

Built for *Speed*

Delaware streamlines arbitration of business disputes

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Delaware recently enacted legislation that will make substantial changes to how arbitration of business disputes may be conducted. The Delaware Rapid Arbitration Act (the “DRAA”), 10 *Del. C.* Ch. 58, addresses the major issues currently occurring in how business disputes are arbitrated and provides a fast, economical arbitration process. This article explains the DRAA.

Existing Problems

The resolution of business disputes through arbitration was intended to streamline the resolution process, maintain the confidentiality of the parties’ affairs and cut the costs involved in litigation. But over time, existing arbitration processes have too often failed to meet those goals. Arbitrations of business disputes now often take too long to get to a resolution, publicize the parties’ private business issues and are as costly as full-blown litigation. Arbitration has lost its way.

There are many reasons for this failure of traditional arbitration. They include: (1) protracted procedural disputes over what issues are to be arbitrated and who is to decide those procedural disputes; (2) delays in selecting arbitrators; (3) scheduling delays by arbitrators; (4) protracted post-arbitration procedures to have an award confirmed as a final judgment and to resolve appeals; (5) extended discovery practice that mirrors litigation; and (6) arbitrator compromises that depart from a fair resolution on the merits. The DRAA addresses those problems.

Pre-Arbitration Delays

Traditional arbitration proceedings often run into procedural delays that occur even before an arbitrator is appointed. It is not unusual for one of the parties who previously agreed to arbitrate any disputes to go to court instead to seek a determination of what issues are subject to the arbitration and who (the court or the arbitrator) should decide the scope of the arbitration. That court proceeding can take months to resolve, both at the trial court level and on appeal.

The DRAA is designed to eliminate that delay. Under the DRAA, a party who has signed an agreement expressly subject to the DRAA thereby is deemed to have agreed that the arbitrator shall decide all issues of arbitrability and to have waived any right to go to court over the scope of the arbitration. 10 *Del. C.* § 5803(b)-(c). While the DRAA does confer jurisdiction on the Delaware Court of Chancery, that jurisdiction is very limited. While the court may “issue an injunction in aid of an arbitration” (typically to enjoin litigation), it has no jurisdiction to enjoin an arbitration. *Id.* § 5804(b).

It is easy to start arbitration proceedings under the DRAA. The proceedings may be initiated by the parties’ notification of an

arbitrator of his appointment, the acceptance of that appointment by the arbitrator and the service on all the parties of that acceptance by the arbitrator. *Id.* § 5808(b). In short, the arbitration proceeding will get off to a faster start under the DRAA.

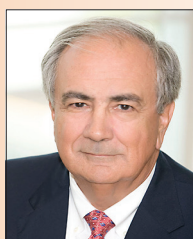
Arbitrator Selection

Traditional arbitration proceedings also are delayed by disputes over selection of the arbitrator. Parties may delay the selection process by not cooperating with each other or by objecting to any proposed arbitrator. Again, that can take months to resolve.

The DRAA cuts through those delays, while still recognizing that the parties should be left free in the first instance to select their own arbitrator. Under the DRAA, if the parties do not agree on an arbitrator, the Court of Chancery will appoint an arbitrator within 30 days after being asked to do so. *Id.* § 5805(a-b). The court’s rules do not permit discovery or other delays in that process. Thus, the DRAA expedites arbitrator selection.

Reaching an Award

Traditional arbitration proceedings are too frequently characterized by extensive delays to permit litigation-type discovery, to schedule a hearing and to issue an arbitration award. When that occurs, the arbitration is akin to litigation and loses its advantages. Moreover, there is little incentive for an arbitrator in a traditional proceeding to avoid these delays and costs. Their fees only increase as the proceedings drift along to an indefinite date for a conclusion.



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The DRAA provides a strong incentive to eliminate such delays and added costs. Under the DRAA, the arbitrator must issue a final award within 120 days of her acceptance of appointment as an arbitrator (subject to just one 60-day extension with the parties' consent). An arbitrator who fails to meet that deadline, in addition to having to report that failure to the Court of Chancery, will have her fees substantially and automatically reduced, up to 100 percent for an award more than 60 days late. *Id.* §§ 5806 and 5808(b).

In addition to the obvious effect of speeding up the timing of the arbitrator's award, the DRAA time limits also will reduce costs. The fast pace of a DRAA arbitration will necessarily limit pre-hearing discovery. There will just not be enough time for too much discovery. Given the broad powers to regulate scheduling that the DRAA confers on arbitrators, they will inevitably limit discovery to permit the hearing to be held promptly, allowing them time to issue an award before their fees will be reduced if the award is late. Thus, the DRAA will speed up arbitration proceedings and cut costs.

Post-Award Delays

Traditional arbitration also may result in extended delays before any award is enforceable. The party who has prevailed needs to file suit to have the award confirmed and then suffer further delays when the trial court's decision is appealed. That too can take years before the award is enforceable.

The DRAA eliminates most of that post-award delay. Once the arbitrator submits her award under the DRAA, the award will automatically be confirmed by either the Court of Chancery or the Delaware Superior Court in the case of purely monetary awards. *Id.* § 5810. Pre-confirmation battles are thus eliminated under the DRAA.

The DRAA only permits an appeal of an award to the Delaware Supreme

Court. That Court's review is limited to the grounds for review under the Federal Arbitration Act and is "on the record." *Id.* § 5809(c). Given the Delaware Supreme Court's history of promptly resolving appeals, this means the review will likely take less than six months. That is a considerable time savings from traditional arbitration award reviews.

Preserving Privacy

While traditional arbitration proceedings are closed to public access, any judicial review of an arbitrator's decision may result in revealing the parties' business confidences. After all, court filings are usually public records. This disclosure of parties' business confidences is particularly a problem when it may affect ongoing relationships, such as between business alliances, joint ventures or private investments in a business.

The DRAA permits the parties to maintain their confidences while still seeking a review of an arbitrator's award. They may do so by agreeing that review will be by a private appellate arbitrator or arbitrators. *Id.* § 5809(d). That appellate review will then be kept private.

The DRAA is Easy to Use

It is also easy to invoke the advantages of an arbitration under the DRAA. All the DRAA requires is that the parties sign an agreement that specifically invokes the DRAA and agrees that Delaware law will control their agreement insofar as it invokes the DRAA. *Id.* § 5803(a). The parties are, of course, always free to provide more details in their agreement on how the arbitration will be conducted, but that is their choice. If they choose not to do any private ordering, the DRAA default provisions will control in most circumstances.

Nor does the DRAA restrict the parties' choice of where to arbitrate or who will be the arbitrator. The place of arbitration may be within or outside the United States. *Id.* § 5807(a). The arbitrator may be whomever the parties choose,

or they may elect to have that choice made for them, such as by the CPR, other ADA organizations or by the Court of Chancery. *Id.* § 5805(b). Moreover, the arbitrator need not be lawyer and may be a person expert in any non-legal discipline described in the agreement to arbitrate. If needed, an arbitrator may retain appropriate counsel, after consulting with the parties. *Id.* § 5806(c).

Limits on Utilization

There are limitations on the utilization of the DRAA. It can only be invoked by an agreement signed by the parties to the arbitration. At least one of those parties must be a "business entity" formed or organized under Delaware law or having its principal place of business in Delaware, and no party can be a "consumer." The agreement must state that it invokes the "Delaware Rapid Arbitration Act" and that Delaware law governs the arbitration provisions of the agreement. *Id.* § 5803(a).

These limitations on the use of the DRAA are intended to exclude disputes involving individuals over purchase of merchandise and to not permit individuals to be subject to a DRAA arbitration unless they have actually signed an agreement to use the DRAA. Thus, consumers may not be required to use the DRAA, and stockholders or investors may not be made subject to the DRAA by a corporate bylaw, certificate of incorporation or other business-entity document they have never signed. *Id.*

Conclusion

The DRAA is not for everyone. For some, the DRAA's speedy disposition will be too risky. They will instead decide to turn over every stone in discovery and to be able to seek court intervention all along the course of a traditional arbitration or to engage in litigation. But as one tool in a business's arsenal of ways to resolve business disputes, the DRAA will have considerable appeal in the right circumstances.