RESOLVING BUSINESS DISPUTES WITHOUT COSTLY LITIGATION: THE DELAWARE VOLUNTARY ALTERNATIVE DISPUTE RESOLUTION ACT

June 1, 2006, Jennifer Gimler Brady

Undoubtedly, virtually every commercial enterprise is aware of the significant costs associated with resolving business disputes through litigation. As an alternative to costly and protracted litigation, the State of Delaware recently enacted the Delaware Voluntary Alternative Dispute Resolution Act (the "Act"). The stated purposes of the Act "are to provide a means to resolve business disputes without litigation and to permit parties to agree, prior to any disputes arising between them, to utilize alternative dispute resolution techniques if a dispute occurs." 6 Del. C. §7701(b). This article will highlight the significant features of the Act and inform readers as to how to invoke the dispute resolution method outlined in the Act.

INVOKING THE ACT’S ALTERNATIVE DISPUTE RESOLUTION PROCESS.

To invoke the alternative dispute resolution("ADR") method prescribed by the Act, interested parties must file a certificate of agreement to submit to ADR with the Delaware Secretary of State, accompanied by a filing fee of $100 "for every corporation, limited partnership, business trust, limited liability company or other entity organized under the laws of the State of Delaware," and $1,000 for everyone else. 6 Del. C. §§ 7703(a), 7706. The certificate of agreement must contain: (1) the name of the person filing the certificate, (2) the filer's address, and (3) a statement that the filer agrees to be bound by the provisions of the Act with regard to any dispute that qualifies for ADR. 6 Del. C. § 7704(a).

Persons who have not filed the requisite certificate of agreement with the Secretary of State may nonetheless be bound by the Act if they enter into a written agreement with a person who has filed a certificate. The written agreement must indicate that the parties agree to submit any qualifying dispute to the ADR process prescribed by the Act. 6 Del. C. § 7703(b). The types of disputes that fall within the scope of the Act are described below.

The certificate of agreement can be revoked by the execution of a certificate of revocation, which is filed in the same manner as the certificate of agreement. The certificate of revocation is effective upon filing,"except with respect to disputes arising under contracts requiring ADR and which were entered into prior to the filing of the certificate of revocation." 6 Del. C. § 7707.
Even when a certificate of agreement has been filed or a contractual agreement to be bound by the Act exists, a dispute does not automatically qualify for the ADR process outlined in the Act. To fall within the scope of the Act, a dispute must be valued at a minimum of $100,000 and cannot be considered a summary proceeding under 8 Del. C. §§ 211, 215, 220, or 225 (pertaining to Delaware's General Corporation Law). 6 Del. C. §7702(b).

THE ADR PROCEEDING.

In the event that a party wishes to initiate an ADR proceeding in an attempt to resolve a qualifying commercial dispute, written notice must be provided to the other parties to the dispute who have either filed a certificate of agreement or otherwise agreed to be bound by the terms of the Act. The notice must state: (1) that the dispute is subject to the terms of the Act, (2) the nature of the dispute, and (3) the identities of the panel of ADR Specialists selected pursuant to § 7709 of the Act. 6 Del. C. § 7710. (Section 7709 describes the procedure for selecting an "ADR Specialist" to conduct the ADR proceeding, and § 7708 addresses the qualifications of an ADR Specialist.)

If other parties to the dispute have not filed a certificate of agreement or otherwise agreed to be bound by the terms of the Act, such parties can nonetheless elect to participate in the ADR proceeding by selecting an ADR Specialist, pursuant to § 7709. Such action is regarded as an agreement by the party to be bound by the terms of the Act, but the agreement extends only to the dispute at issue. 6 Del. C. § 7711.

The ADR Specialist that is selected pursuant to § 7709 of the Act must schedule the ADR proceeding to take place within 60 days of his or her appointment, unless the parties and the ADR Specialist agree to another date. 6 Del. C. § 7712. Section 7714(a) of the Act provides that no later than 7 days prior to the commencement of the ADR proceeding, each party is required to submit to the ADR Specialist and the other parties a statement of its position, limited to 25 pages, and any supporting documentation, if appropriate.

The initial ADR proceeding must be attended by all parties. Business entities may attend through an authorized representative, provided that a written authorization is filed with the ADR Specialist. 6 Del. C. § 7718. During the ADR proceeding, each party has up to one hour to present its position to the ADR Specialist, in the presence of the other parties. Each presentation can be followed by up to one hour of questioning by the other parties. 6 Del. C. § 7714(b). Upon the completion of the presentations and questioning, the ADR Specialist will attempt to resolve the dispute by meeting with the parties, either separately or together. This process concludes when the dispute is resolved or at the regular close of business on the day the ADR proceeding takes place, whichever occurs first. 6 Del. C. § 7714(c). The ADR Specialist can continue to discuss the dispute with the parties, if they so agree, and such discussions will proceed until any party informs the ADR Specialist that discussions are at an impasse. 6 Del. C. § 7714(d).

If the dispute is not resolved by the close of business on the day of the ADR proceeding, or after further mediation at the parties' request until an impasse is declared, the ADR Specialist will advise the parties in writing that the ADR process has concluded. 6 Del. C. § 7715. At that point, the parties are no longer bound by the Act and may proceed with litigation, if they so desire. However, if a settlement is reached during the ADR proceeding, unless otherwise agreed by the parties, the ADR Specialist will prepare a written settlement agreement to be signed by the parties. 6 Del. C. § 7715.

ADDITIONAL FEATURES OF THE ACT.

The ADR Specialist is compensated on the basis of his or her regular hourly rate for professional services for the time spent on the actual ADR proceedings, and the fees are divided among the parties to the proceeding on a pro rata basis. The ADR Specialist also may charge for up to 10 additional hours that are spent in preparation for the ADR proceeding, and the parties can agree to additional compensation. 6 Del. C. § 7713(a). In addition, the ADR Specialist can require the parties to advance his or her fees for preparation and the actual proceeding within 10
days of the notice of the scheduling of the ADR proceeding. 6 Del. C. § 7713(b).

The Act contains some additional features that are noteworthy. For example, Section 7716 provides that the ADR proceeding shall be treated as confidential, and any written position papers submitted to the ADR Specialist, as well as any statements, notes, or materials made by the ADR Specialist or any party in connection with the ADR proceeding, are not discoverable or admissible in a subsequent proceeding. The section does not limit the discovery or use of documents that otherwise would be discoverable or admissible into evidence but for their use in the ADR proceeding.

In addition, the Act:

(1) grants the ADR Specialist immunity, as if he or she were functioning as a judge in a court that would have jurisdiction over the dispute. 6 Del. C. § 7717.

(2) provides that the right to ADR is enforceable in any court with jurisdiction over the parties, and allows for the recovery of attorney’s fees incurred in connection with an action to compel ADR. 6 Del. C. § 7719(a), (b).

(3) provides that the initiation of an ADR proceeding shall toll any applicable statute of limitations until 14 days after the ADR proceeding is concluded. 6 Del. C. § 7720.

(4) provides that the Act will cease to have any force and effect upon the commencement of litigation concerning the dispute that is the subject of the ADR proceeding. 6 Del. C. § 7721.

CONCLUSION.

To date, no certificates of agreement have been filed with the Secretary of State’s office, likely because the Act recently went into effect. It is anticipated, however, that many business entities will take advantage of the ADR process outlined in the Act. At a time of ever-increasing litigation costs, it appears that when confronted with commercial disputes, businesses, both large and small, can benefit from this cost-saving and time-saving alternative to litigation.