IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE DELAWARE RAPID ARBITRATION RULES §
§

Before **STRINE**, Chief Justice, **HOLLAND**, **VALIHURA**, **VAUGHN**, and **SEITZ**, Justices, constituting the Court *en banc*.

O R D E R

This 17th day of June 2015, in accordance with Section 5804(a) of the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq*., the Court adopts the following rules to govern the procedure in arbitrations under the Delaware Rapid Arbitration Act. These rules are effective June 22, 2015. The Clerk of this Court is directed to transmit a certified copy of the Order to the clerk for each trial court in each county.

Delaware Rapid Arbitration Rules

Rule 1: Applicability of the Rules

These Rules shall govern the procedure in arbitrations under the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the "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. The promulgation of these Rules shall not impair the ability of entities to use arbitral procedures of their own choosing other than the Act.

Rule 2: Amendments to the Rules

These Rules are promulgated by order of the Supreme Court of the State of Delaware and may be amended by order of that Court at any time. Unless otherwise agreed between the parties, the Rules in effect at the time the Arbitrator accepts appointment as provided in Rule 9 shall govern in any Arbitration. Any

question as to the Rules applicable to an Arbitration arising out of any amendment to these Rules shall be resolved by the Arbitrator.

Rule 3: Alteration of Rules by Agreement of the Parties and Consent of the Arbitrator

The 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, including without limitation the location of the seat of the Arbitration in 10 *Del. C.* § 5807(a), the time periods set forth in 10 *Del. C.* §§ 5806(d), 5808(b), 5808(c) or 5809(b), and the reduction of the Arbitrator's compensation in the event of an untimely award set forth in 10 *Del. C.* § 5806(b). By way of example and without limiting the scope of permissible amendments to these Rules, the parties may agree, with the consent of the Arbitrator, to proceed on a more accelerated schedule than these Rules contemplate and may agree to dispense with or limit any process for gathering evidence before the Arbitration Hearing. Any such modification of or addition to these Rules shall be in writing and may appear in the Arbitration Agreement.

Rule 4: Definitions

As used in these Rules:

"Arbitration Agreement" means an agreement described in 10 *Del. C.* § 5803(a).

"Arbitration" means the voluntary submission of a dispute between or among parties to an Arbitrator for final and binding determination, and includes all contacts and communications by and among the Arbitrator, any party and any other person participating in such proceeding.

"Arbitrator" means a person, persons or organization appointed under 10 *Del. C.* § 5805 or chosen by the parties to an Arbitration in conformity with the Arbitration Agreement, and who serves a written notice of acceptance of appointment as provided in Rule 9. If an Arbitration proceeds before more than one Arbitrator, references in these Rules to the Arbitrator shall be deemed to be references to the Arbitrators, and (unless otherwise provided in the Arbitration Agreement) references in these Rules to an act of the Arbitrator shall be references to an act of a majority of the Arbitrators.

"Preliminary Conference" means a telephonic conference with the parties and/or their attorneys or other representatives: (i) to obtain additional information about the nature of the dispute, the anticipated length of the Arbitration Hearing and other scheduling issues, (ii) to obtain conflicts statements from the parties, and (iii) to consider with the parties whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

"Preliminary Hearing" means a telephonic conference with the parties and/or their attorneys or other representatives to consider, without limitation: (i) prompt exchange of pleadings and such other statements of each party's claims, damages, defenses, issues asserted, legal authorities relied upon, and positions with respect to issues asserted by other parties, as the Arbitrator may direct, (ii) stipulations of fact, (iii) the scope of exchange of information before the Arbitration Hearing, (iv) exchanging and pre-marking of exhibits for the Arbitration Hearing, (v) the identification and availability of witnesses, including experts, and such matters with respect to witnesses, including their qualifications and expected testimony as may be appropriate, (vi) whether, and to what extent, any sworn statements and/or depositions may be introduced, (vii) the length of the Arbitration Hearing, (viii) whether a stenographic or other official record of the proceedings shall be maintained, (ix) the possibility of mediation or other non-adjudicative methods of dispute resolution, and (x) any procedure for the issuance of subpoenas.

"Scheduling Order" means the order of the Arbitrator (and any amendment thereto) setting forth the pre-hearing activities and the hearing procedures that will govern the Arbitration. The Scheduling Order shall also set forth the date, time and location for the Arbitration Hearing, which ordinarily should be no more than 90 days after the Arbitrator serves the written notice of acceptance of appointment as Arbitrator. The Arbitrator should enter a Scheduling Order as promptly as possible following the Preliminary Conference. The Arbitrator may amend the Scheduling Order, including postponing or rescheduling the Arbitration Hearing, but no amendment to the Scheduling Order shall operate to alter the time periods set forth in 10 *Del. C.* § 5808(b) and (c).

"Arbitration Hearing" means the proceeding in which the claimant presents evidence to support its claims and the respondent presents evidence to support its defenses, and witnesses for each party submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure (so long as the parties are treated equitably and each party has a fair opportunity to be heard and to present its case).

Rule 5: Confidentiality of Arbitrations

Arbitrations under the Act are confidential proceedings. All memoranda and work product contained in the case files of an Arbitrator are confidential. Any communication made in or in connection with the Arbitration that relates to the controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at a Preliminary Conference, Preliminary Hearing or Arbitration Hearing, is confidential. Such confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions: (1) where all parties to the Arbitration agree in writing to waive the confidentiality, or (2) where the confidential materials and communications consist of statements, memoranda, materials, and other tangible evidence that are otherwise subject to disclosure and were not prepared specifically for use in the Arbitration.

No 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. However, in the event of the taking of a challenge to a final award to the Supreme Court of Delaware under 10 *Del. C.* § 5809, a document or other matter submitted to the Supreme Court of Delaware shall become part of the public record only to the extent required by the Rules of that Court or by order of that Court.

The Arbitrator shall have power to issue orders to protect the confidentiality of the proceedings and of any documents or other matter used in the Arbitration.

Rule 6: The Arbitrator's Authority

Upon acceptance of appointment as prescribed in Rule 9, the Arbitrator shall have power and authority: (1) to resolve, finally and exclusively, any dispute of substantive or procedural arbitrability; (2) to resolve, finally and exclusively, any dispute as to the interpretation and application of these Rules (including any modifications of or additions to the Rules made in compliance with Rule 3); (3) to determine in the first instance the scope of the Arbitrator's remedial authority, subject to review solely under 10 *Del. C.* § 5809 (except as otherwise limited by the Arbitration Agreement); (4) to grant interim and/or final relief, including to award any legal or equitable remedy appropriate in the sole judgment of the Arbitrator; (5) to administer oaths as authorized by 10 *Del. C.* § 5807; (6) to

compel the attendance of witnesses and the production of books, records, contracts, papers, accounts and all other documents and evidence (unless otherwise provided in the Arbitration Agreement); (7) to make such rulings, including such rulings of law, and to issue such orders or impose such sanctions as the Arbitrator deems proper to resolve an Arbitration in a timely, efficient and orderly manner.

In addition, if, but only if, the Arbitration Agreement so provides, the Arbitrator shall have power and authority to issue subpoenas and to award commissions to permit a deposition to be taken, in the manner and on the terms designated by the Arbitrator, of a witness who cannot be subpoenaed.

Rule 7: Immunity of the Arbitrator

An Arbitrator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as an Arbitrator. An Arbitrator shall be immune from civil liability for or resulting from any act or omission done or made in connection with the Arbitration, unless the act or omission was 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.

Rule 8: Representation; Parties' Right to Attend Arbitration Hearing

The parties are entitled to be represented at the Preliminary Conference, the Preliminary Hearing and the Arbitration Hearing by counsel of their choice. Counsel appearing in the Arbitration proceeding on behalf of a party shall promptly provide the Arbitrator and counsel for all other parties with their names, postal and email addresses, and telephone and fax numbers. A party electing to change counsel shall notify the Arbitrator and all other parties forthwith; a change of counsel by a party shall not operate to delay the Arbitration.

At least one representative of each party with an interest in the issue or issues to be arbitrated and with authority to resolve the matter must participate in the Arbitration Hearing, but a failure by any party to comply with this obligation shall not operate to delay the Arbitration nor to divest the Arbitrator of any authority, including without limitation the authority to proceed with the Arbitration Hearing in the absence of a party that has received notice of the date, time and location of the Arbitration Hearing, as provided in Rule 22.

Rule 9: Commencement of Arbitration

The parties to an Arbitration may choose an Arbitrator in conformity with the Arbitration Agreement, and if the Arbitrator so chosen by the parties agrees to

serve as Arbitrator, then the Arbitration under the Act is commenced upon service by the Arbitrator upon all parties of a written notice of acceptance of appointment as Arbitrator. If a petition or application for appointment of an Arbitrator is filed with the Court of Chancery (whether on a consensual basis or otherwise), then an Arbitration under the Act is commenced upon entry of an order by the Court of Chancery under 10 *Del. C.* § 5805(b) appointing an Arbitrator, and the Arbitrator shall file with the Court of Chancery and serve upon the parties a written notice of acceptance of appointment as Arbitrator. The notice of acceptance shall set forth the Arbitrator's postal and electronic mail addresses and telephone and fax numbers, and shall specify the form in which written submissions to the Arbitrator shall be made.

Except as permitted by the Act, the time period specified in 10 *Del. C.* § 5808(b) shall commence upon service of the written notice of acceptance of appointment as Arbitrator (or, if more than one person is appointed as Arbitrator, upon service of the written notice of acceptance of appointment by the last such person to effect service).

Rule 10: Communications with the Arbitrator

After the Arbitrator serves the written notice of acceptance of appointment as Arbitrator, the parties should avoid *ex parte* communications with the Arbitrator concerning the Arbitration. Any *ex parte* communication with the Arbitrator made necessary by exigent circumstance shall be reported promptly to all other parties.

Rule 11: Replacement of the Arbitrator

The appointment of a new Arbitrator shall be as provided in the Arbitration Agreement; otherwise, the Court of Chancery may appoint a new Arbitrator in the event the Arbitrator becomes unable to continue as Arbitrator for any reason.

Rule 12: Pleadings

Not later than two business days after service of the written notice of acceptance of appointment by the Arbitrator, the claimant shall serve upon all other parties a complaint giving notice of its claims and the remedies sought. If the dispute giving rise to the Arbitration is already the subject of litigation, then the complaint shall include copies of the pleadings in such litigation.

Within five business days after service of the complaint, or such other time as the Arbitrator may allow, each party against whom relief is sought shall, and any other party may, serve an answer setting forth its response to the claims and

remedies sought in the complaint and any affirmative defenses (including jurisdictional challenges) or counterclaims it may wish to assert in the Arbitration. If the answer asserts counterclaims, a party against whom a counterclaim is asserted may serve a reply within three business days after service of the answer, or within such other time as the Arbitrator may allow.

The failure of a party to answer a complaint or reply to counterclaims shall not operate to delay the Arbitration.

Rule 13: Service of Arbitration Papers

The complaint shall be delivered to the Arbitrator in the manner specified in the written notice of acceptance of appointment as Arbitrator. The complaint shall also be served upon the parties to the Arbitration in a manner calculated to provide them with actual notice and to provide the claimant with written proof of delivery of the complaint, or in such manner as the Arbitrator may direct.

The answer, any reply, any request for pre-hearing exchange of information, any order of the Arbitrator and any written communication delivered to the Arbitrator shall be served upon the Arbitrator and upon all parties to the Arbitration. The Scheduling Order shall specify the manner in which service shall be made upon the parties or their representatives. If the Scheduling Order does not specify a manner of service, then service upon a party shall be effected by electronic mail to the party's counsel, or if the party is not represented by counsel, to the party or the party's designated representative.

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.

Rule 14: Contents of Pleadings

Each party's pleadings shall afford all other parties reasonable notice of the pleading party's claims, affirmative defenses and counterclaims, including the factual basis for such claims, defenses and counterclaims. The Arbitrator may decline to consider a claim, affirmative defense or counterclaim of which the other parties have not been given reasonable notice.

Rule 15: Amendments to Pleadings

Except as provided in this Rule, a party may amend its pleadings only with the Arbitrator's consent. Unless otherwise agreed by the parties, in cases in which

any party seeks a monetary award, the Scheduling Order shall include a cut-off date by which a party may increase or decrease the amount of monetary award sought. The Arbitrator may include in the Scheduling Order a cut-off date by which a party may amend its pleading in other respects. An amendment to the pleadings shall not operate to delay the Arbitration Hearing or alter the time periods set forth in 10 *Del. C.* § 5808(b) and (c).

Rule 16: Order of Proceedings

As soon as practicable after the Arbitrator serves the written notice of acceptance of appointment, the Arbitrator shall set a date and time for the Preliminary Conference and shall notify all parties of that date and time. The Preliminary Conference ordinarily should take place within 10 calendar days of the service of the written notice of acceptance of appointment by the Arbitrator.

The Arbitrator may also schedule one or more Preliminary Hearings, in consultation with the parties and upon reasonable notice to the parties.

The parties shall not engage in dispositive motion practice unless the Scheduling Order so provides.

Rule 17: Exchange of Information Before the Arbitration Hearing

There shall be an exchange of information necessary and appropriate for the parties to prepare for the Arbitration Hearing and to enable the Arbitrator to understand the dispute, unless the parties agree, with the consent of the Arbitrator, to forgo prehearing exchange of information.

The parties shall, in the first instance, attempt in good faith to agree on pre-hearing exchange of information, which may include depositions, and shall present any agreement to the Arbitrator for approval at the Preliminary Conference or as soon thereafter as possible. The Arbitrator may require additional exchange of information between and among the parties, or additional submission of information to the Arbitrator. If the parties are unable to agree on any matter relating to the exchange of information, they shall present the dispute to the Arbitrator promptly, and the Arbitrator shall direct such exchange of information as the Arbitrator deems necessary and appropriate, taking into account the importance of the information to the Arbitration, the burden of producing the information, and such other factors as the Arbitrator deems relevant. The scope of information subject to exchange should ordinarily be substantially less broad than the scope of information that might be subject to discovery in civil litigation.

Unless otherwise agreed by the parties, 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, except in the event of a challenge to a final award under 10 *Del. C.* § 5809 or an appeal under such arbitral appeal procedures as the Arbitration Agreement may prescribe.

The Arbitrator may make such rulings, including rulings of law, and issue such orders or impose such sanctions for violations of discovery orders as the Arbitrator deems proper to resolve the Arbitration in a timely, efficient and orderly manner.

Rule 18: Obtaining Information from Third Parties

The parties generally are expected to cause non-privileged information in the possession, custody or control of their employees, agents and retained professionals to be produced, to the extent such information is subject to exchange under Rule 17. The parties are also expected to produce their employees, agents and retained professionals for deposition, to the extent the Arbitrator determines that the prehearing exchange of information should include depositions of such persons.

Unless otherwise provided in the Arbitration Agreement, the Arbitrator may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts and all other documents and evidence. If, but only if, the Arbitration Agreement so provides, the Arbitrator may issue subpoenas or commissions to permit depositions to be taken, and in such case the Arbitrator may specify the manner in which and the terms on which such depositions shall be taken. In addition, the parties may seek information from third parties by means of subpoena or otherwise, and the Arbitrator may issue such orders in aid of such requests for information as the Arbitrator may deem appropriate for the timely, efficient and orderly resolution of the Arbitration.

Rule 19: Pre-Hearing Disclosures

Before the Arbitration Hearing, at the time specified in the Scheduling Order, each party shall disclose to the Arbitrator and to all other parties the following information: (1) the identity of all fact and expert witnesses the party intends to call at the Arbitration Hearing; (2) a brief description of the expected testimony of each such witness and an estimate of the duration of the witness's

testimony upon direct examination; and (3) a list of all exhibits expected to be used at the Arbitration Hearing. Exhibits should be pre-marked to the extent possible.

Rule 20: Dismissals

The claimant may withdraw its claims before the Arbitrator has served the written notice of acceptance of appointment. After the Arbitrator has served the written notice of acceptance of appointment, no party may withdraw from the Arbitration without the written agreement of all parties to the Arbitration. A party may unilaterally withdraw a claim or counterclaim without prejudice upon written notice to the Arbitrator and to all parties, provided that another party may, within seven calendar days of service of such notice, request that the Arbitrator order the withdrawal to be with prejudice. After affording the parties the opportunity to be heard on such a request, the Arbitrator shall determine the request finally and exclusively.

Rule 21: Pre-Hearing Submissions

The Arbitrator may allow or require the parties to submit brief summaries of the factual and legal basis for their claims, defenses and counterclaims. The Scheduling Order shall specify the number, sequence, due dates, format and maximum length of any such submissions.

Rule 22: The Arbitration Hearing

The Arbitration Hearing will be limited to one day unless the Arbitration Agreement specifies a different period or the Arbitrator determines that a different period is appropriate in consultation with the parties. The Arbitration Hearing ordinarily shall be conducted in person at a location specified in the Arbitration Agreement or (if the Arbitration Agreement does not specify a location) selected by the Arbitrator. The location of the Arbitration Hearing may be at any place, within or without the State of Delaware and within or without the United States of America. The Arbitration Hearing may be conducted by telephone or by other means of remote electronic communication, in whole or in part, if the Arbitration Agreement so specifies or if the Arbitrator, in consultation with the parties, so determines. Regardless of whether the Arbitration Hearing is conducted within or without the State of Delaware, by telephone or by other means of remote electronic communication, the seat of the Arbitration is the State of Delaware.

The Arbitrator shall give notice of the date, time and location of the Arbitration Hearing to all parties, and may proceed with the Arbitration Hearing

and resolve the Arbitration on the evidence produced at the Arbitration Hearing in the absence of one or more parties if such parties have received notice.

The Arbitrator shall control the order of proof and shall allow all parties an opportunity to be heard, to present evidence relevant to the arbitration, and to cross-examine witnesses appearing at the Arbitration Hearing. Unless the Arbitration Agreement otherwise provides, the Arbitrator shall not be obliged to apply the rules of evidence strictly, except that the Arbitrator shall apply applicable law relating to privileges and immunities and to communications or statements made in connection with efforts to settle the dispute.

Witnesses may be required to testify under oath or affirmation in the Arbitrator's discretion. The Arbitrator may consider statements made outside the Arbitration Hearing (whether sworn or unsworn, and whether presented by deposition, affidavit or other means), but shall afford such statements appropriate weight based on the circumstances of such statements.

Unless the Arbitration Agreement otherwise provides or the parties otherwise agree, the Arbitrator may direct that a stenographic or other record of the Arbitration Hearing be prepared and made available for the use of the Arbitrator and the parties.

Rule 23: Post-Hearing Submissions

The Arbitrator may allow or require the parties to submit brief summaries of the evidence presented at the Arbitration Hearing and the application of legal principles to the facts established thereby. The Scheduling Order shall specify the number, sequence, due dates, format and maximum length of any such submissions.

Rule 24: The Final Award

A final award shall be in writing, shall be signed by the Arbitrator, shall be served on each party to the Arbitration, and shall include or be accompanied by a form of judgment for entry under 10 *Del. C.* § 5810. Unless otherwise provided in the Arbitration Agreement, the final award may take any form, whether legal or equitable in nature, deemed appropriate by the Arbitrator. Unless otherwise provided in the Arbitration Agreement, the final award may include rulings by the Arbitrator (or by the Arbitrator's counsel retained under 10 *Del. C.* § 5806(c) and Rule 25, if applicable) on any issue of law that the Arbitrator considers relevant to the Arbitration.

The Arbitrator shall issue the final award within the time fixed by the Arbitration Agreement, or, if not so fixed, within the time specified by 10 *Del. C.* § 5808.

Rule 25: Fees and Costs

An Arbitrator may in consultation with the parties retain appropriate counsel to provide advice to the Arbitrator, to make rulings on issues of law, to the extent requested by the Arbitrator, or both. The fees and costs incurred by the Arbitrator's counsel shall be included as part of the Arbitrator's expenses.

The final award shall provide for the allocation of payment of fees and costs, subject to the reductions for an untimely award provided by 10 *Del. C.* § 5808(b). Unless otherwise provided in the Arbitration Agreement, those fees and costs shall include the Arbitrator's fees and expenses, the costs of preparing a record of the Arbitration Hearing (if any), the fees and costs incurred by counsel retained by the Arbitrator under 10 *Del. C.* § 5806(c), and any other expenses incurred in the conduct of the Arbitration, but not including the counsel fees of the parties to the Arbitration.

Rule 26: Consent Award Upon Settlement

If the parties reach agreement on a settlement of the issues in dispute and ask the Arbitrator to set forth the terms of the settlement in a consent award, the Arbitrator may make such an award, and shall do so unless the Arbitrator concludes, after consultation with the parties, that the terms of the proposed settlement are unlawful or undermine the integrity of the Arbitration. A consent award shall include an allocation of the fees and costs specified in Rule 25.

Rule 27: Enforcement of the Final Award

Proceedings to enforce, confirm, modify or vacate a final award will be controlled by the Delaware Rapid Arbitration Act.

BY THE COURT:

/s/ Leo E. Strine, Jr.

Chief Justice