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Rapid Arbitration Act Brings a New Dispute Resolution Option to Delaware Businesses

Businesses have long turned to arbitration as a potentially more efficient and cheaper option for resolving disputes. Yet, commercial arbitrations don't always turn out that way. As arbitration has "matured," it has evolved to look a lot like litigation, with time-consuming pre-arbitration discovery, including depositions and exhaustive documentary discovery, lengthy hearings and fulsome post-hearing briefing. Add to that the cost of paying for the arbitrator, or in some cases, a panel of arbitrators, and the price tag can easily be equivalent to litigation. Without the cost and speed advantages, many of the perceived benefits of arbitration have been eroded.

Delaware has stepped in to change that—and, in the process, bolster its reputation as the leading jurisdiction for business formation by giving companies one more reason to be domiciled in the "First State." As of May 4, 2015, businesses that are either organized under the laws of Delaware or that have their principal places of business in the state ("Delaware businesses") may avail themselves of a new slimmed-down arbitration process. Here are the key provisions of the Delaware Rapid Arbitration Act ("Act"):

- **Commercial Disputes Only:** The Act applies only to disputes between businesses, one of which must be a Delaware business. The Act may not be used to resolve disputes with consumers. It is intended for use by sophisticated parties who have thoughtfully balanced

the benefit of speed and cost-reduction against the loss of greater procedural rights available in court.

- **Written Agreement Required:** The parties must enter into a written agreement to arbitrate that (1) is signed by both parties; (2) explicitly references the "Delaware Rapid Arbitration Act"; and (3) provides that it "shall be governed by or construed under the laws of the State [of Delaware] without regard to principles of conflict of laws, regardless of whether the laws of this State govern the parties' other rights, remedies, liabilities, powers and duties." This agreement could be signed when the parties agree to do business—long before the dispute arises.
- **Strict Time Limits:** Under the Act, arbitrations must be completed within 120 days unless another time limit is provided in the parties' agreement. During the arbitration, the parties can agree to one 60-day extension, but not more. Thus, most disputes will be resolved within six months. There are strong incentives to maintain the time limits as the arbitrator's fees are automatically reduced (from 25%-100% depending on the length of the delay) if the arbitrator doesn't issue her decision in a timely manner.
- **Flexible Arbitration Location:** The arbitration may take place anywhere "within or without the United States," not just in Delaware. Thus, the Act should be

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conveniently available to many business disputes in and outside Delaware.

- **Arbitrator Selection:** The parties may select any arbitrator to resolve their dispute. If they fail to do so, or the selected arbitrator cannot serve, any party may petition the Delaware Court of Chancery to appoint an arbitrator and the Court is required to do so within 30 days. Each party may provide the Court with the names of up to three arbitrators for consideration. In addition to appointing a person selected in the manner provided by the arbitration agreement, the Court may appoint a lawyer (who must be a member of the Bar of the Delaware Supreme Court in good standing for at least 10 years) or “a person expert in any non-legal discipline described in an agreement.” A non-lawyer arbitrator can bring a different and useful skillset to the table. Under the Act, a non-lawyer arbitrator may retain legal counsel to decide issues of law. The Court shall appoint only one arbitrator unless the agreement specifies more than one.

- **Discovery:** The Act provides the parties and arbitrator wide latitude to determine how discovery will proceed. However, the arbitrator will only have authority to issue third party subpoenas or to require depositions if the parties provide for such authority in the arbitration agreement.

- **The Hearing:** While the parties will generally have the opportunity to present witnesses and documentary evidence and to cross-examine witnesses of the opposing party, the arbitrator has discretion to limit the amount of evidence presented to ensure that the time limits specified in the Act can be met. The

parties may provide by agreement, prior to the arbitrator’s appointment, to present evidence via submission rather than live witness testimony.

- **Limited Judicial Review:** Any challenge to an arbitration award under the Act must be brought in the Delaware Supreme Court within 15 days of issuance of the award, and the grounds for challenge are very limited. (You can imagine how often Delaware’s highest court is likely to step in to reverse allegedly faulty awards.) If no such challenge is brought, the award is deemed confirmed 5 days after this period expires. The parties may contract to eliminate even this modest appellate review, or alternatively, they may contract for appellate review of the final award by an arbitrator or arbitral panel and may agree to the standard of review for this “appellate” process.

Delaware businesses should take a hard look at this process to see if they may want to incorporate the Act into existing or new commercial contracts. The process may be especially useful to address disputes arising in a continuing relationship, where both parties desire a prompt resolution that is less likely to disrupt the overall tenor of the relationship. Non-Delaware businesses may also wish to consider importing some ideas from the Act (such as strict time-limits tied to arbitrator compensation, or provision for arbitral appellate review) in their arbitration agreements by contract.

For more information about the Act or to discuss how it might be useful for your business, please contact Kim Rinehart or Mark Kaduboski.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.