



Delaware Enacts New Rapid Arbitration Act

Posted by Kobi Kastiel, Co-editor, HLS Forum on Corporate Governance and Financial Regulation, on Tuesday, April 14, 2015

Editor’s Note: The following post comes to us from [David J. Berger](#), partner focusing on corporate governance at Wilson Sonsini Goodrich & Rosati, and is based on a WSGR Alert memorandum. This post is part of the [Delaware law series](#), which is cosponsored by the Forum and Corporation Service Company; links to other posts in the series are available [here](#).

The Delaware Rapid Arbitration Act (DRAA)—which provides a streamlined arbitration process that will allow for prompt, cost-effective resolution of business disputes—was passed by the Delaware House of Representatives on March 19, 2015, and the Delaware Senate on March 31, 2015, and was signed by Governor Jack Markell on April 3, 2015. The DRAA will become effective on May 4, 2015, and will be codified as new Chapter 58 of Title 10 of the Delaware Code. As summarized in more detail below, the DRAA offers a real alternative to the litigation process, providing companies with the chance to engage in a fast, relatively low-cost dispute resolution process without the burden of extensive discovery. The DRAA may be particularly beneficial to companies that are in commercial relationships with each other and that seek to avoid a lengthy, extensive, and public litigation process.

What Is the DRAA and Who Can Use It

The DRAA is designed to provide parties with what the proponents of arbitration originally anticipated from an alternative dispute resolution method: an opportunity for sophisticated parties to resolve business disputes faster and at far less cost than other forms of dispute resolution. The process is completely voluntary. All parties must explicitly agree to arbitration under the DRAA and select Delaware law to govern the agreement—either in the agreement that forms the basis for the dispute or in a separate agreement in which they consent to arbitration under the DRAA. Further, at least one of the parties to the agreement must be a business entity formed in Delaware or with its principal place of business in Delaware.

The DRAA, like much of Delaware’s corporate law, is “enabling” in the sense that it does not limit parties’ access to other forms of dispute resolution, such as other arbitration procedures and litigation (although greater limitations may be imposed in the contract pursuant to which the parties agree to have potential disputes resolved under the DRAA). Also, the DRAA is limited to disputes between business entities; as a result, the DRAA will not be available to resolve consumer disputes.

How the DRAA Process Will Work

Parties will be required to first opt into the DRAA process by agreeing in writing to submit to arbitration under the DRAA. In this agreement, the parties may specifically identify the arbitrator(s) to hear any disputes, or the parties may designate a process for selecting the arbitrator(s). If the agreement does not specifically identify either of these two alternatives, then the parties may petition the Delaware Court of Chancery to appoint one or more arbitrators. Additionally, if for any reason the arbitrator is unable or unwilling to act or the parties are unable to select an arbitrator in accordance with the agreement, the Court of Chancery may then also select an arbitrator.

All issues of substantive and procedural arbitrability will be resolved by the arbitrator and not by the courts. Unless the parties' agreement provides otherwise, the parties will be entitled to be heard at a hearing, to present evidence, and to cross examine witnesses. To facilitate the timely resolution of disputes, however, arbitrators will have authority to make interim rulings and issue interim orders to determine what evidence and which witnesses will be presented and to limit the presentation of evidence, and those interim rulings and orders cannot be appealed or challenged. Arbitrators will also have the authority to administer oaths, to compel the attendance of witnesses and production of documents and evidence, to issue subpoenas (which will be subject to all provisions of law compelling a person under subpoena to testify) if provided for by the agreement, and to make rulings, issue orders, or impose sanctions to ensure that the arbitration is resolved in a timely, efficient, and orderly manner.

The arbitration is designed to result in a fast resolution. Specifically, the arbitrator must issue a final award within 120 days of the arbitrator's acceptance of the appointment or as otherwise provided by agreement, and any extensions (which will require unanimous consent) may not exceed 60 days after the expiration of the original deadline for issuing a final award. Thus, unless the parties' agreement provides otherwise, the process cannot last more than 180 days. As a result of the expedited nature of these proceedings, the discovery and cost of the matter is likely to be less than in a full litigation, which does not have any particular time restrictions.

Unless the parties otherwise provide in their agreement, arbitrators will have broad discretion to grant whatever relief they deem appropriate, whether legal or equitable in nature, including money damages, injunctions, and specific performance. To help ensure that arbitration stays on track, arbitrators will face financial penalties for failing to comply with the timing requirements of the DRAA. Once the arbitrator issues a final ruling, any challenge must be made within 15 days to the Delaware Supreme Court. The Supreme Court's review will be in conformity with the Federal Arbitration Act. The parties can, however, agree to eliminate appellate review of a final award entirely or agree to appellate review by one or more arbitrators as provided in their agreement.

The Benefits of the DRAA Process

As set forth above, the DRAA is designed to resolve commercial disputes with more speed and less cost. Parties must be willing to forgo the extensive discovery and appeal procedures that are typical in traditional arbitration and litigation. In exchange, their dispute will be resolved at significantly less expense and in six months or less.

The DRAA will enable parties to avoid pre-arbitration litigation over issues of arbitrability, because under the DRAA those issues are to be resolved exclusively by the arbitrator. The limited procedure for challenges, which is not available for interim rulings and orders, means that parties will have finality sooner and at far less cost. Importantly, the proceedings will also remain private and confidential unless and until a party files a challenge in the Delaware Supreme Court or otherwise involves a court in the limited circumstances provided in the DRAA.

Although the arbitration process under the DRAA will not be an appropriate process to resolve every business dispute, it may be particularly beneficial for parties with ongoing business relationships. For example, we anticipate that some investment banks may wish to consider including the DRAA as their preferred method for resolving disputes in their engagement letters with their clients, and that the DRAA might be used in commercial licensing agreements, where the parties have multiple business relationships with each other. On the whole, we believe that the DRAA is an important new Delaware initiative that offers the potential for significant time and cost savings for those who choose to use it.