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Is That Decision-Maker an Expert or an Arbitrator?

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In commercial transactions, parties often seek to resolve a disagreement by designating an expert who will decide a particular issue based upon that individual's expertise. On other occasions, an arbitrator is selected to issue an award to resolve the dispute.

What distinguishes an expert from an arbitrator, however, and how might the difference affect the dispute resolution process?

Two recent cases in the Delaware Court of Chancery, decided only four days apart, reflect these differences, and how counsel may assure that parties' expectations have been incorporated into their agreement.

Agiliance v. Resolver SOAR, (No. 2018-0389-TMR, 2019 Del. Ch. LEXIS 3, Jan. 25)*,* involved a sale which required a post-closing purchase price adjustment based on the difference between estimated net working capital and final net working capital. The agreement also contained a provision to arbitrate disputes. When the parties disagreed as to the final net capital working amount, Agiliance (the seller) sought to compel arbitration. Resolver SOAR (the buyer) objected, however, contending that seller had forfeited its right to arbitration by failing to satisfy required notice provisions.

The agreement provided that if the parties were unable to resolve the matter themselves, “such disagreement shall be submitted for arbitration by a nationally recognized accounting firm that agrees to use its best efforts to complete such arbitration within 30 days)” with each side submitting its calculations to the accounting firm. The accounting firm would then “arbitrate the dispute and submit a written statement of its adjudication …” It would be limited in its decision-making authority, however, to selecting either the seller’s or buyer’s proposal, and not making any other determination. Thereafter, “The determination of the accounting firm shall constitute an arbitral award that is final, binding and unappealable.”

The status of the accounting firm as an expert or arbitrator was significant. Whether the seller had satisfied the arbitration notice provisions involved a procedural rather than substantive determination; and, when arbitration is involved, such procedural decisions are for the arbitrator rather than the court to decide. Thus, if the accounting firm was an expert, its authority would be limited to deciding the net capital issue, but the court would initially determine whether seller had complied with the notice provisions. If the accounting firm were deemed to be an arbitrator, however, it would decide the notice issue.

The court stated that “determining what type of dispute resolution mechanism the parties have agreed to presents a question of contract interpretation. The question of arbitration or expert determination depends on the intent of the parties.” In ascertaining that intent, “the court looks to the most objective indicia of that intent: the words found in the written instrument.” Moreover, while courts will ascribe to words their common or ordinary meaning, “Where a word has attained the status of a term of art and is used in a technical context, the technical meaning is preferred over the common or ordinary meaning;” and, “When established legal terminology is used in a legal instrument, a court will presume that the parties intended to use the established legal meaning of the term.” If the writing contains a clear and unmistakable meaning, it is not ambiguous, and the writing is the sole source for gaining an understanding of intent. A “steadfast disagreement” between the parties as to interpretation “will not, alone render [a] contract ambiguous.”

Here the court found no ambiguity. The agreement in the critical paragraph found four references to arbitration but never used the word “expert.” “The clear intention of the parties as expressed in the agreement requires binding arbitration.”

The court rejected the buyer’s contention that the accounting firm should not be considered to be an arbitrator because it was not permitted to “do its own math” and make an independent finding as to net working capital but was limited in its decision-making authority to selecting one of the two submissions of the parties. The court noted that this merely reflected a long-recognized process known as “baseball arbitration.”

The court found also found unpersuasive the propositions that arbitration was never intended because arbitration rules were never specified, and that the accounting firm lacked legal experience or training.

In conclusion, as the agreement reflected an intention that disputes be resolved by arbitration, and the "sufficiency of notice" issue involved procedural rather than substantive arbitrability, it was for the accounting firm, serving as arbitrator, rather than the court to decide whether Seller had satisfied the contractual notice provisions.

Only four days later, in *Ray Beyond v. Trimaran Fund Management,* C.A. No. 2018-0497-KSJM, Jan. 29) the Chancery Court determined that a designated independent accountant was an expert and not an arbitrator.

Section 6.17 of the parties' merger agreement provided for distribution of an escrowed amount depending on whether the Chicago Public Schools (CPS) renewed an outstanding contract. If not renewed, the escrowed funds would be paid to *Ray Beyond;* and if renewed, to *Trimaran*. If a dispute between the parties arose, Section 6.17 set forth six CPS tests to determine whether there had been a renewal. Four had objective criteria, a fifth had more flexible criteria, and a sixth provided a "middle ground" based upon good faith discussions.

Section 6.17 also provided that certain disputes regarding the distribution of the CPS escrow account "would be resolved by a third-party independent accounting firm called the 'settlement accountant' which would be 'an expert and not an arbitrator'".

The settlement accountant procedure was mentioned in three places in Section 6.17. Two were the fifth and six CPS tests noted above. The third mention provided that if the parties "are not able in good faith to agree upon an appropriate distribution of the CPS escrow amount, the matter shall be referred to the settlement accountant".

Eventually, the CPS agreed to extend the contract by one year, but the parties disagreed as to whether a one-year extension qualified as a renewal under the merger agreement.

Ray Beyond contended that as the parties were unable to reach an agreement in good faith the matter under 6.17 *to* be referred to the settlement accountant must include the "appropriate distribution" of the escrow account.

The court disagreed. It concluded that "interpreting the 'matter of' the 'appropriate distribution' to include legal questions is inconsistent with the parties' intent to narrow the settlement accountant's role to that of an 'expert and not an arbitrator'".

It noted that experts and arbitrators generally differ in their scope of authority. Expert authority is typically limited "to deciding a specific factual dispute within the decision-maker's expertise. In contrast, the scope of authority conferred on an arbitrator is analogous to the authority conferred on a judicial officer."

The court found that the settlement accountant's role was specifically confined in Section 6 to three limited circumstances; the issue in dispute, however, was legal in nature and beyond the intended scope of that section. "The crux of the parties' current dispute is

whether the extension qualifies as a new CPS contract. Resolving his question would not fall to an independent accountant's expertise, but rather requires a legal conclusion concerning whether the extension meets the definition of a new CPS contract as set forth in Section 1.1 of the merger agreement."

Interestingly, this court, unlike the *Ray Beyond* court, concludes that, "Arbitration provisions typically include procedural rules affording each party the opportunity to present its case; indeed, this is viewed as a 'defining characteristic' of arbitration provisions. By contrast, the settlement accountant provisions contain no reference to procedural rules."

These two opinions reflect the attention required in drafting dispute resolution provisions. In anticipating what discrete issues should be determined by experts, arbitrators or courts, the title and authority of the designee, the issues to be resolved, and the governing procedures (or ADR provider) to be employed must be carefully spelled out to assure that expectations as to how, by whom and what particular decisions will be made are realized. •

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