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FROM: David S. Eagle, Esq.
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RE: Delaware Rapid Arbitration Act

In April 2015, the Delaware General Assembly enacted the Delaware Rapid Arbitration Act (the “Act” or the “DRAA”) in response to the United States District Court for the District of Delaware striking the Arbitration Proceedings for Business Disputes statute. The Act is designed to provide a speedy and tailored proceeding for resolution of confidential business disputes. As stated in 10 *Del. C.* § 5811, the Act is intended to “give maximum effect to the principle of freedom of contract and to the enforceability of agreements.” Therefore, the Act consists of a set of default standards that can be largely varied by contract. The Act authorizes the Supreme Court, in consultation with the Court of Chancery, to “publish rules for arbitration proceedings and, unless an agreement provides for different rules, ... specify that those rules govern arbitration proceedings...” 10 *Del. C.* § 5804(a). The Supreme Court and the Court of Chancery have both instituted such rules which became effective on June 1, 2015.

Some of the key features of the Act are:

- **Arbitration Agreements (10 *Del. C.* § 5803).**
 - The DRAA is only available for disputes involving at least 1 business entity formed under the laws of, or having its principal place of business in, Delaware;
 - No party to the Agreement (defined below) may be a consumer (as defined in 6 *Del. C.* § 2731) or organization (defined in 10 *Del. C.* § 5801 to be civic associations, neighborhood alliances, homeowners maintenance corporation, homeowners maintenance association, common interest community or other similar entity).
 - The parties must enter into a written agreement to submit to arbitration that (the “Agreement”):
 - Is signed by all parties;

- Provides it will be “governed by or construed under the laws of Delaware, without regard to principles of conflicts of laws, regardless of whether the laws of this State govern the parties’ other rights, remedies” etc...; and
- Includes a specific reference to the Delaware Rapid Arbitration Act.
- Entering into an Agreement waives a party’s objection to and is deemed consent to:
 - The procedures set forth in §§ 5801 et. seq.;
 - “Submission exclusively to an arbitrator of issues of substantive and procedural arbitrability,” an issue which has been the subject of considerable litigation;
 - Exclusive personal and subject matter jurisdiction of an arbitration, the seat of which is Delaware regardless of where the hearing is held;
 - Exclusive personal and subject matter jurisdiction of the Courts of Delaware for the limited purpose set out in § 5804 (jurisdiction); and
 - Except as otherwise agreed to, the arbitrator’s power and authority to: (a) determine in the first instance the scope of his or her remedial authority, subject to certain judicial review; and (b) grant relief, including any legal or equitable remedy.
- Entering into an Agreement waives the following:
 - The right to seek to enjoin arbitration;
 - The right to remove the action to federal court;
 - The right to appeal or challenge an interim ruling or order;
 - The right to appeal or challenge a final award, except under § 5809; and
 - The right to challenge whether an arbitration was properly held except under § 5809.
- **Jurisdiction (10 Del. C. § 5804)**
 - Except as provided in the Agreement, the Supreme Court may hear challenges to a final award under § 5809;
 - The Supreme Court does not have jurisdiction to hear disputes regarding:
 - A determination of an arbitrator’s fees;
 - The issuance or denial of an injunction in aid of arbitration; and
 - The grant or denial of an order enforcing a subpoena.
 - The Court of Chancery’s jurisdiction is limited to:
 - Appointing an arbitrator;
 - Entering judgment under § 5810(b);
 - Enforcing a subpoena – when such enforcement is requested by the arbitrator;
 - Determining an arbitrator’s fee; and
 - Issuing an injunction in aid of arbitration – *only* before an arbitrator accepts appointment.
 - The Superior Court may enter judgments based on confirmed final awards providing purely monetary relief.
 - No Court may enjoin an arbitration under this chapter.

- **Appointment of Arbitrator(s) (10 Del. C. § 5805)**
 - The Court of Chancery, upon petition or application of a party in an existing case, has exclusive jurisdiction to appoint 1 or more arbitrators upon:
 - Consent of all parties;
 - Failure or inability of an arbitrator named in the Agreement to serve;
 - Failure of an Agreement to name an arbitrator or provide a method for selecting one;
 - Inability of the parties to appoint an arbitrator; or
 - The failure of a procedure set forth in the Agreement for selecting an arbitrator.
 - Following the filing of a petition or application, each party shall propose to the Court of Chancery no more than 3 people who are qualified and willing to serve.
 - The Court of Chancery shall, within 30 days of the petition or application, appoint an arbitrator. The Court of Chancery may consider:
 - The terms of the Agreement;
 - The candidates proposed by the parties; and
 - Any reports made under § 5806(d) (concerning the failure to issue a timely award in an arbitration, which the arbitrator must report to the Court of Chancery).
 - An arbitrator must be:
 - A person named in or selected under the Agreement; or
 - A person expert in any non-legal discipline described in the Agreement; or
 - A member in good standing of the Delaware bar for at least 10 years.
 - Unless otherwise provided in the Agreement, the Court of Chancery shall appoint a single arbitrator.
- **Arbitrator's fees and expenses (10 Del. C. § 5806)**
 - An arbitrator's fees and expenses, together with other expenses (not including counsel fees of the parties) shall be borne by the parties as provided in the final award.
 - An arbitrator is immune from civil liability resulting from any act or omission done or made in connection with an arbitration (unless made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another).
 - If the arbitrator's final award is late (§ 5808 details when a final award is due), the arbitrator's fees must be reduced according to a scale set out in § 5806. If the final award is more than 60 days late the arbitrator's fees "must be reduced 100%."
 - The arbitrator can retain counsel who can make rulings on issues of law which are afforded the same weight as if made by the arbitrator. The arbitrator's counsel's fees are considered expenses to be borne by the parties as provided in the final award.
- **Hearings and Evidence (10 Del. C. § 5807)**
 - The arbitrator shall appoint a time and place for a hearing.
 - The arbitration can be held anywhere (in or outside of Delaware) but the seat of the arbitration is always Delaware.
 - The parties have the right to be heard, present evidence and cross-examine witnesses.

- The arbitrator can administer oaths and compel attendance and production of documents.
- If provided in the Agreement, the arbitrator can issue subpoenas.
- If provided in the Agreement, the arbitrator can issue commissions.
- **Arbitration Awards (10 Del. C. § 5808)**
 - Awards must be in writing, signed, provided to all parties and include a form of judgment.
 - Arbitrators may award any relief they determine appropriate, including both legal and equitable relief.
 - Arbitrators may make rulings on issues of law.
 - The final award must issue within the time set in the Agreement or, if the Agreement does not include such a time, within 120 days of the arbitrator's acceptance of the appointment.
 - That time can be extended by unanimous written consent, but cannot exceed 60 days after the expiration of the time set in the Agreement or, if the Agreement does not include such a time, 120 days after the arbitrator's acceptance of the appointment.
- **Challenges to awards (10 Del. C. § 5809)**
 - Challenges to final awards are taken to the Delaware Supreme Court as a civil appeal.
 - Challenges must be made within 15 days of the issuance of the final award.
 - The Supreme Court may only vacate, modify or correct the final award in conformity with the Federal Arbitration Act. The Supreme Court can confirm the arbitration award.
 - The Agreement may provide for:
 - No appellate review; or
 - Appellate review of a final award by 1 or more arbitrators (who may be appointed by the Court of Chancery).
- **Confirmation of final award (10 Del. C. § 5810)**
 - Unless challenged, or unless the Agreement provides for appellate review by 1 or more arbitrators, a final award is deemed confirmed on the 5th business day following the period for challenge under § 5809. If the Agreement provides for no appellate review the award is confirmed on the 5th business day after issuance.
 - Except when the final award provides purely monetary damages, the Court of Chancery, upon application by a party, shall promptly enter final judgment in conformity with the award.
 - Awards of purely monetary damages are entered by the Superior Court upon application of a party. The judgment becomes and is a lien on all the real estate of the debtor in the county, in the same manner as other Superior Court judgments, and may be executed and enforced in the same way.