

Arbitration & ADR - USA

Delaware Rapid Arbitration Act – a new avenue for dispute resolution

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The state of Delaware recently enacted the Delaware Rapid Arbitration Act, designed to facilitate the prompt and economical resolution of commercial disputes between sophisticated business entities within as few as 120 days.⁽¹⁾ The Delaware Rapid Arbitration Act is significant for international arbitration practitioners because it applies where at least one of the parties is incorporated in Delaware (or has its principal place of business there), and many US counterparties – as well as the US subsidiaries of non-US companies – are incorporated in Delaware and can therefore avail of the act.

Delaware Rapid Arbitration Act

The Delaware Rapid Arbitration Act is an act of Delaware state law. Its purpose is:

"to give Delaware business entities a method by which they may resolve business disputes in a prompt, cost-effective, and efficient manner, through voluntary arbitration conducted by expert arbitrators, and to ensure rapid resolution of those business disputes".⁽²⁾

Thus, the Delaware Rapid Arbitration Act was enacted to achieve the twin goals to which US federal courts often point when discussing the Federal Arbitration Act: "settling disputes efficiently and avoiding long and expensive litigation".⁽³⁾

History

The Delaware Rapid Arbitration Act is not Delaware's first attempt at creating an arbitration act: in 2009 Delaware passed the Delaware Court of Chancery Business Arbitration Programme. However, that programme proved controversial because it provided that sitting Delaware Chancery Court judges would act as arbitrators and hearings would be held in Delaware courthouses. The programme was declared unconstitutional in 2013 because private arbitrations that were held before judges in the courthouse violated the public right of access to court proceedings as provided in the First Amendment to the US Constitution.⁽⁴⁾

The Delaware Rapid Arbitration Act has remedied those constitutional concerns by removing the requirement that sitting trial court judges serve as arbitrators. Additionally, it does not require that hearings take place in Delaware courthouses, instead allowing parties to hold hearings wherever they choose.

Requirements

Parties may avail of the Delaware Rapid Arbitration Act if they satisfy the following five requirements:

- There is a written arbitration agreement between the parties.
- At least one party is a business entity that either is incorporated in or has its principal place of business in Delaware.
- No party is a 'consumer' as defined by Delaware law.⁽⁵⁾
- The arbitration agreement provides that it will be governed by Delaware law.
- The arbitration agreement includes an express reference to the Delaware Rapid Arbitration Act.⁽⁶⁾

Accordingly, parties must affirmatively choose to arbitrate under the Delaware Rapid Arbitration Act and cannot be compelled to do so merely by entering into an arbitration agreement with a Delaware party.⁽⁷⁾

Selecting an arbitrator

Section 5805(a) of the Delaware Rapid Arbitration Act allows parties to select "one or more" arbitrators. Accordingly, it permits three-person tribunals to decide disputes and parties to establish

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the appointment method.

As mentioned, unlike under the previous Delaware arbitration programme, sitting Delaware Chancery Court judges do not serve as the default arbitrators. Instead, the parties are free to select arbitrators of their choice.

If the parties cannot agree on a sole arbitrator or if a party fails to make an appointment, the Delaware Chancery Court acts as the appointing authority. However, the court is obliged to select the arbitrator from a list of candidates provided by the parties.⁽⁸⁾

Scope of arbitrator's authority

The Delaware Rapid Arbitration Act grants arbitrators exclusive jurisdiction to decide issues of procedural and substantive arbitrability, thereby eliminating the role that courts sometimes play when there is a dispute regarding substantive arbitrability.⁽⁹⁾ Additionally, parties that have agreed to arbitrate under the act are deemed to have waived the right to seek to enjoin the arbitration, remove it to federal court or appeal or challenge any interim rulings. Thus, the act seeks to minimise court interference in the arbitral process while it is ongoing and streamline the route to a final award.

Time limits on issuance of awards

The Delaware Rapid Arbitration Act requires arbitrators to issue a final award within 120 days of the arbitrator's acceptance of its appointment.⁽¹⁰⁾ Moreover, while parties may agree to extend the time for the issuance of a final award, they may do so only for an additional 60 days. Accordingly, the act contemplates that disputes will be fully resolved within a maximum of six months, so practitioners should assess at the outset whether the dispute in question can be resolved appropriately within that timeframe.

The act sets clear incentives for resolving disputes within the timeframe established: an arbitrator's fees are reduced by 25% if the award is one to 30 days late, 75% if the award is 30 to 60 days late and 100% if the award is more than 60 days late.⁽¹¹⁾

Given the tight timeframes at issue for delivering an award, arbitrators are expected to limit the scope of discovery in order to comply with the deadlines. This will likely offer cost benefits.

Challenges to awards

A challenge to an award must be made within 15 days of the award's issuance. The bases for challenge are the same as those set forth in Chapter 1 of the Federal Arbitration Act and are therefore limited to matters that would affect a party's due process rights (eg, an arbitrator exceeding its powers or permitting some procedural irregularity that prejudiced a party's rights). Challenges must be brought directly to the Delaware Supreme Court, which can vacate, modify or correct the final award only in conformity with the Federal Arbitration Act. However, unlike under the Federal Arbitration Act, an arbitration agreement under the Delaware Rapid Arbitration Act may provide for no appellate review or appellate review by one or more arbitrators instead.⁽¹²⁾

Awards are deemed confirmed five days after the period for challenge has expired or, if the agreement forbids appellate review altogether, five days after issue of the award.

Comment

The Delaware Rapid Arbitration Act is designed to offer a means for quickly and economically resolving commercial disputes for Delaware-based parties with minimal court interference. It therefore offers yet another alternative to traditional courts for businesses wishing to resolve their disputes quickly and out of the public eye.

For further information on this topic please contact James P Duffy, Tara L Pehush or Priya Chadha at K&L Gates by telephone (+1 212 536 3900) or email (jp.duffy@klgates.com, tara.pehush@klgates.com or priya.chadha@klgates.com). The K&L Gates website can be accessed at www.klgates.com.

Endnotes

(1) The full text of the Delaware Rapid Arbitration Act can be accessed at [http://legis.delaware.gov/LIS/lis148.nsf/vwLegislation/HB+49/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis148.nsf/vwLegislation/HB+49/$file/legis.html?open).

(2) 10 Del C § 5802.

(3) *Scandinavian Reinsurance Co Ltd v Saint Paul Fire & Marine Ins Co*, 668 F3d 60, 71-72 (2d Cir 2012).

(4) *Delaware Coal for Open Gov't Inc v Strine*, 733 F3d 510 (3d Cir 2013).

(5) Delaware law defines a consumer as an "individual who purchases or leases merchandise primarily for personal, family or household purposes". 6 Del C § 2731.

(6) 10 Del C § 5803(a).

(7) Compare with the Bahrain Chamber for Dispute Resolution Jurisdiction by Law Section 1 (Legislative Decree 3/2009), directing certain commercial disputes heard in Bahrain in excess of Bd500,000 or with a commercial party licensed by the Central Bank of Bahrain to be resolved before the Bahrain Chamber for Dispute Resolution.

(8) Additionally, any arbitrator appointed by the chancery court must have been a member in good standing of the Delaware Bar for at least 10 years.

(9) 10 Del C § 5803(b)(2).

(10) 10 Del C § 5808(b).

(11) 10 Del C § 5806(b).

(12) Compare with *In re Wal-Mart Wage & Hour Employment Practices Litig*, 737 F3d 1262, 1267-68 (9th Cir 2013), holding that parties may not agree to entirely waive court review under the Federal Arbitration Act; see *Hall St Assocs, LLC v Mattel, Inc*, 552 US 576, 583-84 (2008), holding that parties may not agree to expand or modify the bases for review under the Federal Arbitration Act.

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