

DELAWARE BUSINESS COURT INSIDER

The Delaware Rapid Arbitration Act: Prompt, Cost-Effective, Efficient and Underutilized

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Despite the primacy of Delaware courts in addressing complex business disputes, even here the need remains for prompt resolution of certain types of disputes without full-blown discovery and with total confidentiality.

In fact, Delaware has a tool, and it remains underutilized: the Delaware Rapid Arbitration Act. The DRAA provides a structure for quick, streamlined and confidential arbitration. The statute hasn't gotten much attention since a flurry of coverage when it was first enacted in April 2015. Nonetheless, eight years of experience with the DRAA have spawned practical lessons and practice pointers—for both litigators and transactional lawyers—to make the most of the DRAA's advantages.

Prior to the enactment of the DRAA, the Delaware General Assembly passed legislation in 2009 authorizing members of the Delaware Court of Chancery to arbitrate business disputes on a confidential basis. The author participated in one of the few of these chancery arbitrations that took place prior to 2013. That year, the U.S. Court of Appeals for the Third Circuit ruled that, among other things, the program violated the U.S. Constitution's provisions regarding open courts. Without confidentiality, these chancery arbitrations no longer held the same allure.

The Delaware General Assembly went back to the drawing board, and the result was the DRAA. The key features of the DRAA (10 Del. C. Section 5801, et seq.) are:

- Speed—most disputes resolved within 120 days (Section 5808(b))
- Flexibility—there are default provisions but parties may specify details about discovery, qualifications of the arbitrator, and appeal rights (Section 5811)
- Financial penalties for slow decision-making by arbitrator (Section 5806(b))

To take advantage of the DRAA, at least one of the parties to the dispute must be a Delaware business entity (formed under Delaware law, or with a principal place of business in Delaware). The dispute resolution clause must expressly reference the DRAA, and all parties to the arbitration must sign the agreement authorizing DRAA arbitration. The DRAA specifically carves out consumer disputes, which fall outside of its purpose to afford sophisticated businesses an additional option for rapid and confidential dispute resolution. (Section 5803(a)).

Practitioners have learned through experience that the DRAA framework is well-suited to disputes over settlement agreements, where the universe of documents is relatively defined. In addition, post-closing M&A disputes often can be handled efficiently and effectively through the DRAA process. Where privacy, speed and certainty are paramount, such as in ongoing contracts between businesses for highly technical services, the DRAA has an additional advantage: the ability to choose as an arbitrator with technical expertise.

The DRAA has also enabled parties to avoid spending time and money litigating threshold issues of arbitrability. By agreeing to DRAA arbitration, and unless the agreement specifies otherwise, the parties waive certain rights. These include the right to challenge the substantive or procedural arbitrability of a dispute to a court, the right to challenge the jurisdiction of the Delaware courts to appoint an arbitrator, enter judgment, and grant certain interim relief before the appointment of an arbitrator, and the right to an appeal, except with respect to a final award. (Section 5803(b)-(c)).

Consistent with Delaware's contractarian approach, the DRAA "giv[es] maximum effect to the principle of freedom of contract and to the enforceability of agreements." (Section 5811). If an agreement is silent, however, certain default rules apply. These defaults are principally set forth in rules adopted by the Delaware Supreme Court. Rule 5 states that all DRAA arbitrations are confidential.


Parties may wish to adjust some of the default rules in their arbitration agreement. For example, with respect to selection of arbitrators, the expectation is that the parties will be able to agree on an arbitrator. If they cannot, the Court of Chancery will appoint an arbitrator based on the specifications in the agreement. Absent such specifications, the Court may appoint a lawyer who has been a member of the Delaware Bar for 10 years or more. When negotiating a DRAA clause in an agreement, parties should consider carefully whether it makes sense to specify an individual, an expertise, or even whether the arbitrator should be an accountant instead of an attorney. Experience demonstrates that having seasoned Delaware litigation counsel weigh in on arbitrator selection is critical once the parties decide to commence arbitration.

The default rules also recommend that the arbitrator schedule a preliminary conference within 10 days after the appointment. Even before the pandemic, telephonic proceedings were the norm, enabling the parties and the arbitrator to set a schedule and parameters quickly given the strict time constraints. In some cases, parties agree at this stage to convert the process to mediation or to bifurcate certain issues.

The parties should have a plan for exchanging relevant information, including in some cases, taking depositions. Parties often negotiate limitations to increase speed and reduce burden. A common example is to agree that communications between claimant and respondent need not be produced unless a party intends to rely on the content of the communication. Importantly, information exchanged in a DRAA arbitration may be used "exclusively for purposes of the Arbitration." (Rule 17). By default, the DRAA does not authorize third-party discovery. Each party must provide to the arbitrator and the other parties a list of witnesses (fact and expert), a description of the anticipated testimony, and an exhibit list. The arbitrator has discretion to order the parties to make pre-hearing written submissions, as well as post-hearing written submissions.

The hearing itself is limited to one day, unless otherwise agreed. Anecdotally, many parties agree to two or three day proceedings to afford the opportunity to present witnesses. The hearing may take at any location, and may be conducted telephonically or through "other means of remote electronic communication." (Rule 22). The seat of the arbitration is Delaware, however, so any post-arbitration proceedings are in Delaware, as well.

The arbitrator must issue a signed, written award, which is accompanied by a form of judgment for entry of an order under 10 Del. C. Section 5810. (Rule 24). The arbitrator has the authority to award fees and costs. (Rule 25). Many DRAA provisions afford fee-shifting to prevailing parties, which the arbitrator is empowered to award.



Section 5809 provides for an appeal to the Delaware Supreme Court within 15 days of the final award. The Court “may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.” Those grounds relate to serious misconduct, fraud or corruption in the arbitration. The Supreme Court has authority to confirm the award if the appeal is rejected.

A word about appeals: Parties can contract for no appellate review. Some practitioners insert provisions regarding appeals to a single arbitrator or a panel of arbitrators. Such provisions may be appropriate for some disputes, but generally speaking they drive up costs and lengthen the process.

If there is no appeal to the Delaware Supreme Court, the final award is “deemed to have been confirmed” on the fifth business day after the expiration of the time for appeal. Section 5810. If the award is for money damages alone, the prevailing party may apply to the Superior Court of Delaware to enter a judgment consistent with the award. If the award includes other relief, the prevailing party must apply to the Court of Chancery to enter a judgment consistent with the award.

In summary, the DRAA is a useful, albeit underutilized tool for resolving many types of business disputes. The DRAA affords greater flexibility, lower costs, and quicker resolution than many other types of arbitration. Given its many advantages, business lawyers should advise their clients about the DRAA and give serious consideration to including it in dispute resolution clauses.

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