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The ABSTRACT

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The Delaware Rapid Arbitration Act: Considerations for Commercial Real Estate Finance

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Introduction

On April 2, 2015, Delaware Governor Jack Markell signed into law the Delaware Rapid Arbitration Act ("Act"). This Act allows for alternative dispute resolution consistent with arbitration's origins as a rapid and efficient means of resolving disputes. The Act responds to growing complaints by Delaware's companies about the incrustation of costs and delays onto non-judicial dispute resolution. The Act is the product of the collaboration of practitioners in Delaware, including members of this firm, led by Delaware's Chief Justice, Leo E. Strine Jr., Delaware's Chancellor, Andre G. Bouchard, and the Secretary of State, Jeffrey W. Bullock.

The Act makes the process of starting an arbitration quick and inexpensive, accelerates the arbitration itself to ensure a swift resolution, and does away with confirmation proceedings altogether. It also provides for either private, contractual appeals or challenges directly to the Delaware Supreme Court. The Act attempts to strike a balance between the contractual decisions of the parties while innovating to make commencing an arbitration a speedy and inexpensive process.

The Act is not designed to preempt more traditional arbitration proceedings. Rather, it is a response to the clear need for a modern and efficient arbitration process, specially designed for disputes where the parties need swift resolution, such as in the case of ongoing business relationships that would suffer from drawn-out litigation—for example, between the parties to a joint venture.

Under the Act, the arbitration does not have to occur in Delaware and does not have to use Delaware attorneys. The only criteria are that the parties elect by contract to resolve their disputes under the Act and that one of those parties is a Delaware business entity.

Top Four Elements of a Rapid Arbitration

The four most important elements of the Act, and therefore arbitration under the Act, are that it is rapid, confidential, tailored to parties' needs, and cost efficient.

1. Rapid

The Act operates to ensure that an arbitration under the Act will commence, be held, and conclude rapidly. The parties by law agree to submit all issues of arbitrability to the arbitrator, thereby eliminating all of the preliminary jousting about both substance and procedure that has tended to bog down arbitrations.

And, the Act provides a swift procedure for the Court of Chancery to appoint an arbitrator if the parties cannot agree on the arbitrator within their set time frame. Once the arbitrator has been appointed, the arbitrator must issue the award within 120 days, unless the parties have otherwise agreed in their arbitration agreement in advance of the commencement of the arbitration. This time period can be extended by up to 60 days but only if all parties and the arbitrator agree. In addition, the arbitrator will be penalized by reduction of its fee for any delays beyond this 120- or 180-day period. There is no ability to bring interim appeals during the course of the proceeding, and the final award is deemed to have been confirmed by the court, thereby eliminating the lengthy confirmation litigation that so often occurs after an arbitration award. By default, any challenge to the award goes directly to the Delaware State Supreme Court with limited bases for challenges. Moreover, the parties can agree to waive any such right to appeal the award.

2. Confidential

The same elements that provide for a rapid resolution of the dispute also provide for a confidential one. The initial litigation over arbitrability is gone; interim appeals are gone; and any type of public hearing for judicial confirmation of the award is gone.

Likewise, the parties can eliminate even an appeal hearing that could make the arbitration award less than totally confidential.

3. Tailored to Parties' Needs

The parties can identify up front the criteria for the arbitrator, whether that person is an industry expert, an accountant, a retired member of the judiciary, etc. The parties can identify up front what type of discovery and other pre-hearing activities are permitted, or even dispense with all of them entirely. As noted, the parties can even provide for no appellate review of the award. All of this allows the parties great discretion in structuring how they wish disputes to be resolved, without allowing the process to spiral out of control or not focus on what is important to the parties.

4. Cost Efficient

Again, the same elements that make for a rapid dispute resolution result in one that is efficient in costs. The parties save on the cost of upfront litigation and interim appeals. The parties control the prehearing activities, such as, for example, having no depositions and only permitting testimony at the hearing from the parties and their employees and perhaps an expert or two. And because this is a process structured between the parties and governed by statute, there are no administrative fees to be paid, such as in the case of third-party arbitration providers.

Considerations For Commercial Real Estate Finance

As is evident, the Act permits rapid, confidential, and efficient resolution of disputes. This allows arbitration under the Act to be useful in situations where those elements of dispute resolution are important. For example, a commercial lender may want to have any claims of lender liability disposed of in a confidential, rapid proceeding. Likewise, when joint venture or preferred equity structures are used for financing, a rapid arbitration process can allow the parties to dispose of any dispute in an efficient and less expensive manner. And lenders subject to an intercreditor agreement may prefer such an expedited process to resolve any disagreements. In addition, with the adoption of Regulation AB II, the SEC now mandates the use of alternative dispute resolutions in mortgage and certain other asset class securitizations in connection with asset repurchase disputes. In doing so, the SEC blessed the approach adopted by the private mortgage securitization market in the immediate aftermath of the financial crises of using arbitration as a cost-effective, practical solution to the problem of addressing disputes relating to the quality of the asset pool sold to the securitization vehicle. The Act may be well suited to be used in these structures given its emphasis on providing an inexpensive and fast arbitration alternative to traditional arbitration regimes.

Conclusion

By electing to proceed under the Act, parties to business activities can restore rapidity, confidentiality, tailored proceedings, and cost efficiency to the resolution of their disputes. One can see how this type of procedure could benefit businesses in many ways, such as to provide for rapid resolution of disputes between joint venturers or parties in the capital stack who need to resolve the matter quickly and get on with their business together.

More information, including forms and rules of procedures, may be found at www.rlf.com/draa.