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Innovation in Arbitration Law: The Case of Delaware

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I. INTRODUCTION

American states have played a limited role in the development of international arbitration law in the United States.[1] Because of the availability of federal court subject matter jurisdiction over cases involving international arbitration,[2] broad authority to remove such cases from state courts,[3] and preemption of state law by the Federal Arbitration Act (FAA),[4] state innovation in international arbitration law has been limited. Even when states have legislated on international arbitration matters, most commonly they have adopted the UNCITRAL Model Law.[5] While the Model Law is perhaps innovative relative to the FAA, adoption of a model statute itself is not particularly innovative.

In recent years, however, Delaware has proven to be an exception. Delaware is well known for its leading role as a state for incorporation.[6] But Delaware has become increasingly active in adopting innovative arbitration laws. While these laws have applied both to domestic and international arbitration, at least part of the motivation for the innovations apparently has been to compete in the market for international dispute resolution.[7]

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1. *See, e.g.*, Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. DISP. RESOL. 101, 101 ("[T]his extensive body of state arbitration law has had only a 'marginal impact' on American arbitration practice—particularly international arbitration practice—because the Federal Arbitration Act (FAA) preempts conflicting state arbitration laws, even in state court." (footnotes omitted)).

2. 9 U.S.C. § 203 (2012).

3. *Id.* § 205.

4. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984).

5. *See* Drahozal, *supra* note 1, at 101.

6. *About Agency*, DEL. DIVISION CORPS., http://www.corp.delaware.gov/aboutagency.shtml (last visited Jan. 29, 2016) ("More than 1,000,000 business entities have made Delaware their legal home. More than 50% of all publicly-traded companies in the United States including 64% of the Fortune 500 have chosen Delaware as their legal home."); *see also* Brian Broughman, Jesse M. Fried & Darian Ibrahim, *Delaware Law as Lingua Franca: Theory and Evidence*, 57 J.L. & ECON. 865, 872 (2014).

7. *See, e.g.*, Matt Chiappardi, *Delaware's Bold Plan to Become the World's Arbitration Hub*, LAW360 (May 15, 2015, 2:46 PM), http://www.law360.com/articles/656338/delaware-s-bold-plan-to-become-the-world-s-arbitration-hub ("The state hopes it will offer businesses an attractive alternative to other dispute resolution forums such as the American Arbitration Association or well-traveled overseas venues in London and Singapore. . . . Gregory V. Varallo of Richards Layton & Finger PA, who was part of the working group that put the law together, . . . says Delaware is eyeing in particular businesses with a South American connection that might not be able to easily pursue arbitration in Europe and Southeast Asia . . . ."); Lewis H. Lazarus, *Court of Chancery Arbitration Likely to Become More Prevalent*, DEL. BUS. CT. INSIDER (Sept. 28, 2011), http://www.morrisjames.com/pp/article-58.pdf ("[F]or parties in disputes with foreign entities, the

In 2009, Delaware adopted a confidential system of "arbitration" conducted by sitting Court of Chancery judges, which was subsequently held unconstitutional as violating the First Amendment right of public access to the courts.[8] In 2015, it enacted the Delaware Rapid Arbitration Act (DRAA), creating a system of expedited arbitration in Delaware.[9] Among other things, the DRAA sets mandatory time limits for the completion of arbitration proceedings (with financial penalties for arbitrators who fail to comply),[10] restricts the degree of court involvement in the arbitration process,[11] and provides for expeditious review of arbitration awards directly to the Delaware Supreme Court.[12]

This Article analyzes the DRAA, Delaware's most recent innovation in arbitration law. It distinguishes the provisions of the DRAA that require legislative action from those that the parties can themselves establish by contract. It also notes several potential difficulties with and uncertainties caused by the Act. Finally, it comments on the role of Delaware (as opposed to other American states) as an innovator in arbitration law.

II. DELAWARE COURT OF CHANCERY ARBITRATION[13]

In 2009, Delaware enacted House Bill 49, which provided that "[t]he

new statutes and arbitration rules may provide greater comfort that the arbitration award will be enforceable against a foreign entity on its home turf under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards."); *see also* SIMPSON THACHER & BARTLETT LLP, DELAWARE COURT OF CHANCERY ARBITRATION PROVIDES OPTION FOR DELAWARE PARTIES TO RESOLVE DISPUTES WITH FOREIGN COUNTERPARTIES 3 (Sept. 14, 2010), http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub1027.pdf?sfvrsn=2 ("The Court's new arbitration procedures may provide a promising dispute resolution option for transactions between Delaware and foreign counterparties. Arbitration under the Court's rules should alleviate enforceability concerns because the awards should be enforceable in most foreign countries under the New York Convention."). For a discussion on whether Delaware Court of Chancery arbitration, discussed *infra* notes 14–27, would have qualified as "arbitration" within the meaning of the New York Convention, see Christopher R. Drahozal, *Judge-Arbitrators in Delaware*, KLUWER ARB. BLOG (Dec. 20, 2011), http://kluwerarbitrationblog.com/blog/2011/12/20/judge-arbitrators-in-delaware/.

8. *See infra* notes 14–27 and accompanying text.
9. *See infra* notes 28–35 and accompanying text.
10. *See infra* notes 99–100 and accompanying text.
11. *See infra* notes 85–87, 122–25 and accompanying text.
12. *See infra* notes 133–38 and accompanying text.
13. This sub-part is based in part on Drahozal, *supra* note 7.

Court of Chancery shall have the power to arbitrate business disputes."[14] If the parties agreed, a Court of Chancery judge or other authorized person would serve as the arbitrator.[15] Unlike court proceedings, which are open to the public, the Court of Chancery arbitration proceedings "shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal."[16] The purpose of the Act, according to its synopsis, was "to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters."[17]

In 2010, the Court of Chancery issued rules governing the arbitration proceedings and a standing order setting a filing fee of $12,000, plus an additional $6,000 per hearing day (not including the first).[18] Each party was to pay an equal share of the fees.[19] A Court of Chancery arbitration between Advanced Analogic Technologies, Inc. and Skyworks Solutions, Inc. became public in 2011 when it was disclosed in a federal securities filing.[20] The arbitration, which arose out of a merger agreement, was ultimately

14. DEL. CODE ANN. tit. 10, § 349(a) (West 2015). For a dispute to be eligible for Court of Chancery arbitration, it had to meet five requirements: (1) the parties must have agreed to arbitration; (2) at least one of the parties must have been a "business entity"; (3) the business entity must have either been incorporated under Delaware law or have had its principal place of business in Delaware; (4) no party could be a consumer; and (5) the amount in controversy must have been at least $1,000,000 (for claims seeking solely money damages). *Id.* § 347(a).

15. *Id.* § 349(a).

16. *Id*. § 349(b). The appeal was to be filed directly with the Delaware Supreme Court. *Id.* § 349(c).

17. H.B. 49, 145th Gen. Assemb., 2009 Sess. (Del. 2009), http://legis.delaware.gov/LIS/LIS145.NSF/vwLegislation/HB+49?Opendocument. For further discussion of the provisions and purpose of the Act, see GREGORY V. VARALLO, BLAKE ROHRBACHER & JOHN D. HENDERSHOT, THE PRACTITIONER'S GUIDE TO THE DELAWARE RAPID ARBITRATION ACT 1, 3–5 (2015) [hereinafter DRAA PRACTITIONER'S GUIDE], http://www.rlf.com/Files/11206_DRAA%20Book%20Final.pdf; Brian JM Quinn, *Arbitration and the Future of Delaware's Corporate Law Franchise*, 14 CARDOZO J. CONFLICT RESOL. 829, 842–47 (2013); Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 353–57 (2013).

18. DEL. ARB. R. 96–98 (DEL. COURT OF CHANCERY, Proposed Arbitration Rules 2010) (repealed 2013), http://www.delawarelitigation.com/uploads/file/int1D.PDF.

19. *Id*.

20. *See* Skyworks Sols., Inc., Current Report (Form 8-K) 2–4 (Sept. 26, 2011). A total of six Court of Chancery arbitrations were filed before the procedure was invalidated. *See* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 4; *see also* Quinn, *supra* note 17, at 838 (noting that, based on a sample of 248 corporation transactions from 2009–2011, "[o]nly two transactions in the sample (less than 1%) opted for arbitration in any form, and both of those transactions opted for the new Delaware Chancery arbitration procedure").

settled.[21] But the publicity given to the process resulted in a storm of criticism[22] and eventually a court challenge.[23]

The Delaware Coalition for Open Government filed suit challenging the statute in Delaware federal court.[24] The district court held that the confidential nature of the arbitration process violated the First Amendment by denying the public its constitutional right of access to the courts.[25] The Third Circuit affirmed, stating: "Because there has been a tradition of accessibility to proceedings like Delaware's government sponsored arbitration, and because access plays an important role in such proceedings, we find that there is a First Amendment right of access to Delaware's government-sponsored arbitrations."[26] The Supreme Court denied certiorari on March 24, 2014.[27]

III. THE DELAWARE RAPID ARBITRATION ACT

On March 12, 2015, another House Bill 49 was introduced into the Delaware House of Representatives.[28] House Bill 49, prepared by the Delaware State Bar Association,[29] proposed the DRAA.[30] According to

21. *See* Advanced Analogic Techs., Inc., Current Report (Form 8-K) 2 (Dec. 5, 2011).

22. *See, e.g.*, Paul Kirgis, *In Court, but out of Sight: Chancery Court Arbitration*, INDISPUTABLY (Dec. 15, 2011), http://www.indisputably.org/?p=3165; Steven Davidoff Solomon, *A Troubled Deal and the Law of Unintended Consequences*, N.Y. TIMES DEALBOOK (Nov. 7, 2011, 4:12 PM), http://dealbook.nytimes.com/2011/11/07/a-troubled-deal-runs-into-the-law-of-unintended-consequences/?_r=0.

23. *See* Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 494 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014) (mem.).

24. *Id*. at 493.

25. *Id*. at 494 ("The Court concludes that the Delaware proceeding functions essentially as a non-jury trial before a Chancery Court judge. Because it is a civil trial, there is a qualified right of access and this proceeding must be open to the public.").

26. Del. Coal. for Open Gov't v. Strine, 733 F.3d 510, 521 (3d Cir. 2013). The court of appeals found, quite correctly in my view, the fact that "arbitrations with non-state action in private venues tend to be closed to the public" to be "only of questionable relevance." *Id.* at 518 & n.2. Delaware Court of Chancery arbitration constituted state action to which constitutional protections applied, while courts have consistently held contractual arbitration is not state action. *See* Everett v. Paul Davis Restoration, Inc., 771 F.3d 380, 386 (7th Cir. 2014); Perpetual Sec., Inc. v. Tang, 290 F.3d 132, 137–39 (2d Cir. 2002); Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1202–03 (9th Cir. 1998), *overruled on other grounds by* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003); Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1190–91 (11th Cir. 1995).

27. Strine v. Del. Coal. for Open Gov't, Inc., 134 S. Ct. 1551 (2014) (mem.).

28. *See* H.B. 49, 148th Gen. Assemb., 2015 Sess. (Del. 2015).

29. *See* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 1 (explaining that the DRAA was

section 5802 of the Bill: "The purpose of the Delaware Rapid Arbitration Act 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."[31]

One week later, on March 19, 2015, the Delaware House passed the bill by a vote of 36–1.[32] On March 31, 2015, the Delaware Senate passed the bill by a vote of 21–0.[33] Governor Jack Markell signed the DRAA into law on April 2, 2015.[34] The DRAA took effect May 2, 2015.[35]

Subsequently, on June 17, 2015, the Delaware Supreme Court promulgated rules to govern arbitrations conducted under the DRAA.[36] The Delaware Rapid Arbitration Rules (DRA Rules) apply unless modified or supplanted by the parties.[37] In other words, they are default rules governing the procedure in arbitrations under the DRAA. The DRA Rules address many of the same issues as rules promulgated by arbitration institutions, such as commencing the arbitration, confidentiality, discovery, pre-hearing conferences, the hearing, and the award.[38]

"[d]eveloped through extensive consultation with leading U.S. and foreign arbitration specialists"); *see also id.* at 9 ("Representatives of the state met with companies and practitioners in the U.S. and abroad to evaluate the need for an improved arbitration scheme. Experts in international arbitration practicing in London, Singapore and the U.S. were consulted. Leading in-house counsel in various industries and academics with an interest in arbitration and ADR were consulted, as were corporate practitioners from across the country.").

30. *See* Del. H.B. 49.

31. *Id.* § 5802; *see also* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 9–13.

32. DE H.R. Voting Rep., 2015 Reg. Sess. H.B. 49 (Del. 2015) (Westlaw). The Delaware House of Representatives passed one amendment to House Bill 49 by voice vote. *Id.*

33. *Id.*

34. *Id.*

35. DEL. CODE ANN. tit. 10, §§ 5801–12 (West 2015).

36. *In re* Del. Rapid Arbitration Rules Order (Del. June 17, 2015). The Delaware Supreme Court also amended its own rules of procedure to address proceedings arising under the DRAA. *See* Order Amending Rules 6, 7, 9, and 32 of the Rules of the Supreme Court of Del. (Del. May 21, 2015); *see also* DEL. CT. CH. R. 96.

37. DEL. RAPID ARB. R. 1 ("These Rules shall govern the procedure in arbitrations under the Delaware Rapid Arbitration Act . . . always subject to the provisions of the Act and subject to any agreement in conformity with Rule 3 modifying these Rules or adopting additional rules for an Arbitration."). Rule 3 states that "[t]he parties to an Arbitration may agree, with the consent of the Arbitrator, to modify any of these Rules or to adopt additional rules governing the Arbitration, provided that no modification of or addition to these Rules may be inconsistent with any provision of the Act . . . ." *Id.* R. 3.

38. *See id.* R. 5–26. By comparison, the DRA Rules do not authorize dispositive motions, unless

Each of the next four subsections of this Article highlights and analyzes different parts of the DRAA (including the DRA Rules): first, the scope of the DRAA; second, its provisions on enforcing arbitration agreements; third, its provisions on the arbitral proceeding; and fourth, its provisions on enforcing and challenging awards.[39]

A. Scope of the DRAA

By its terms, the DRAA applies and makes an arbitration agreement enforceable if the following requirements are met:

> (1) [T]he agreement is signed by the parties to an arbitration; (2) at least 1 party to the agreement is a business entity, as that term is defined in § 346 of this title, formed or organized under the laws of this State or having its principal place of business in this State; (3) no party to the agreement is a consumer, as that term is defined in § 2731 of Title 6 . . . ; (4) the agreement provides that it shall be governed by or construed under the laws of this State, 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; and (5) the agreement includes an express reference to the "Delaware Rapid Arbitration Act."[40]

Thus, for the DRAA to apply, the parties must expressly opt in to its use, both by specifying that Delaware arbitration law governs and by expressly mentioning the DRAA.[41] As such, section 5802 of the DRAA states that the Act "is intended to provide an additional option by which sophisticated parties may resolve their disputes. . . . [N]othing in the Act is intended to impair the ability of entities to use other arbitral procedures of

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the arbitrator so provides in a scheduling order; do not require a reasoned award; and do not permit the arbitrator to correct an award after it is issued. DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 82, 92–93.

39. I do not intend this to be a comprehensive analysis of the DRAA. Other sources already provide such an analysis. *See, e.g.*, DRAA PRACTITIONER'S GUIDE, *supra* note 17. Instead, what follows are my comments on the sections of the DRAA and DRA Rules that I find particularly interesting or noteworthy.

40. DEL. CODE ANN. tit. 10, § 5803(a).

41. DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 21 ("[A]n implicit reference, such as 'the parties agree to a rapid arbitration under Delaware law,' does not suffice.").

their own choosing."[42]

1. Signed by the Parties

The DRAA applies only when all "parties to an arbitration" have signed the arbitration agreement.[43] The Frequently Asked Questions document appended to the bill submitted to the Delaware General Assembly explains: "Specifically, the requirement that the arbitration agreement is signed by all parties to the arbitration is meant to exclude the possibility that provisions in a certificate of incorporation or by-laws would bind stockholders who did not personally sign a document expressly agreeing to arbitration under the Act."[44]

In addition to preventing application of the DRAA to arbitration agreements in certificates and by-laws, the signature requirement would also exclude arbitration clauses in other types of contracts not signed by both parties, such as contracts formed by tacit acceptance of a writing.[45]

More generally, the DRAA's signature requirement would seem to preclude courts from relying on many of the theories courts use to resolve the frequently litigated issue of when nonsignatories are bound to or can invoke arbitration clauses.[46] The premise of these theories is that the party sought to be bound by or to invoke the arbitration clause has not signed the arbitration agreement.[47] As such, the DRAA would not seem to apply to such party.[48] The inapplicability of the DRAA to nonsignatories requires

42. DEL. CODE ANN. tit. 10, § 5802.

43. *Id*. § 5803(a). By comparison, the FAA does not require the arbitration agreement to be signed. *See* Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1369 (11th Cir. 2005) ("[T]he overwhelming weight of authority supports the view that no signature is required to meet the FAA's 'written' requirement.").

44. H.B. 49, 148th Gen. Assemb., 2015 Sess. app. at 3 (Del. 2015), http://lawprofessors.typepad.com/files/de-rapid-arbitration-act.pdf.

45. *Cf.* Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd., 186 F.3d 210, 215 (2d Cir. 1999) (construing the "agreement in writing" requirement of the New York Convention).

46. *See, e.g.*, Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 777–80 (2d Cir. 1995) (listing incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel); *see* RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 2-3(b) & reporters' notes b–f (AM. LAW INST., Tentative Draft No. 4, 2015).

47. *See Thomson-CSF*, 64 F.3d at 776. One exception might be incorporation by reference if the parties have signed the contract that incorporates the arbitration clause. *See id*. at 777.

48. *See* DRAA FAQ, *supra* note 44 ("In no event may the Act be used to force arbitration with consumers, or with others who have not signed a written agreement to submit their disputes to resolution under the Act.").

careful drafting of the arbitration agreement to make sure that all interested parties are identified in and sign the agreement.

2. Delaware Corporation as Party

The DRAA requires that at least one party to the arbitration agreement be either incorporated in Delaware or have its principal place of business in Delaware.[49] By including such a requirement, the DRAA differs from most international arbitration statutes, which do not typically require that one of the parties to the arbitration be a national but instead seek to attract arbitrations regardless of the nationality of the parties.[50] By restricting the parties that can use the DRAA, the Act reduces its competitiveness in the international arbitration arena. That said, the substantial number of large corporations incorporated in Delaware[51] means that the potential market for the DRAA is sizeable even with this restriction. Moreover, the requirement does provide at least some (slight) incentive for firms to incorporate in Delaware.[52]

3. Exclusion for "Vulnerable Parties"

The synopsis to the DRAA states: "To ensure that no person is subject to the Act without his or her express and voluntary consent, the Act precludes its use in cases where there is a danger that vulnerable parties' rights are at stake."[53] Accordingly, the DRAA expressly excludes contracts to which a "consumer" is a party.[54]

The DRAA adopts the definition of "consumer" from section 2731 of Title 6 of the Delaware Code as "an individual who purchases or leases merchandise primarily for personal, family or household purposes."[55] By

49. DEL. CODE ANN. tit. 10, § 5803(a) (West 2015).

50. *See, e.g.*, U.N. COMM. ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 1, U.N. Sales No. E.08.V.4 (2008).

51. *See supra* note 6 and accompanying text.

52. *See* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 17 (explaining that "nothing in the Act would preclude the ability of a non-Delaware entity from forming a Delaware subsidiary to enter into a contract for the express purpose of availing the parties to that contract of the benefits of the Act.").

53. *See* DE H.R. Voting Rep., *supra* note 32.

54. DEL. CODE ANN. tit. 10, § 5803(a)(3).

55. *Id.* tit. 6, § 2731(1).

limiting consumers to individuals "who purchase[] or lease[] merchandise,"[56] the statute appears to define consumers narrowly. The dictionary definition of "merchandise" is "the commodities or goods that are bought and sold in business."[57] But the definition of "merchandise" in section 2731(3) is not limited to goods but rather is much broader: "'Merchandise' means any objects, wares, goods, commodities, intangibles, real estate or services, other than insurance."[58] So the vast majority of consumer contracts are excluded from the DRAA, but insurance contracts are not.[59]

In addition, nowhere does the DRAA exclude employment contracts. The inclusion of employment contracts between businesses and their executives is not problematic; CEOs are certainly not "vulnerable parties."[60] Typically, however, rank-and-file employees are grouped together with consumers when identifying vulnerable parties,[61] and the drafters of the DRAA offered no reason to distinguish between those two groups in the application of the DRAA.[62] As long as the employee and employer have signed the arbitration agreement and the other requirements for application of the DRAA are met, it appears that employers can incorporate the DRAA into their dispute resolution programs with employees.[63]

4. Enforceability of Arbitration Agreements Under Other Law

What if parties enter into an arbitration agreement that is otherwise binding and that specifically references the DRAA as required by Delaware law but does not meet one of the other requirements for application of the

56. *Id*.

57. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1413 (3d ed. 2002).

58. DEL. CODE ANN. tit. 6, § 2731(3).

59. *See id*. Another exclusion, added by amendment in the Delaware House, is for homeowners' associations and similar groups. *House Amendment No. 1 to House Bill No. 49*, DEL. STATE LEGISLATURE (2015), http://www.legis.delaware.gov/LIS/lis148.nsf/vwLegislation/HA+1+to+HB +49/$file/legis.html?open; *see* DEL. CODE ANN. tit. 10, §§ 5801(5), 5803(a)(3).

60. *See* Erin O'Hara O'Connor, Kenneth J. Martin & Randall S. Thomas, *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 138 (2012) (noting that CEO employment contracts are different from "adhesion contracts typically found in employment" because "both parties have significant bargaining power and actively negotiate their agreements with the assistance of counsel").

61. *See, e.g.*, Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. §§ 2–3 (2015).

62. *See* DEL. CODE ANN. tit. 10, § 5803.

63. *See supra* note 43 and accompanying text.

Act? For example, what if one or more parties did not sign the arbitration agreement but did orally assent (or was bound under a nonsignatory theory)? What if one of the parties was a consumer? Or what if neither party was a Delaware corporation? Under the FAA, the arbitration agreement might still be enforceable because the FAA does not require a signature, applies to consumers as well as corporations, and does not require a Delaware corporation to be a party.[64] But if so, how should a court deal with the reference to the DRAA?

I can see three possible approaches. First, the court could conclude that the arbitration agreement is enforceable and that the parties incorporated by reference the provisions of the DRAA.[65] Under this view, those provisions of the DRAA that address the arbitration proceeding would be applicable (by contract because the parties agreed to them), but the provisions of the DRAA dealing with the interaction between the arbitration and the Delaware courts would not apply.[66] Second, the court could conclude that the arbitration agreement is enforceable but not under the DRAA (because the DRAA, by its terms, does not apply).[67] Instead, assuming the parties are in Delaware court, perhaps other Delaware arbitration law would apply.[68] Third, the court could find the arbitration agreement to be unenforceable because the applicability of the DRAA was an "integral" part of the parties' arbitration agreement, leaving the parties' dispute to be resolved in court.[69]

B. Enforcing Arbitration Agreements Under the DRAA

Like Delaware's Uniform Arbitration Act, the DRAA provides that

> [a] written agreement to submit to arbitration any controversy

64. *See* 9 U.S.C. § 2 (2012); *see also* DEL. CODE ANN. tit. 10, § 5702(c).

65. *Cf.* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 475 (1989) (taking as given that California court construed general choice-of-law clause as incorporating California arbitration law into the contract).

66. *See* DEL. CODE ANN. tit. 10, § 5702(c).

67. *See supra* note 40 and accompanying text.

68. *See* DEL. CODE ANN. tit. 10, §§ 5701–25.

69. *Compare* Khan v. Dell Inc., 669 F.3d 350, 356 (3d Cir. 2012) (holding the application of NAF Rules was not integral to parties' arbitration agreement), *and* Schuiling v. Harris, 747 S.E.2d 833, 838 (Va. 2013) (same), *with* Ranzy v. Tijerina, No. 10-20251, 2010 U.S. App. LEXIS 17872, at *4 (5th Cir. Aug. 25, 2010) ("[D]esignation of the NAF as the sole arbitration forum is an integral part of the arbitration agreement."), *and* Carr v. Gateway, Inc., 944 N.E.2d 327, 336–37 (Ill. 2011) (same), *and* Rivera v. Am. Gen. Fin. Servs., 259 P.3d 803, 815 (N.M. 2011) (same).

> existing at or arising after the effective date of the agreement is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of the controversy . . . .[70]

This, of course, is subject to the additional requirements discussed above.

1. No Motion to Stay or Petition to Compel

Unlike the FAA[71] and the Delaware Uniform Arbitration Act,[72] the DRAA does not itself authorize a motion to stay litigation pending arbitration or a petition to compel arbitration. Moreover, while parties agreeing to arbitration under the DRAA waive a variety of rights,[73] they do not expressly waive the right to file suit.[74] The drafters of the DRAA seemed to assume that by making arbitration agreements enforceable, delegating questions of substantive and procedural arbitrability to the arbitrator,[75] and barring anti-arbitration injunctions[76] the Act will "eliminate that typical initial round of litigation before arbitration, where one party seeks relief in court to determine which issues are properly subject to arbitration and which are not."[77] But the frequent litigation in federal courts over arbitration clauses that include delegation clauses suggests that the

70. DEL. CODE ANN. tit. 10, § 5803(a); *see id.* § 5701 ("A written agreement to submit to arbitration any controversy existing at or arising after the effective date of the agreement is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of the controversy . . . .").

71. 9 U.S.C. §§ 3–4 (2012).

72. DEL. CODE ANN. tit. 10, § 5703(a) ("A party aggrieved by the failure of another to arbitrate may file a complaint for an order compelling arbitration. . . . If the application is granted, the order shall operate to stay the pending or any subsequent action, or so much of it as is referable to arbitration.").

73. *See id.* § 5803(c). For example, under the DRAA, the parties waive the right to "remove any action under [the] chapter to a federal court." *Id.* § 5803(c)(2); *see also* 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3721 (4th ed. 2015) ("The modern view . . . is that, in advance of suit, a defendant can contractually waive his right to remove to federal court an action brought against him in a state court, unless the Constitution or a federal statute grants the federal courts exclusive jurisdiction over that action."). Without such a waiver, a party wishing to avoid application of much of the DRAA might remove the case to federal court and frustrate the Act's application.

74. *See* DEL. CODE ANN. tit. 10, § 5803(c).

75. *See infra* notes 88–95 and accompanying text.

76. *See infra* notes 85–87 and accompanying text.

77. DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 17.

hope of eliminating such litigation (as distinct from expediting its resolution) is unrealistic.[78] Perhaps other provisions of Delaware law authorizing a motion to stay and petition to compel arbitration will apply under the DRAA,[79] even though the DRAA does not so provide and, in fact, expressly denies any jurisdiction to the Court of Chancery to engage in actions not listed in the Act.[80] Or maybe the court's authority to stay an action pending arbitration is implicit in the parties' obligation to arbitrate their dispute or the court's authority under the DRAA to issue "an injunction in aid of arbitration."[81]

2. Anti-Suit and Anti-Arbitration Injunctions

The DRAA expressly authorizes the Delaware Court of Chancery (albeit "only before an arbitrator accepts appointment as such") to "issue an injunction in aid of arbitration."[82] Although the provision is not completely clear, an anti-suit injunction, enjoining a party from litigating a claim subject to an arbitration agreement, arguably is "an injunction in aid of arbitration."[83] Under this view, the Court of Chancery would have power to issue anti-suit injunctions, as do courts under the FAA.[84]

Conversely, the DRAA precludes issuance of an anti-arbitration injunction—an injunction against an arbitration proceeding under the Act.[85] By comparison, the Delaware Uniform Arbitration Act expressly authorizes anti-arbitration injunctions,[86] and the FAA has generally been held to permit

78. *See, e.g.*, RESTATEMENT, *supra* note 46, § 2-7 reporters' note b (citing cases).

79. *See* DEL. CODE ANN. tit. 10, § 5702(c).

80. *Id.* § 5804(b) (stating that "[t]he making of an agreement confers jurisdiction on the Court of Chancery of the State *only* to" engage in the specifically enumerated acts (emphasis added)).

81. *Id.* § 5804(b)(5).

82. *Id.*

83. *See infra* notes 122–30 and accompanying text.

84. *See, e.g.*, RESTATEMENT, *supra* note 46, § 2-28. Although the FAA does not expressly authorize anti-suit injunctions, courts have consistently held that they can issue such injunctions in appropriate circumstances. *See id*.

85. DEL. CODE ANN. tit. 10, § 5804(b)(5) ("Notwithstanding the foregoing, no court has jurisdiction to enjoin an arbitration under this chapter."); *id.* § 5803(c)(1) ("A party to an agreement is deemed to have waived the right to . . . [s]eek to enjoin an arbitration . . . .").

86. *Id*. § 5703(b) ("Subject to subsection (c) of this section, a party who has not participated in the arbitration and who has not been made or served with an application to compel arbitration may file its complaint with the Court seeking to enjoin arbitration on the ground that a valid agreement was not made or has not been complied with.").

such injunctions.[87]

3. Substantive Versus Procedural Arbitrability

DRAA section 5803(b) provides that "a party to an agreement [under the DRAA] is deemed to have waived objection and consented to . . . the submission exclusively to an arbitrator of issues of substantive and procedural arbitrability."[88] Although it is perhaps unfortunate the Act uses "arbitrability" in the broad American sense,[89] the terms are familiar in Delaware case law:

> Issues of substantive arbitrability are gateway questions relating to the scope of an arbitration provision and its applicability to a given dispute, and are presumptively decided by the court. Procedural arbitrability issues concern whether the parties have complied with the terms of an arbitration provision, and are presumptively handled by arbitrators. These issues include whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, as well as allegations of waiver, delay, or a like defense to arbitrability.[90]

The default rule in U.S. arbitration law is that issues of substantive arbitrability are for the court to decide and issues of procedural arbitrability are for the arbitrator to decide.[91] The DRAA changes that default rule by

87. *See, e.g.*, RESTATEMENT, *supra* note 46, § 2-28.

88. DEL. CODE ANN. tit. 10, § 5803(b)(2); DEL. RAPID ARB. R. 6.

89. *See* RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 4-17 reporters' note a (AM. LAW INST., Tentative Draft No. 3, 2013) ("Confusion may arise, however, because courts in the United States often refer to the existence and scope of the parties' consent to arbitrate as 'arbitrability' questions.").

90. *See* Viacom Int'l Inc. v. Winshall, 72 A.3d 78, 82 (Del. 2013) (quoting Viacom Int'l, Inc. v. Winshall, No. 7149-CS, 2012 WL 3249620, at *12 (Del. Ch. Aug. 9, 2012)); *see also* John J. Barceló III, *Substantive and Procedural Arbitrability in Ad Hoc Investor-State Arbitration*—BG Group v. Argentina, *in* CONTEMPORARY ISSUES IN INTERNATIONAL AND MEDIATION: THE FORDHAM PAPERS 355, 358 (Arthur W. Rovine ed., 2015) (explaining that "'substantive arbitrability' questions . . . deal with whether an arbitration agreement between the parties has come into existence; if so, whether it is valid; and if it exists and is valid, whether each of the claims raised by the claimant is within the arbitration agreement's scope. Thus, 'substantive arbitrability' questions concern the existence, validity, and scope of the arbitration agreement.").

91. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 555–59 (1964); *see also* UNIF. ARBITRATION ACT § 6 cmt. 2 (UNIF. L.

making issues of substantive arbitrability for the arbitrator to decide.[92] But under the FAA, the parties can make the same change in their arbitration agreement,[93] and indeed, "[v]irtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules" does so.[94] As a result, while this provision is one of the touted advantages of the DRAA,[95] it actually adds very little.

C. The Arbitration Proceeding Under the DRAA

The most highly publicized innovation of the DRAA is its adoption of strict time limits for arbitration proceedings—hence the name of the statute, the Delaware *Rapid* Arbitration Act.[96]

1. Time Limits and Enforcement

Section 5808(b) of the DRAA provides that "an arbitrator shall issue a final award within the time fixed by an agreement or, if not fixed, within 120 days of the arbitrator's acceptance of the arbitrator's appointment."[97] The DRAA permits the parties to agree to only one extension, of at most 60

COMM'N 2000) (explaining that under the FAA, "in the absence of an agreement to the contrary, issues of substantive arbitrability, *i.e.*, whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide").

92. *See supra* note 88 and accompanying text.

93. *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 66 (2010); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947 (1995); Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp., 123 Cal. Rptr. 3d 547, 552 (Ct. App. 2011) ("When the parties 'clearly and unmistakably' delegate issues of arbitrability to the arbitrator, the arbitrator, not the court, decides such issues as the scope of the arbitration agreement.").

94. Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013). *But see* RESTATEMENT, *supra* note 46, § 2-7 reporters' note b(iii) (rejecting the majority approach).

95. *See* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 35 ("Perhaps the most significant grant of power to the arbitrator in the DRAA is the power to determine all issues of arbitrability.").

96. For the DRAA's treatment of discovery, see DEL. CODE ANN. tit. 10, § 5807(b) (West 2015); DEL. RAPID ARB. R. 17; DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 38 ("The DRAA is silent as to the scope of permissible pre-hearing discovery, leaving that issue entirely to the parties and (if the parties cannot agree) the arbitrator."); *id*. at 58 ("[U]sing a bare minimum clause [under the DRAA] will preclude the arbitrator, once appointed, from authorizing third-party discovery . . . ."); *id.* at 89–90 (discussing DEL. RAPID ARB. R. 17).

97. DEL. CODE ANN. tit. 10, § 5808(b).

days.[98] If the arbitrator does not issue the award in the time period allotted, the arbitrator's fees are further reduced the longer the delay continues:

> [T]he arbitrator's fees must be reduced by 25% if the final award is less than 30 days late; the arbitrator's fees must be reduced by 75% if the final award is between 30 and 60 days late; and the arbitrator's fees must be reduced by 100% if the final award is more than 60 days late.[99]

In addition, an arbitrator who fails to issue a timely award must report that fact to the Register in Chancery.[100]

The DRAA is certainly noteworthy in its attempt to avoid undue delays of the arbitration process.[101] But its time limits do not add much that parties could not already do. Many arbitration administrators already have expedited or fast track arbitration rules that set strict time limits for arbitral proceedings,[102] and at least one imposes severe restrictions on the availability of extensions.[103] Moreover, in January 2015, the ICC International Court of Arbitration announced that it would begin reducing an arbitral tribunal's fees when the tribunal is late in submitting an award.[104]

98. *See id.* § 5808(c).

99. *Id.* § 5806(b) (adding that, "[n]otwithstanding the foregoing sentence, upon petition by an arbitrator, the Court of Chancery may summarily determine, on clear and convincing evidence, that exceptional circumstances exist such that the reductions in the foregoing sentence should be modified or eliminated").

100. *See id.* § 5806(d).

101. *See* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 2 (noting how the DRAA "is designed to address resolution of disputes where the parties most need no-nonsense and swift resolution").

102. *See, e.g.*, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES E-1 to -10 (AM. ARBITRATION ASS'N 2015), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103; FAST TRACK MEDIATION AND ARBITRATION RULES OF PROCEDURE (CPR 2015), http://www.cpradr.org/RulesCaseServices/CPRRules/FastTrackRulesofProcedure.aspx.

103. *See* FEDARB RULES r. 1.04 (FEDARB 2015), http://www.fedarb.com/rules/fedarb-rules/ ("An Arbitrator or Panel may not vary any applicable time limit on any action required of that Arbitrator or Panel, and may not seek any extension of a time period from the parties to an arbitration except through FedArb. Any party may decline any request for extension of time limitations, and such decisions will be conclusive unless an extension is determined to be necessary by FedArb or the FedArb Council in the interests of justice.").

104. *See ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency*, INT'L CHAMBER COM. (Jan. 5, 2016), http://www.iccwbo.org/News/Articles/2016/ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/ (stating that the ICC International Court of Arbitration will reduce fees paid to arbitrators for awards submitted more than "three months after the last substantive hearing concerning matters to be decided in an award").

Accordingly, the parties already can accomplish by contract much, if not all, of what these provisions of the DRAA are aiming to accomplish.

2. Arbitrator Appointment

If the arbitrator selection method set out in the agreement fails, under the DRAA the Delaware Court of Chancery "has exclusive jurisdiction to appoint 1 or more arbitrators."[105] The court has only 30 days in which to appoint an arbitrator, who "may only be: (a) A person named in or selected under an agreement; (b) A person expert in any nonlegal discipline described in an agreement;[106] or (c) A member in good standing of the Bar of the Supreme Court of the State for at least 10 years."[107] If the parties want an arbitrator who is not a member of the Delaware bar, they should take care to ensure that they agree on a method of appointment that permits or requires selection of a non-Delaware arbitrator (or make sure that the Court of Chancery does not end up making the appointment).[108]

3. Confidentiality

The DRAA does not itself address the confidentiality or privacy of the arbitration proceeding.[109] The FAQ released with the DRAA states that "[l]ike any private arbitration, proceedings under the Act are confidential, until and unless a challenge is filed" in court to any award.[110] Given the previous litigation over the confidentiality of the Court of Chancery arbitration,[111] it is surprising that the DRAA itself did not address the confidentiality of the proceeding. Moreover, the assertion in the FAQ that "[l]ike any private arbitration, proceedings under the Act are confidential"

105. DEL. CODE ANN. tit. 10, § 5805(a) (setting out other situations in which the court has the exclusive authority to appoint arbitrators).

106. To facilitate the selection of non-lawyer arbitrators, the DRAA permits arbitrators to hire counsel to make rulings on issues of law or to advise the arbitrator on legal issues in the case. *Id.* § 5806(c); *see* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 13 ("Arbitrators who use this option may wish to rule directly (based on their counsel's advice) to avoid any possible foreign enforcement issues arising from such rulings.").

107. DEL. CODE ANN. tit. 10, § 5805(b)(2)(a)–(c).

108. DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 30–31.

109. *See id.* at 83.

110. DRAA FAQ, *supra* note 44, at 2.

111. *See supra* notes 24–27 and accompanying text.

may be misleading.[112] Under U.S. law, arbitration is private, not confidential.[113] The public cannot attend an arbitration hearing, and the arbitrator and arbitration institution are subject to an obligation of confidentiality.[114] But unless the parties have entered into a confidentiality agreement, neither is precluded from disclosing information about the arbitration, including the award itself.[115]

However, the DRA Rules address confidentiality at length, and unless changed by party agreement, they provide for broad confidentiality of arbitration proceedings under the DRAA.[116] First, the DRA Rules provide generally that "[a]rbitrations under the Act are confidential proceedings."[117] Second, the Rules make "[a]ll memoranda and work product contained in the case files of an Arbitrator" and "[a]ny communication made in or in connection with the Arbitration that relates to the controversy being arbitrated" confidential.[118] Third, under the Rules,

> [n]o document or other matter submitted to the Arbitrator, served upon the parties to an Arbitration, used in any hearing or conference with the Arbitrator, or referred to or relied upon in an arbitral award shall become part of a public record as a result of such submission, service, use, reference or reliance.[119]

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112. *See* DRAA FAQ, *supra* note 44, at 2.

113. Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION (forthcoming 2016).

114. *See id.*

115. *See, e.g.*, *id.* For an exception, see ADMINISTERED ARBITRATION RULES r. 20 (CPR 2013), http://www.cpradr.org/Portals/0/Administered%20Arbitration%20Rules.pdf ("Unless the parties agree otherwise, *the parties*, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party." (emphasis added)).

116. *See* DEL. RAPID ARB. R. 5.

117. *Id*. The Rules do not expressly preclude nonparties from attending the arbitration hearing, *see id.* R. 22, or make the final award confidential, *see id*. R. 24, but presumably those requirements follow from the general confidentiality provision, if not one of the more specific provisions of the rule.

118. *Id.* R. 5; *see also id.* R. 13 ("A record of all pleadings and other papers delivered to the Arbitrator shall be maintained by the Arbitrator, but shall remain confidential except as otherwise provided by Rule 5.").

119. *Id.* R. 5; *see also id.* R. 17 (providing that all "information exchanged between the parties shall be used exclusively for purposes of the Arbitration, shall be maintained on a confidential basis by the other parties, and shall be returned or destroyed upon conclusion of the Arbitration"). The

Thus, the DRA Rules go well beyond the usual American approach to the confidentiality of arbitration proceedings and make almost every aspect of the proceeding confidential.[120] That said, parties can achieve the same degree of confidentiality under current law as long as they include an appropriate confidentiality provision in their arbitration clause.[121]

4. Interim Relief

Two provisions of the DRAA and DRA Rules address (at least arguably) the availability of interim relief under the Act. First, section 5804(b) of the DRAA permits the Court of Chancery "only before an arbitrator accepts appointment as such, [to] issue an injunction in aid of arbitration."[122] Preliminary injunctions are certainly a form of interim relief that courts sometimes order in support of arbitration, and limiting the availability of court-ordered injunctions to before the arbitrator accepts appointment would likewise be consistent with construing this provision as authorizing interim relief.[123] That said, the commentary on the section focuses on "the delays associated with the pre-arbitration skirmishes that have become commonplace,"[124] which seems more directed at anti-suit injunctions than interim relief.[125]

Rules recognize the following exceptions: (1) when "all parties to the Arbitration agree in writing to waive the confidentiality"; (2) when the materials or communications "are otherwise subject to disclosure and were not prepared specifically for use in the Arbitration"; and (3) when an award is challenged in the Delaware Supreme Court (to the extent provided in applicable court rules). *Id.* R. 5.

120. The one exception is that nothing in the Rules precludes a party from disclosing the fact of its dispute with the other party, although the party likely cannot disclose that the dispute is being resolved in arbitration. *See* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 16 ("Parties to disputes often prefer not to have the fact of their disputes become public."). For example, if one party believes that the other party sold it defective goods, nothing in the DRA Rules would preclude it from complaining publicly about the quality of the goods it received. *See* Drahozal, *supra* note 113. But, that party likely could not announce publicly that it has filed a claim in arbitration seeking to recover for breach of contract due to the defective goods. *Id*.

121. *See* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 16, 83.

122. DEL. CODE ANN. tit. 10, § 5804(b)(5) (West 2015).

123. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 215–16 (7th Cir. 1993).

124. DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 18.

125. Perhaps parties can accomplish the same end by carving out interim relief from the arbitration clause, as they commonly do now. *See* Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1969–88 (2014).

Second, Rule 6 of the DRA Rules provides that "[u]pon acceptance of appointment as prescribed in Rule 9, the Arbitrator shall have power and authority . . . to grant interim and/or final relief, including to award any legal or equitable remedy appropriate in the sole judgment of the Arbitrator."[126] This provision, like many institutional rules,[127] authorizes arbitrators themselves to grant interim relief. Some authority under the FAA permits parties to challenge and enforce arbitrator awards of interim relief in court.[128] The DRAA appears expressly to preclude such a possibility, permitting only court review and enforcement of the arbitrators' final award.[129] Perhaps the arbitrators can issue more than one "final award," but doing so seems inconsistent with the scheme of expedited court review of awards established by the DRAA.[130]

D. Challenging and Enforcing Arbitration Awards Under the DRAA

The provisions of the DRAA dealing with challenging and enforcing arbitral awards also are designed to expedite the arbitration process.[131] Indeed, some of these provisions are among the few that the parties cannot replicate themselves by contract because they address the authority of the courts rather than the arbitrators.[132]

1. Challenging Award Directly to Delaware Supreme Court

Under the DRAA, "[a] challenge to a final award may be taken to the Supreme Court of the State in the manner as appeals are taken from orders

126. DEL. RAPID ARB. R. 6.

127. *See, e.g.*, U.N. COMM. ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES art. 26 (2013).

128. RESTATEMENT, *supra* note 46, § 1-1(p) & reporters' note p.

129. DEL. CODE ANN. tit. 10, § 5801(4) (West 2015) ("'Final award' means an award designated as final and issued in an arbitration by an arbitrator."); DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 43 ("The arbitrator may enter interim orders or other rulings during the pendency of the arbitration, but those do not qualify as the final award under the DRAA."); *id.* at 36 ("The arbitrator's interim rulings—including . . . interim equitable relief and sanctions—cannot be appealed or challenged.").

130. *See infra* notes 133–37 and accompanying text. If so, that would also make arbitration under the DRAA ill-suited for cases in which the parties or the arbitrator wish to bifurcate the proceedings.

131. DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 19, 51.

132. *See* DEL. CODE ANN. tit. 10, § 5804(a).

or judgments in a civil action."[133] The challenge must be filed within fifteen days after the arbitral award is issued.[134] By permitting the challenge to be filed directly in the Delaware Supreme Court, the DRAA eliminates a layer of review that would otherwise delay final resolution of the case.[135] One federal court of appeals has held that parties may waive the right to appeal a district court's ruling on an action to vacate an arbitral award, also eliminating a layer of review.[136] But the DRAA permits appeal directly to the appellate court, which is not possible under the FAA.[137] The parties' choice between the two approaches may depend on whether they prefer review at the trial court or appellate court level.

2. Grounds for Vacating Awards

Unlike section 5714 of the Delaware Uniform Arbitration Act,[138] the DRAA expressly tracks the grounds for vacating awards from section 10 of the FAA (which the Court of Chancery arbitration legislation had previously done).[139] That approach has the advantage of incorporating a longstanding and well-known set of vacatur grounds. But it has the disadvantage of possibly incorporating manifest disregard of the law as a vacatur ground under the DRAA. The current status of manifest disregard under the FAA is uncertain.[140] If the Supreme Court were to hold that manifest disregard of the law is a ground for vacating awards under FAA section 10, then it would be available under the DRAA as well.[141] Given the uncertainty the ground has caused and the criticism directed towards it,[142] I am surprised that the

133. *Id*. § 5809(a).

134. *Id*. § 5809(b).

135. DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 19, 51.

136. MACTEC, Inc. v. Gorelick, 427 F.3d 821, 830 (10th Cir. 2005).

137. *See* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 19, 51. *Compare* DEL. CODE ANN. tit. 10, § 5809, *with* 9 U.S.C. § 16 (2012).

138. DEL. CODE ANN. tit. 10, § 5714.

139. *See id.* § 5809(c); *see also* 9 U.S.C. § 10; DEL. CODE ANN. tit. 10, § 349(c).

140. Wachovia Sec. v. Brand, 671 F.3d 472, 481 n.7 (4th Cir. 2012); *see* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3 (2010) ("Assuming, *arguendo,* that such a [manifest disregard of the law] standard applies, we find it satisfied for the reasons that follow.").

141. *See* DEL. CODE ANN. tit. 10, § 5809(c).

142. *See, e.g.*, State v. Philip Morris, Inc., No. 41679, 2015 Ida. LEXIS 147, at *18 (Idaho June 22, 2015); J. Don Gordon Constr., Inc. v. Brown, No. 113112, 2015 Ala. LEXIS 71, at *4 (Ala. June 5, 2015); Visiting Nurse Ass'n of Fla., Inc. v. Jupiter Med. Ctr., Inc., 154 So. 3d 1115, 1125 (Fla. 2014), *cert. denied*, 135 S. Ct. 2052 (2015).

drafters of the DRAA did not make clear that manifest disregard was not available.

3. Waiver of Appeal

The DRAA also permits the parties in their agreement to waive the right to seek court review of an award and either replace it with an arbitral appeals panel or do away with review altogether.[143] By comparison, under the FAA courts have held that parties cannot waive the grounds for vacating awards.[144] In this respect the DRAA is similar to the arbitration laws of several European countries, which also permit parties to waive court review of awards (although Swiss law permits such waivers only if none of the parties to the agreement are Swiss).[145] This provision and the direct appeal to the Delaware Supreme Court are the most innovative aspects of the DRAA.

4. FAA Preemption

As a general matter, because the DRAA adopts the FAA section 10 grounds for vacating awards,[146] FAA preemption should not be a concern here. The one possible exception is for the provision of the DRAA permitting waiver of any court review of awards.[147] If section 10 of the FAA

143. DEL. CODE ANN. tit. 10, § 5809(d). If the right to seek court review is waived, the "final award, without further action by the Court of Chancery of the State, is deemed to have been confirmed" after five days. *Id.* § 5810(a). Upon application by a party, the appropriate court "shall promptly enter a final judgment in conformity with that final award." *Id.* § 5810(b)–(c).

144. *See, e.g.*, M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 847 (6th Cir. 1996). Parties can certainly provide for an arbitral appeals panel, but whatever award the arbitral appeals panel issues would then itself be subject to review under the FAA.

145. *See* CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1522 (Fr.), *reprinted in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, *France*, Annex II-14 (Jan Paulsson & Lise Bosman eds., Kluwer Law Int'l Supp. 2011) ("By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside."); BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [PRIVATE INTERNATIONAL LAW ACT], Dec. 18, 1987, SR 291, art. 192 (Switz.), *reprinted in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, *Switzerland*, Annex II-5 (Jan Paulsson & Lise Bosman eds., Kluwer Law Int'l Supp. 2008) ("If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).").

146. *See* DEL. CODE ANN. tit. 10, § 5809(c).

147. *See id.* § 5809(d).

applies in state court (by its own terms as opposed to the DRAA's incorporation of the section 10 vacatur grounds), as a number of courts have held,[148] it may preempt that provision of the DRAA.[149] But by its plain language, FAA section 10 appears to apply only in federal court, in which case the DRAA provision permitting waiver of appeal would not be preempted under most theories of FAA preemption.[150]

E. The DRAA and Interjurisdictional Competition

Other American states have made changes in their arbitration laws to try to attract international arbitration business.[151] But none has been as innovative as Delaware (although whether those innovations are ones that parties will use remains to be seen).[152] So why is Delaware making such noticeable efforts at innovation in its arbitration laws? At least three possibilities occur to me (and none of these possibilities are mutually exclusive—i.e., all may well be at work in some combination).

First, Delaware might simply be seeking to compete in the market for international dispute resolution like other states, and its experience in competing in other legal markets is influencing how it competes here. Prior

148. *See, e.g.*, William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1245–46 (2003); Hans Smit, *Manifest Disregard of the Law in the New York Supreme Court, Appellate Division, First Department*, 15 AM. REV. INT'L ARB. 111, 116 (2004).

149. *See supra* note 144 and accompanying text (discussing how FAA section 10 does not permit waiver of its vacatur grounds).

150. *See* Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 905, 924–26 (2010).

151.Most commonly, states have adopted the UNCITRAL Model Law on International Commercial Arbitration, or some other form of international arbitration statute, as noted earlier. *See supra* note 5 and accompanying text. Several states have identified judges to specialize in international arbitration matters. *See* Anibal Sabater & Mark Stadnyk, *New York's International Arbitration Judge, One Year Later*, N.Y.L.J. (Nov. 17, 2014), http://www.newyorklawjournal.com/id=1202676271006/New-Yorks-International-Arbitration-Judge-One-Year-Later#ixzz3X13QfFI6; 11th Judicial Circuit of Florida, Media Advisory, Eleventh Judicial Circuit Establishes International Commercial Arbitration Court (Dec. 17, 2013), http://www.jud11.flcourts.org/documents/NewsReleases/International%20Arbitration%20Court%20Announcement%20-%20Dec%202013.pdf; Greg Land, *Fulton County Superior Court's Business Court to Take International Arbitration Cases*, DAILY REP. (June 25, 2015), http://www.dailyreportonline.com/id=1202730517745/Fulton-County-Superior-Courts-Business-Court-to-Take-International-Arbitration-Cases?slreturn=20151111130045.

152. The DRAA is not limited to international arbitration; it applies to domestic arbitration as well.

to the adoption of the DRAA, Delaware does not appear to have been a particularly popular choice as arbitral seat. No international arbitrations administered by the International Chamber of Commerce were seated in Delaware from 2010 through 2013 (the most recent data available).[153] Delaware ranked 38th out of 50 states as a site for domestic commercial and construction arbitrations administered by the AAA from 2007 to 2011.[154] Only a handful of parties had agreed to arbitrate using Delaware's Court of Chancery arbitration rules.[155]

Certainly commentaries on the DRAA suggest that Delaware is trying to set up an arbitration regime that can compete for international arbitration business.[156] But if that was its only goal in adopting the DRAA, the Act would permit all parties to contract for application of the Act, rather than requiring at least one party be incorporated or located in Delaware.[157] The limitation to Delaware corporations suggests that more is going on than Delaware simply seeking to compete for international arbitrations.

Second, Delaware might want to shore up its lead in corporate chartering by adding ancillary services like arbitration. Commentary on the DRAA supports that view,[158] as does the structure of the Act because of its

153. *2013 Statistical Report*, 25-1 ICC INT'L CT. ARB. BULL. 5, 13 (2014); *2012 Statistical Report*, 24-1 ICC INT'L CT. ARB. BULL. 5, 14 (2013); *2011 Statistical Report*, 23-1 ICC INT'L CT. ARB. BULL. 5, 13 (2012); *2010 Statistical Report*, 22-1 ICC INT'L CT. ARB. BULL. 5, 13 (2011).

154. This is based on data provided by the AAA. For a detailed discussion of the sample, see Erin O'Hara O'Connor & Peter B. Rutledge, *Arbitration, the Law Market, and the Law of Lawyering*, 38 INT'L REV. L. & ECON. 87, 98–99 (2013). This ranking is in line with Delaware's population and the amount of economic activity in the state. *See Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico*, U.S. CENSUS BUREAU, http://www.census.gov/popest/data/state/totals/2014/tables/NST-EST2014-01.xls (last visited Oct. 19, 2015) (showing Delaware ranked as 46th most populous state as of July 1, 2014); *Broad Growth Across States in 2014*, U.S. DEP'T COM., BUREAU ECON. ANALYSIS tbl.1 (June 10, 2015), https://www.bea.gov/newsreleases/regional/gdp_state/2015/xls/gsp0615.xlsx (showing Delaware ranked as the state with the 42nd highest GDP as of December 31, 2014).

155. *See supra* note 20.

156. *See supra* note 7 and accompanying text.

157. DEL. CODE ANN. tit. 10, § 5803(a)(2) (West 2015).

158. *See* DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 25 ("The DRAA is also designed, in part, to provide an additional service to Delaware business entities."); Celia Taylor, *Delaware Tries Again on Rapid Arbitration*, THERACETOTHEBOTTOM (Mar. 24, 2015), http://www.theracetothebottom.org/home/delaware-tries-again-on-rapid-arbitration.html?printerFriendly=true ("Why seek to implement DRAA in light of the failure of the earlier arbitral program? The race to remain competitive as a state amenable to business interests is never-ending. The race has shifted its focus from being the preferred state of incorporation to being the state that offers the most favorable regime of corporate governance. With a rapid arbitration process, Delaware seeks to provide a

requirement that at least one party be a Delaware corporation. It is hard to know how much effect the DRAA will have on a party's choice to incorporate in Delaware. So far two corporations have cited the DRAA (among many other reasons) in their SEC filings to explain to their shareholders why they were changing their state of incorporation to Delaware.[159] But how much effect the DRAA has on corporate decision making at the margin is uncertain.

Third, Delaware appears to be behind New York in the competition among states for choice of law and choice of forum,[160] and may be attempting to use arbitration law to recapture some of that lost ground. While Delaware is ranked first among states in incorporations (by far), New York is ranked ahead of it in providing the law and forum chosen in most types of material corporate contracts.[161] Delaware fares well in some kinds of material contracts, such as merger agreements and trust agreements, but not in most others.[162] Perhaps, in adopting the DRAA, Delaware is seeking

system it believes is desired by the business community as an alternative to otherwise expensive litigation.")

159. *See* Mentor Capital, Inc., Preliminary Information Statement (Schedule 14C) 3 (June 23, 2015) ("In addition to the separate corporate law court system, Delaware also recently enacted the Delaware Rapid Arbitration Act which provides a streamlined arbitration system for many business law disputes."); PICO Holdings, Inc., Definitive Proxy Statement (Schedule 14A) 18 (May 27, 2015) ("Delaware recently passed the Delaware Rapid Arbitration Act, which became effective on May 4, 2015, and which provides a streamlined arbitration process that will allow for prompt, cost-effective resolution of business disputes."). But, there is no way to tell whether the DRAA actually played any role in the companies' decision to reincorporate in Delaware.

160. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1508–09 (2009) ("New York's decades-long campaign to attract legal business has been highly successful though usually overshadowed by the focus on Delaware's success in attracting incorporations."); *see also id.* at 1511 ("Delaware suffers a net outflow of choices of law and forum relative to its connections to contracts through incorporation or other factors."); Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894, 906 (2014) ("New York is the most common choice at 27 percent, followed by Delaware and California at 12 and 11 percent, respectively.").

161. *See, e.g.*, Eisenberg & Miller, *supra* note 160, at 1491, 1504 (finding New York law and New York courts are most commonly chosen in material corporate contracts); Sanga, *supra* note 160, at 906 (noting that New York law ranked first in choice of law, and Delaware ranked second).

162. *See* John C. Coates IV, *Managing Disputes Through Contract: Evidence from M&A*, 2 HARV. BUS. L. REV. 295, 323–24 (2012) ("Delaware courts retain a large share (75%) of M&A contract designations when the targets are public *and* incorporated in Delaware, but only obtain a modest number of designations in deals involving public companies incorporated outside of Delaware. More starkly, Delaware courts are *never* chosen in bids for private non-Delaware companies, and other courts are chosen about as often (50% vs. 53%) in bids for private Delaware targets as for private non-Delaware targets."); Eisenberg & Miller, *supra* note 160, at 1491 tbl.3

to attract disputes for which parties otherwise would choose a different forum or law.

In any event, an important incentive appears to be to benefit Delaware lawyers.[163] As the Judiciary Committee of the Delaware House of Representatives stated in its report on the DRAA:

> While the Act does not require parties or arbitrators to be represented by Delaware lawyers, arbitrations of the type specified in this legislation would likely involve retention of Delaware lawyers for consultation, if not representation. Thus, this legislation would bring work to Delaware corporate lawyers in addition to attracting new business and increasing revenue.[164]

Whether the DRAA in fact has such an effect remains to be seen.

IV. CONCLUSION

By enacting the Delaware Rapid Arbitration Act, Delaware again is an innovator in arbitration law. Some of the provisions of the DRAA—such as the ones adopting sanctions against arbitrators who do not abide by the specified time limits and allocating authority to the arbitrators to decide issues of substantive arbitrability—are ones that parties can do themselves by contract.[165] But other provisions—in particular ones permitting a direct appeal to the Delaware Supreme Court and waiver of all court review of awards—require legislative change of the sort provided by the DRAA.[166] Little has happened in the short time since the DRAA took effect,[167] but it is

(noting Delaware law is chosen in 81.25% of trust agreements filed with SEC); Juliet P. Kostritsky et al., Empirical Study Redux on Choice of Law and Forum in M&A: The Data and Its Limits 12 tbl.1 (2015), http://works.bepress.com/juliet_kostritsky/27/ (finding that 47.23% of the sample of merger agreements in 2011 chose Delaware law, and 12.24% chose New York law).

163. For a discussion of the supply and demand of corporate law more generally, see ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 109–13 (2009).

164. DEL. JUDICIARY COMM., COMMITTEE REPORT ON H.B. 49, at 148–49, 2015 Sess. (2015), http://legis.delaware.gov/LIS/LIS148.NSF/d81ce478bd9ae572852568730079e2fe/ea18ed2224156cca85257e0b0063278d?OpenDocument.

165. *See supra* Part III.C.

166. *See supra* Part III.D.

167. As of December 1, 2015, only one material contract filed with the SEC had provided for DRAA arbitration. *See* Ener-Core, Inc., Indemnification Agreement (Form S-1/A) exhibit 10.1 art. 5.1 (Nov. 5, 2015) ("Alternatively, Indemnitee, at Indemnitee's option, may seek an award in arbitration to be conducted pursuant to the Delaware Rapid Arbitration Act.").

still early.[168] Only time will tell if parties find the DRAA's innovations as attractive as its supporters hoped.

168. DRAA PRACTITIONER'S GUIDE, *supra* note 17, at 4 ("[A]ny new experiment in dispute resolution often takes years to play out—parties first learn about and then include clauses triggering the new forum's arbitration in their commercial agreements, only to reach arbitration years later when a serious dispute threatens to disrupt their business relationship.").

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