INSIGHTS

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Introducing Delaware's Rapid Arbitration Act

The newly enacted Delaware Rapid Arbitration Act provides an expedient and efficient method of resolving disputes. It is worthy of consideration in any commercial arrangement.

By Blake Rohrbacher

On April 2, 2015, Governor Jack Markell signed into law the Delaware Rapid Arbitration Act (DRAA or Act), which makes Delaware, in all likelihood, "the most arbitration-friendly jurisdiction in the nation."[1] The DRAA is designed to provide Delaware business entities with an expedient and efficient method of resolving disputes. It does so by streamlining arbitral procedures at the beginning, middle, and end of the process: for example, pre-arbitration litigation is largely eliminated, arbitrators are strongly incentivized to issue final awards on time, and confirmation is automated. Meanwhile, the Act provides parties with significant flexibility to design their own optimal dispute-resolution structure. This article explores the genesis of the Act and the features of the Act that make it unique and worthwhile of consideration in any commercial arrangement. It also provides key drafting points for practitioners to consider.

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Genesis of the Act

The DRAA originated in a prior attempt by Delaware's General Assembly to provide a powerful method of alternative dispute resolution for its corporate citizens. In 2009, Delaware adopted a new arbitration statute providing its Court of Chancery with the power to arbitrate business disputes confidentially in front of sitting members of the Court.[2] The new statute was an immediate success, and a number of Chancery arbitrations were completed in the first year of its operation. Ultimately, the statute was held unconstitutional, by a divided panel of the U.S. Court of Appeals for the Third Circuit, because it authorized public judges to preside over confidential private arbitrations.[3]

But Delaware did not give up on arbitration. A working group, led by Chief Justice Leo E. Strine, Jr., Chancellor Andre G. Bouchard, and Secretary of State Jeffrey W. Bullock, began studying the perceived problems with current arbitration systems. After an extensive consultation process, involving meetings with national and international arbitration practitioners and experts, a few themes began to emerge: arbitrations were often slow and

unwieldy (often no better than litigation), and parties had too many opportunities to derail arbitrations for strategic gain. The DRAA was designed to address these concerns.

Who May Use the DRAA

The first requirement for persons seeking to use the Act is a written agreement to submit a dispute to arbitration.[4] That agreement must include an "express reference" to the Act.[5]

The arbitration agreement must be governed by Delaware law.[6] Nevertheless, the parties' other rights and obligations may be governed by another jurisdiction's laws.[7] For example, a comprehensive joint-venture agreement governing an entity in Brazil might provide for certain business aspects of a joint venture to be governed by local law and enforceable in Brazil, while the governance provisions are subject to rapid arbitration and governed by Delaware law.

The arbitration agreement must be "signed by the parties" to the arbitration.[8] This requirement ensures that no person can be forced to arbitrate under the Act without their consent. It also ensures that, for example, corporations may not subject stockholders to the DRAA simply by adopting arbitration-only charter provisions or bylaws; the stockholders would have to sign a stockholders' agreement or similar document invoking the Act.

The Act is limited to certain types of parties as well. At least one party to the arbitration agreement must be a Delaware business entity—defined broadly to include nearly any type of corporation or unincorporated entity, such as a statutory trust, limited liability company, or limited partnership.[9] So long as the business entity is organized or formed under Delaware law or has its principal place of business in Delaware, it will qualify under the Act.[10] The Act is generally intended for sophisticated parties, and its invocation in contracts of adhesion is disfavored. Therefore, the DRAA prohibits its use against "consumer" parties.[11]

Given the above requirements, one practitioner handbook provides the following clause as the "bare minimum" necessary for an arbitration agreement subject to the Act:

> 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.[12]

So long as one of the parties to the agreement is a Delaware corporation or other business entity, and none is a "consumer" under the meaning of the Act, that bare-minimum clause will suffice to invoke the DRAA. (Of course, this bare-minimum clause is not recommended; practitioners should tailor any arbitration provision to meet the parties' specific needs, since this clause would leave the parties subject to all of the Act's default provisions.)

How the DRAA Expedites Arbitration

Among the key goals of the working group responsible for drafting the DRAA was to provide parties and practitioners with a reliably efficient method of dispute resolution. Accordingly, the Act attempts to address potential delay at the beginning, middle, and end of the arbitration process. These features combine to ensure that arbitrations under the Act may not be derailed by the parties, the courts, or the arbitrator.

Rapid at the Beginning

A common feature at the outset of many arbitrations is one party's attempt to prevent the arbitration by seeking an injunction of the arbitration from a court.[13] This and similar types of pre-arbitration jousting often involve questions of "substantive arbitrability" (that is, whether certain claims are arbitrable) and "procedural arbitrability" (that is, whether one party complied

with the terms of the arbitration agreement).[14] If nothing else, these issues increase the cost and the length of arbitrations. They also provide the courts with complicated interpretation questions regarding the arbitration agreement.[15]

The DRAA avoids this process by requiring that every party to an arbitration agreement invoking the Act waives objection and consents to "[t]he submission exclusively to an arbitrator of issues of substantive and procedural arbitrability."[16] The parties to a DRAA-governed arbitration agreement also waive other, similar rights, including any objection to the "exclusive personal and subject matter jurisdiction" in Delaware's courts for a few limited purposes, the right to remove any proceeding under the Act to a federal court, and the right to "[s]eek to enjoin an arbitration."[17] These additional concessions prevent either party from circumventing the DRAA's provisions through proceedings in the courts.

The Act also helps arbitrations start quickly by providing a specialized, limited procedure by which parties may seek the assistance of Delaware's Court of Chancery in appointing an arbitrator.[18] This procedure allows one party a way to avoid an opposing party's attempts to delay in choosing an arbitrator, and it also allows an expedited method of appointing an arbitrator if a prior arbitrator is unable or unwilling to serve. After one party initiates a proceeding to appoint an arbitrator, all parties propose up to three potential arbitrators each, and the Court will appoint an arbitrator within 30 days of service of the initiating petition.[19] Notably, this appointment decision is not appealable,[20] so the arbitration can begin nearly immediately after appointment.

Rapid in the Middle

Once an arbitration begins under the Act, a number of provisions combine to empower the arbitrator to make any necessary decisions to keep the arbitration moving swiftly.[21] Further, parties to a DRAA-governed arbitration agreement are deemed to have waived their right to "[a]ppeal or challenge an interim ruling or order of an arbitrator."[22] Accordingly, no party may delay an arbitration by seeking interlocutory review or by heading to court during the arbitration.

But the most obvious way in which the DRAA ensures a rapid resolution is the 120-day limit. Unless the parties agree otherwise, every arbitration under the Act must result in a final award "within 120 days of the arbitrator's acceptance of the arbitrator's appointment."[23] The parties (with the arbitrator's consent) may extend this period by up to 60 days.[24] If the final award is not issued by the deadline, the arbitrator's fee is reduced—and the reduction percentage increases with the lateness of the final award.[25] Further, an arbitrator issuing a late final award must self-report to the Register in Chancery, which may then influence future appointments by the Court of Chancery.[26] The Act's financial penalty is designed to provide an incentive for arbitrators to issue timely awards as well as to exercise tight control over parties and schedules to ensure that the proceedings are resolved promptly.

Rapid at the End

One of the issues with current arbitral procedures is that, to obtain a court order on the arbitrator's award, the prevailing party must seek confirmation from a court.[27] This procedure, which may involve a challenge to the arbitration itself, can significantly extend the final resolution of any dispute.[28] One problem is that the application for confirmation is made at the trial-court level, allowing additional appeals of the original confirmation.[29]

The Act addresses this issue in two ways. First, a final award issued under a DRAA arbitration is deemed to have been confirmed by the Delaware Court of Chancery by the mere passage of time (unless a challenge or appeal is made to the arbitration award).[30] Thus, no further proceeding is necessary, but any party can then obtain a judgment on that confirmed award in a Delaware court.[31] Second, any challenge to a final award issued under the Act goes directly to the Delaware

Supreme Court, skipping proceedings at the trial-court level.[32] And that challenge is limited to the standards set forth in the Federal Arbitration Act.[33] Parties may instead contract for no appellate review or for a full appeal in front of an arbitral panel, in which case they may determine their own standards for appeal.[34]

Points for Practitioners

Given the Act's flexibility, practitioners considering a DRAA provision in an agreement should review the options available so that they can make an informed choice that meets the parties' needs. Five issues in particular deserve careful consideration.

The Arbitrator

The Act provides multiple ways in which arbitrators may be chosen:[35] they may be specifically named in an arbitrator agreement ("Attorney Smith or, if Attorney Smith is unable to serve, former Judge Jones"); they may be selected by the parties under agreed-to terms ("an accounting firm located in Boston, Massachusetts, with more than 10 CPAs"); they may be agreed on and appointed by the parties at any time; or they may be appointed by the Delaware Court of Chancery in a special proceeding.[36] The Act also makes clear that parties may agree to appoint multiple arbitrators; if the parties do so, they should set forth how any decision is made (unless otherwise agreed, multiple arbitrators act by majority).[37]

Third-Party Discovery

Due to concerns about confidentiality, parties to an arbitration may wish to forgo the benefits of third-party discovery, which also comes with the costs of publicity. An arbitrator in a DRAA arbitration only has the power to compel third-party discovery (whether through subpoenas or commissions) if the parties grant that power in the arbitration agreement.[38] Practitioners therefore should consider carefully whether they wish to retain or foreclose the option to seek third-party discovery in any future arbitration.

Time Limits

The Act provides a default limit of 120 days for the arbitration (extendable by 60 days).[39] But not every arbitration will be suited to such a short timeframe. Therefore, the Act specifically allows the parties to choose their own deadline[40]—but only if they do so before the arbitration commences. Thus, the parties should consider this issue at drafting because the deadline is immutable once the arbitration begins (except for the 60-day extension). Other aspects of an arbitration agreement may be amended, with the arbitrator's consent, to alter the procedures of an arbitration during the arbitration; but the time limit may not be changed later.[41]

Appellate Procedures

The Act allows the parties to choose from among three options: the default is an FAA challenge directly to the Delaware Supreme Court, but parties may also choose to forgo appeal entirely or provide for appellate review by one or more arbitrators.[42] If the parties choose to employ arbitral appellate review, they must also consider the procedures for that process. While the default challenge to the Delaware Supreme Court is narrowly tailored, parties opting for an arbitral review can customize for their purposes, among other things, the standard of review, the number of appellate arbitrators, and the procedures for briefing and submitting the record on appeal.

Rules Governing the Arbitration

Key to the arbitration process are the rules that govern it. The Act itself does not provide a complete set of procedures, although it empowers the arbitrator to "issue such orders or impose such sanctions as the arbitrator deems proper to resolve an arbitration in a timely, efficient, and

orderly manner."[43] As a general matter, therefore, the parties may choose any set of rules to govern their arbitration and may customize their procedures as they see fit. Under the DRAA, the Delaware Supreme Court is empowered to publish default rules that would apply to all rapid arbitrations "unless an agreement provides for different rules."[44] At the time of publication, the Delaware Supreme Court had not yet promulgated a set of default rules; until then, if the parties do not (or cannot) agree on a specific set of rules or procedures, it is likely that the arbitrator will have to impose a set of procedures on the arbitration.

Conclusion

Delaware's new Rapid Arbitration Act is designed to provide Delaware entities with an option for efficient dispute resolution. Time will tell whether Delaware succeeded in its goal, but feedback received thus far indicates that the Act fills a gap in practitioners' drafting toolboxes.[45]

Notes

1. *http://www.jonesday.com/delaware-update-delaware-enacts-new-rapid-arbitration-act-04-22-2015/.*

2. 10 *Del. C.* § 349.

3. *Strine v. Del. Coal. for Open Gov., Inc.*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1511 (2014).

4. 10 *Del. C.* § 5803(a).

5. 10 *Del. C.* § 5803(a)(5).

6. 10 *Del. C.* § 5803(a)(4).

7. *Id.*

8. 10 *Del. C.* § 5803(a)(1).

9. 10 *Del. C.* § 5803(a)(2); *see also id.* § 346(b).

10. 10 *Del. C.* § 5803(a)(2).

11. 10 *Del. C.* § 5803(a)(3); *see also* 6 *Del. C.* § 2731(1). For similar reasons, the Act also forbids its use by homeowners' associations. 10 *Del. C.* § 5803(a)(3).

12. Gregory V. Varallo, Blake Rohrbacher & John D. Hendershot, *The Practitioner's Guide to the Delaware Rapid Arbitration Act* 65 (2015), available at *www.rlf.com/DRAA.*

13. *See, e.g.*, *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *1 (Del. Ch. Dec. 4, 2007) ("This is an action by one party to an LLC agreement, Julie N. Brown, against another party to that agreement, T-Ink, LLC, seeking to enjoin T-Ink from proceeding with an arbitration before the American Arbitration Association ('AAA').").

14. *See, e.g.*, *id.* at *8-12; *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006).

15. *See, e.g.*, *James & Jackson*, 906 A.2d at 78-82.

16. 10 *Del. C.* § 5803(b)(2).

17. 10 *Del. C.* § 5803(b)(4), (c)(1)-(2). Separately, the DRAA provides for limited jurisdiction in the Delaware Court of Chancery to issue an injunction "in aid of an arbitration"; but that jurisdiction only lasts until the arbitration accepts appointment, and the "injunction may not divest the arbitrator of jurisdiction or authority." 10 *Del. C.* § 5804(b)(5).

18. 10 *Del. C.* § 5805(a) (listing the limited circumstances in which the Court of Chancery has jurisdiction to appoint an arbitrator).

19. 10 *Del. C.* § 5805(a)-(b).

20. 10 *Del. C.* § 5804(a)(1).

21. *See, e.g.*, 10 *Del. C.* § 5807(c) ("An arbitrator may make such rulings, including rulings of law, and issue such orders or impose such sanctions as the arbitrator deems proper to resolve an arbitration in a timely, efficient, and orderly manner.").

22. 10 *Del. C.* § 5803(c)(3); *see also* 10 *Del. C.* § 5804(a) (granting the Delaware Supreme Court jurisdiction "to hear only a challenge to a final award").

23. 10 *Del. C.* § 5808(b).

24. 10 *Del. C.* § 5808(c).

25. 10 *Del. C.* § 5806(b).

26. 10 *Del. C.* §§ 5805(b)(1)(c), 5806(d).

27. *See, e.g.*, 9 U.S.C. § 9.

28. *See, e.g.*, *SPX Corp. v. Garda USA, Inc.*, 94 A.3d 745 (Del. 2014) (reversing the Court of Chancery's decision, which vacated an October 2011 arbitration award); *Roncone v. Phoenix Payment Sys., Inc.*, 2014 WL 6735210 (Del. Ch. Nov. 26, 2014) (confirming a final award issued in September 2013 in an arbitration filed in June 2012).

29. *See, e.g.*, *SPX*, 94 A.3d 745.

30. 10 *Del. C.* § 5810(a).

31. 10 *Del. C.* § 5810(b)-(c).

32. 10 *Del. C.* § 5809(a).

33. 10 *Del. C.* § 5809(c); *see also* 9 U.S.C. § 10(a) ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either 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.").

34. 10 *Del. C.* § 5809(d)(2).

35. *See* 10 *Del. C.* § 5801(3).

36. *See also* 10 *Del. C.* § 5805(b)(2) (providing that the Court of Chancery may appoint only "a. A person named in or selected under an agreement; b. A person expert in any nonlegal discipline described in an agreement; or c. A member in good standing of the Bar of the Supreme Court of the State [of Delaware] for at least 10 years").

37. 10 *Del. C.* § 5801(3).

38. 10 *Del. C.* § 5807(b).

39. 10 *Del. C.* § 5808(b)-(c).

40. 10 *Del. C.* § 5808(b) (providing that "an arbitrator shall issue a final award within the time fixed by an agreement").

41. 10 *Del. C.* § 5803(a).

42. 10 *Del. C.* § 5809(a), (d).

43. 10 *Del. C.* § 5807(c).

44. 10 *Del. C.* § 5804(a).

45. Model rules, arbitration forms, a practitioner's guidebook to the Act, and other helpful information may be found at *www.rlf.com/DRAA*.