* Model Rule 19.

269 *See* Model Rule 21.

270 *See* Model Rule 23.

271 *See* Model Rule 24.

they wish to preserve the optionality of a challenge to the Delaware Supreme Court or an arbitral appeal.

The Model Rules permit the arbitrator to award any form of legal or equitable relief the arbitrator deems appropriate, and to include rulings on any issue of law the arbitrator deems relevant, unless the arbitration agreement provides otherwise.²⁷² The arbitrator may retain appropriate counsel (in consultation with the parties) and may direct that counsel to make rulings on issues of law.²⁷³

The final award should contain an allocation of payment of the fees and costs of the arbitration, including the arbitrator's fees and costs, the fees and costs of any counsel retained by the arbitrator, and the cost of preparing a record (if any).²⁷⁴ The Model Rules do not require the arbitrator to allocate the counsel fees of the parties. That is, the Model Rules contemplate that each party will bear its own counsel fees, but the arbitrator retains discretion to shift counsel fees on appropriate grounds (which might include a fee-shifting provision in the arbitration agreement or the substantive law governing the dispute, or any of the recognized exceptions to the American Rule requiring each party to bear its own counsel fees).²⁷⁵

The Model Rules do not provide an opportunity for the arbitrator to correct a final award once issued, as some arbitral regimes do. Instead, the Model Rules and the DRAA contemplate that any correction will be made through the challenge process or through an arbitral appeal. Especially in cases where the parties have agreed to waive appeal, the parties and the arbitrator should consider building time into the scheduling order for the arbitrator to issue a draft award and for the parties to apply to the arbitrator for corrections before that award becomes final.

272 See Model Rule 24.

273 See Model Rule 25; 10 *Del. C.* § 5806(c).

274 See Model Rule 25.

275 See *id.*

APPENDIX I: MODEL ARBITRATION RULES

Rule 1: Applicability of the Rules

These Rules shall govern the procedure in arbitrations under the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.*, the “Act”, but always subject to the provisions of the Act. The promulgation of these Rules shall not impair the ability of entities to use arbitral procedures of their own choosing other than the Act.

Rule 2: Amendments to the Rules

These Rules may be amended at any time. Unless otherwise agreed between the parties, the Rules in effect at the time of appointment of the Arbitrator shall govern in any Arbitration. Any question as to the Rules applicable to an Arbitration arising out of any amendment to these Rules shall be resolved by the Arbitrator.

Rule 3: Alteration of Rules by Agreement of the Parties and Consent of the Arbitrator

The parties to an Arbitration may agree, with the consent of the Arbitrator, to modify any of these Rules or to adopt additional rules governing the Arbitration, provided that no modification of or addition to these Rules may be inconsistent with any provision of the Act, including without limitation the location of the seat of the Arbitration in 10 *Del. C.* § 5807(a), the time periods set forth in 10 *Del. C.* §§ 5806(e), 5809(b), 5809(c) or 5810(b), and the reduction of the Arbitrator’s compensation in the event of an untimely award set forth in 10 *Del. C.* § 5806(b). By way of example and without limiting the scope of permissible amendments to these Rules, the parties may agree, with the consent of the Arbitrator, to proceed on a more accelerated schedule than these Rules contemplate and may agree to dispense with or limit any process for gathering evidence before the Arbitration Hearing. Any such modification of or addition to these Rules may appear in the Arbitration Agreement.

Rule 4: Definitions

As used in these Rules: “Arbitration Agreement” means an agreement described in 10 *Del. C.* § 5803(a).

“Arbitration” means the voluntary submission of a dispute to an Arbitrator for final and binding determination, and includes all contacts between the Arbitrator and any party.

“Arbitrator” means a person, persons or organization appointed under 10 *Del. C.* § 5805 or chosen by the parties to an Arbitration in conformity with the Arbitration Agreement, and who accepts appointment as provided in Rule 9. If an Arbitration proceeds before more than one Arbitrator, references in these Rules to the Arbitrator shall be deemed to be references to the Arbitrators, and (unless

otherwise provided in the Arbitration Agreement) references in these Rules to an act of the Arbitrator shall be references to an act of a majority of the Arbitrators.

“Preliminary Conference” means a telephonic conference with the parties and/or their attorneys or other representatives (i) to obtain additional information about the nature of the dispute, the anticipated length of the Arbitration Hearing and other scheduling issues, (ii) to obtain conflicts statements from the parties, and (iii) to consider with the parties whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

“Preliminary Hearing” means a telephonic conference with the parties and/or their attorneys or other representatives to consider, without limitation: (i) prompt exchange of pleadings and such other statements of each party’s claims, damages, defenses, issues asserted, legal authorities relied upon, and positions with respect to issues asserted by other parties, as the Arbitrator may direct, (ii) stipulations of fact, (iii) the scope of exchange of information before the Arbitration Hearing, (iv) exchanging and pre-marking of exhibits for the Arbitration Hearing, (v) the identification and availability of witnesses, including experts, and such matters with respect to witnesses, including their qualifications and expected testimony as may be appropriate, (vi) whether, and to what extent, any sworn statements and/or depositions may be introduced, (vii) the length of the Arbitration Hearing, (viii) whether a stenographic or other official record of the proceedings shall be maintained, (ix) the possibility of mediation or other non-adjudicative methods of dispute resolution, and (x) any procedure for the issuance of subpoenas.

“Scheduling Order” means the order of the Arbitrator (and any amendment thereto) setting forth the pre-hearing activities and the hearing procedures that will govern the Arbitration. The Scheduling Order shall also set forth the date, time and location for the Arbitration Hearing, which ordinarily should be no more than 90 days after the Arbitrator serves the notice of acceptance of appointment as Arbitrator. The Arbitrator should enter a Scheduling Order as promptly as possible following the Preliminary Conference. The Arbitrator may amend the Scheduling Order, including postponing or rescheduling the Arbitration Hearing, but no amendment to the Scheduling Order shall operate to alter the time periods set forth in 10 *Del. C.* § 5808(b) and (c).

“Arbitration Hearing” means the proceeding in which the claimant presents evidence to support its claims and the respondent presents evidence to support its defenses, and witnesses for each party submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure (so long as the parties are treated equitably and each party has a fair opportunity to be heard and to present its case).

Rule 5: Confidentiality of Arbitrations

Arbitrations under the Act are confidential proceedings. All memoranda and work product contained in the case files of an Arbitrator are confidential. Any

communication made in or in connection with the Arbitration that relates to the controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at a Preliminary Conference, Preliminary Hearing or Arbitration Hearing, is confidential. Such confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions: (1) where all parties to the Arbitration agree in writing to waive the confidentiality, or (2) where the confidential materials and communications consist of statements, memoranda, materials, and other tangible evidence that are otherwise subject to disclosure and were not prepared specifically for use in the Arbitration.

No document or other matter submitted to the Arbitrator, served upon the parties to an Arbitration, used in any hearing or conference with the Arbitrator, or referred to or relied upon in an arbitral award shall become part of a public record as a result of such submission, service, use, reference or reliance. However, in the event of the taking of a challenge to a final award to the Supreme Court of Delaware under 10 *Del. C.* § 5809, a document or other matter submitted to the Supreme Court of Delaware shall become part of the public record only to the extent required by the Rules of that Court or by order of that Court.

The Arbitrator shall have power to issue orders to protect the confidentiality of the proceedings and of any documents or other matter used in the Arbitration.

Rule 6: The Arbitrator's Authority

Upon acceptance of appointment as prescribed in Rule 9, the Arbitrator shall have power and authority (1) to resolve, finally and exclusively, any dispute of substantive or procedural arbitrability; (2) to resolve, finally and exclusively, any dispute as to the interpretation and application of these Rules (including any modifications of or additions to the Rules made in compliance with Rule 3); (3) to determine in the first instance the scope of the Arbitrator's remedial authority, subject to review solely under 10 *Del. C.* § 5809 (except as otherwise limited by the Arbitration Agreement); (4) to grant interim and/or final relief, including to award any legal or equitable remedy appropriate in the sole judgment of the Arbitrator; (5) to administer oaths as authorized by 10 *Del. C.* § 5807; (6) to compel the attendance of witnesses and the production of books, records, contracts, papers, accounts and all other documents and evidence (unless otherwise provided in the Arbitration Agreement); (7) to make such rulings, including such rulings of law, and to issue such orders or impose such sanctions as the Arbitrator deems proper to resolve an Arbitration in a timely, efficient and orderly manner.

In addition, if, but only if, the Arbitration Agreement so provides, the Arbitrator shall have power and authority to issue subpoenas and to award commissions to permit a deposition to be taken, in the manner and on the terms designated by the Arbitrator, of a witness who cannot be subpoenaed.

Rule 7: Immunity of the Arbitrator

An Arbitrator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as an Arbitrator. An Arbitrator shall be immune from civil liability for or resulting from any act or omission done or made in connection with the Arbitration, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.²⁷⁶

Rule 8: Representation; Parties' Right to Attend Arbitration Hearing

The parties are entitled to be represented at the Preliminary Conference, the Preliminary Hearing and the Arbitration Hearing by counsel of their choice. Counsel appearing in the Arbitration proceeding on behalf of a party shall promptly provide the Arbitrator and counsel for all other parties with their names, postal and email addresses, and telephone and fax numbers. A party electing to change counsel shall notify the Arbitrator and all other parties forthwith; a change of counsel by a party shall not operate to delay the Arbitration.

At least one representative of each party with an interest in the issue or issues to be arbitrated and with authority to resolve the matter must participate in the Arbitration Hearing, but a failure by any party to comply with this obligation shall not operate to delay the Arbitration nor to divest the Arbitrator of any authority, including without limitation the authority to proceed with the Arbitration Hearing in the absence of a party that has received notice of the date, time and location of the Arbitration Hearing, as provided in Rule 22.

Rule 9: Commencement of Arbitration

The parties to an Arbitration may choose an Arbitrator in conformity with the Arbitration Agreement, and if the Arbitrator so chosen by the parties agrees to serve as Arbitrator, then the Arbitration under the Act is commenced upon service by the Arbitrator upon all parties of a notice of acceptance of appointment as Arbitrator. If a petition or application for appointment of an Arbitrator is filed with the Court of Chancery (whether on a consensual basis or otherwise), then an Arbitration under the Act is commenced upon entry of an order by the Court of Chancery under 10 *Del. C.* § 5805(b) appointing an Arbitrator, and the Arbitrator shall file with the Court of Chancery and serve upon the parties a notice of acceptance of appointment as Arbitrator. The notice of acceptance shall set forth the Arbitrator's postal and electronic mail addresses and telephone number, and shall specify the form in which written submissions to the Arbitrator shall be made.

²⁷⁶ Note: Section 5806(a) of the Act provides an Arbitrator with immunity from suit. The Act does not, however, expressly shield the Arbitrator from discovery. Until the Delaware courts adopt these, or similar, rules providing such a testimonial privilege, the parties' use of these rules will not be effective to confer that privilege. This provision is nevertheless included to bar the parties from attempting to take testimony from the Arbitrator. Further, the parties may wish to consider allowing such testimony to be taken if the Arbitrator issues a late award and petitions the Court of Chancery to reverse the statutory reduction of the Arbitrator's fees.

Except as permitted by 10 *Del. C.* § 5805(b), the time period specified in 10 *Del. C.* § 5805(b) shall commence upon service of the notice of acceptance of appointment as Arbitrator (or, if more than one person is appointed as Arbitrator, upon service of the notice of acceptance of appointment by the last such person to effect service).

Rule 10: Communications with the Arbitrator

After the Arbitrator serves the notice of acceptance of appointment as Arbitrator, the parties should avoid *ex parte* communications with the Arbitrator concerning the Arbitration. Any *ex parte* communication with the Arbitrator made necessary by exigent circumstance shall be reported promptly to all other parties.

Rule 11: Replacement of the Arbitrator

The appointment of a new Arbitrator shall be as provided in the Arbitration Agreement; otherwise, the Court of Chancery may appoint a new Arbitrator in the event the Arbitrator becomes unable to continue as Arbitrator for any reason.

Rule 12: Pleadings

Not later than two business days after acceptance of appointment by the Arbitrator, the claimant shall serve upon all other parties a complaint giving notice of its claims and the remedies sought. If the dispute giving rise to the Arbitration is already the subject of litigation, then the complaint shall include copies of the pleadings in such litigation.

Within five business days after service of the complaint, or such other time as the Arbitrator may allow, each party against whom relief is sought shall, and any other party may, serve an answer setting forth its response to the claims and remedies sought in the complaint and any affirmative defenses (including jurisdictional challenges) or counterclaims it may wish to assert in the Arbitration. If the answer asserts counterclaims, a party against whom a counterclaim is asserted may serve a reply within three business days after service of the answer, or within such other time as the Arbitrator may allow.

The failure of a party to answer a complaint or reply to counterclaims shall not operate to delay the Arbitration.

Rule 13: Service of Arbitration Papers

The complaint shall be delivered to the Arbitrator in the manner specified in the notice of acceptance of appointment as Arbitrator. The complaint shall also be served upon the parties to the Arbitration in a manner calculated to provide them with actual notice and to provide the claimant with written proof of delivery of the complaint, or in such manner as the Arbitrator may direct.

The answer, any reply, any request for pre-hearing exchange of information, any order of the Arbitrator and any written communication delivered to the

Arbitrator shall be served upon all parties to the Arbitration. The Scheduling Order shall specify the manner in which service shall be made upon the parties or their representatives. If the Scheduling Order does not specify a manner of service, then service upon a party shall be effected by electronic mail to the party's counsel, or if the party is not represented by counsel, to the party or the party's designated representative.

A record of all pleadings and other papers delivered to the Arbitrator shall be maintained by the Arbitrator, but shall remain confidential except as otherwise provided by Rule 5.

Rule 14: Contents of Pleadings

Each party's pleadings shall afford all other parties reasonable notice of the pleading party's claims, affirmative defenses and counterclaims, including the factual basis for such claims, defenses and counterclaims. The Arbitrator may decline to consider a claim, affirmative defense or counterclaim of which the other parties have not been given reasonable notice.

Rule 15: Amendments to Pleadings

Except as provided in this Rule, a party may amend its pleadings only with the Arbitrator's consent. Unless otherwise agreed by the parties, in cases in which any party seeks a monetary award, the Scheduling Order shall include a cut-off date by which a party may increase or decrease the amount of monetary award sought. The Arbitrator may include in the Scheduling Order a cut-off date by which a party may amend its pleading in other respects. An amendment to the pleadings shall not operate to delay the Arbitration Hearing or alter the time periods set forth in 10 *Del. C.* §5808(b) and (c).

Rule 16: Order of Proceedings

As soon as practicable after the Arbitrator serves the notice of acceptance of appointment, the Arbitrator shall set a date and time for the Preliminary Conference and shall notify all parties of that date and time. The Preliminary Conference ordinarily should take place within 10 calendar days of the service of the notice of acceptance of appointment by the Arbitrator.

The Arbitrator may also schedule one or more Preliminary Hearings, in consultation with the parties and upon reasonable notice to the parties.

The parties shall not engage in dispositive motion practice unless the Scheduling Order so provides.

Rule 17: Exchange of Information Before the Arbitration Hearing

There shall be an exchange of information necessary and appropriate for the parties to prepare for the Arbitration Hearing and to enable the Arbitrator to understand the dispute, unless the parties agree, with the consent of the Arbitrator, to forgo prehearing exchange of information.

The parties shall, in the first instance, attempt in good faith to agree on pre-hearing exchange of information, which may include depositions, and shall present any agreement to the Arbitrator for approval at the Preliminary Conference or as soon thereafter as possible. The Arbitrator may require additional exchange of information between and among the parties, or additional submission of information to the Arbitrator. If the parties are unable to agree on any matter relating to the exchange of information, they shall present the dispute to the Arbitrator promptly, and the Arbitrator shall direct such exchange of information as the Arbitrator deems necessary and appropriate, taking into account the importance of the information to the Arbitration, the burden of producing the information, and such other factors as the Arbitrator deems relevant. The scope of information subject to exchange should ordinarily be substantially less broad than the scope of information that might be subject to discovery in civil litigation.

Unless otherwise agreed by the parties, information exchanged between the parties shall be used exclusively for purposes of the Arbitration, shall be maintained on a confidential basis by the other parties, and shall be returned or destroyed upon conclusion of the Arbitration, except in the event of a challenge to a final award under 10 *Del. C.* § 5809 or an appeal under such arbitral appeal procedures as the Arbitration Agreement may prescribe.

The Arbitrator may make such rulings, including rulings of law, and issue such orders or impose such sanctions for violations of discovery orders as the Arbitrator deems proper to resolve the Arbitration in a timely, efficient and orderly manner.

Rule 18: Obtaining Information from Third Parties

The parties generally are expected to cause non-privileged information in the possession, custody or control of their employees, agents and retained professionals to be produced, to the extent such information is subject to exchange under Rule 17. The parties are also expected to produce their employees, agents and retained professionals for deposition, to the extent the Arbitrator determines that the prehearing exchange of information should include depositions of such persons.

Unless otherwise provided in the Arbitration Agreement, the Arbitrator may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts and all other documents and evidence. If, but only if, the Arbitration Agreement so provides, the Arbitrator may issue subpoenas or commissions to permit depositions to be taken, and in such case the Arbitrator may specify the manner in which and the terms on which such depositions shall be taken. In addition, the parties may seek information from third parties by means of subpoena or otherwise, and the Arbitrator may issue such orders in aid of such requests for information as the Arbitrator may deem appropriate for the timely, efficient and orderly resolution of the Arbitration.

Rule 19: Pre-Hearing Disclosures

Before the Arbitration Hearing, at the time specified in the Scheduling Order, each party shall disclose to the Arbitrator and to all other parties the following information: (1) the identity of all fact and expert witnesses the party intends to call at the Arbitration Hearing; (2) a brief description of the expected testimony of each such witness and an estimate of the duration of the witness's testimony upon direct examination; and (3) a list of all exhibits expected to be used at the Arbitration Hearing. Exhibits should be pre-marked to the extent possible.

Rule 20: Dismissals

The claimant may withdraw its claims before the Arbitrator has served the notice of acceptance of appointment. After the Arbitrator has served the notice of acceptance of appointment, no party may withdraw from the Arbitration without the written agreement of all parties to the Arbitration. A party may unilaterally withdraw a claim or counterclaim without prejudice upon written notice to the Arbitrator and to all parties, provided that another party may, within seven calendar days of service of such notice, request that the Arbitrator order the withdrawal to be with prejudice. After affording the parties the opportunity to be heard on such a request, the Arbitrator shall determine the request finally and exclusively.

Rule 21: Pre-Hearing Submissions

The Arbitrator may allow or require the parties to submit brief summaries of the factual and legal basis for their claims, defenses and counterclaims. The Scheduling Order shall specify the number, sequence, due dates, format and maximum length of any such submissions.

Rule 22: The Arbitration Hearing

The Arbitration Hearing will be limited to one day unless the Arbitration Agreement specifies a different period or the Arbitrator determines that a different period is appropriate in consultation with the parties. The Arbitration Hearing ordinarily shall be conducted in person at a location specified in the Arbitration Agreement or (if the Arbitration Agreement does not specify a location) selected by the Arbitrator. The location of the Arbitration Hearing may be at any place, within or without the State of Delaware and within or without the United States of America. The Arbitration Hearing may be conducted by telephone or by other means of remote electronic communication, in whole or in part, if the Arbitration Agreement so specifies or if the Arbitrator, in consultation with the parties, so determines. Regardless of whether the Arbitration Hearing is conducted within or without the State of Delaware, by telephone or by other means of remote electronic communication, the seat of the Arbitration is the State of Delaware.

The Arbitrator shall give notice of the date, time and location of the Arbitration Hearing to all parties, and may proceed with the Arbitration Hearing and resolve the Arbitration on the evidence produced at the Arbitration Hearing in the absence of one or more parties if such parties have received notice.

The Arbitrator shall control the order of proof and shall allow all parties an opportunity to be heard, to present evidence relevant to the arbitration, and to cross-examine witnesses appearing at the Arbitration Hearing. Unless the Arbitration Agreement otherwise provides, the Arbitrator shall not be obliged to apply the rules of evidence strictly, except that the Arbitrator shall apply applicable law relating to privileges and immunities and to communications or statements made in connection with efforts to settle the dispute.

Witnesses may be required to testify under oath or affirmation in the Arbitrator's discretion. The Arbitrator may consider statements made outside the Arbitration Hearing (whether sworn or unsworn, and whether presented by deposition, affidavit or other means), but shall afford such statements appropriate weight based on the circumstances of such statements.

Unless the Arbitration Agreement otherwise provides or the parties otherwise agree, the Arbitrator may direct that a stenographic or other record of the Arbitration Hearing be prepared and made available for the use of the Arbitrator and the parties.

Rule 23: Post-Hearing Submissions

The Arbitrator may allow or require the parties to submit brief summaries of the evidence presented at the Arbitration Hearing and the application of legal principles to the facts established thereby. The Scheduling Order shall specify the number, sequence, due dates, format and maximum length of any such submissions.

Rule 24: The Final Award

A final award shall be in writing, shall be signed by the Arbitrator, shall be served on each party to the Arbitration, and shall include or be accompanied by a form of judgment for entry under 10 *Del. C.* § 5810. Unless otherwise provided in the Arbitration Agreement, the final award may take any form, whether legal or equitable in nature, deemed appropriate by the Arbitrator. Unless otherwise provided in the Arbitration Agreement, the final award may include rulings by the Arbitrator on any issue of law that the Arbitrator considers relevant to the Arbitration.

The Arbitrator shall issue the final award within the time fixed by the Arbitration Agreement, or, if not so fixed, within the time specified by 10 *Del. C.* § 5808.

Rule 25: Fees and Costs

An Arbitrator qualified under 10 *Del. C.* § 5801(3)(a) or (b) may in consultation with the parties retain appropriate counsel to make rulings on issues of law, to the extent requested by the Arbitrator. The fees and costs incurred by the Arbitrator's counsel shall be included as part of the Arbitrator's expenses.

The final award shall provide for the allocation of payment of fees and costs, subject to the reductions for an untimely award provided by 10 *Del. C.* § 5806(b). Unless otherwise provided in the Arbitration Agreement, those fees and costs

shall include the Arbitrator's fees and expenses, the costs of preparing a record of the Arbitration Hearing (if any), the fees and costs incurred by counsel retained by the Arbitrator under 10 *Del. C.* § 5806(c), and any other expenses incurred in the conduct of the Arbitration, but not including the counsel fees of the parties to the Arbitration.

Rule 26: Consent Award Upon Settlement

If the parties reach agreement on a settlement of the issues in dispute and ask the Arbitrator to set forth the terms of the settlement in a consent award, the Arbitrator may make such an award, and shall do so unless the Arbitrator concludes, after consultation with the parties, that the terms of the proposed settlement are unlawful or undermine the integrity of the Arbitration. A consent award shall include an allocation of the fees and costs specified in Rule 25.

Rule 27: Enforcement of the Final Award

Proceedings to enforce, confirm, modify or vacate a final award will be controlled by the Delaware Rapid Arbitration Act.

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About Richards, Layton & Finger

Richards, Layton & Finger, Delaware's largest law firm, has been committed from its founding to helping sophisticated clients navigate complex issues and the intricacies of Delaware law. Our lawyers have long played crucial roles in drafting and amending Delaware's influential business statutes, and we have worked on many of the groundbreaking cases defining Delaware corporate law. Our commitment to excellence and innovation spans decades and remains central to our reputation for delivering extraordinary service to our clients.

