

PURCHASE PRICE ADJUSTMENT DISPUTE: ACCOUNTANT, ARBITRATOR, OR EXPERT?

Delaware Chancery Court finds dispute resolution procedure in merger agreement required an "expert determination" and not an arbitration, and accordingly the court (not the reviewing accountant appointed to resolve the dispute) decided whether extrinsic evidence was admissible.

Many M&A agreements provide for post-closing purchase price adjustments. The purchase price adjustment clauses in those agreements commonly provide that disputes over the calculation of the adjustment are to be referred to an accountant. Some courts have held that such dispute resolution procedures are always to be treated as arbitrations where the entire controversy, including issues of contract interpretation and liability, are for the accountant. In a [decision](#) handed down this week¹, the Chancery Court of Delaware ruled that, while many jurisdictions within the U.S. no longer observe the English common law distinction between arbitrations and "expert determinations," Delaware does.

The distinction can have significant practical consequences. In the case decided by the Chancery Court, a merger agreement required that the parties' dispute over a post-closing price adjustment based on tax attributes be referred to an accountant. The seller wanted to present extrinsic evidence to the accountant. The buyer opposed the introduction of extrinsic evidence. The seller argued that the proceeding before the accountant should be considered an arbitration and that accordingly it was for the accountant -- acting as an arbitrator -- to decide whether to consider the extrinsic evidence. But the Chancery Court found the merger agreement called for an "expert determination" (and not an arbitration) and ruled that the admissibility of the extrinsic evidence had to be determined by the court, not the arbitrator. The Chancery Court then went on to find that the terms of the merger agreement precluded the introduction of extrinsic evidence.

The Chancery Court's decision is a welcome departure from the one-size-fits-all approach that many courts have taken to these types of dispute resolution mechanisms. It draws heavily on a 2013 report by a New York City Bar committee, and the entirely reasonable premise of that report -- which is that

"Determining what type of dispute resolution mechanism the parties have agreed to presents a question of contract interpretation... In this case, the Merger Agreement clearly states: 'In resolving the items in dispute, the parties agree that the Accounting Firm shall be acting as an accounting expert only and not as an arbitrator and shall not import or take into account usage, custom or other extrinsic factors.' This language explicitly calls for the role of 'expert' while disclaiming the role of 'arbitrator.'"

Vice Chancellor Laster
July 9, 2018

¹ [Penton Business Media Holdings LLC v. Informa PLC, et al., Del Ch., C.A. No. 2017-0487, Laster, V.C. \(July 9, 2018\) \(Mem. Op.\)](#).

whenever possible, courts should give effect to the intention of sophisticated commercial counterparties, as reflected in the contracts they negotiate. This approach teaches that if parties wish to give someone other than a court authority to resolve a broad range of disputes arising under their contract, they can use the arbitration model. But if instead the parties wish to give someone a limited mandate to deploy her professional expertise for example as an accountant or appraiser, and the parties wish to have issues of contract interpretation resolved by a court, the parties can use an "expert determination" model.

With the benefit of this guidance, contracting parties should carefully consider the alternative forms of dispute resolution mechanism available to them, and should ensure the contracts they negotiate reflect their chosen alternative. In this regard, the Chancery Court's opinion notes that sometimes parties negotiate contracts that in part appear to select an expert determination model (for example by providing an accountant will serve "as an expert but not as an arbitrator"), but then elsewhere appear to select an arbitration model (for example by providing the accountant is authorized to resolve all aspects of any disputes arising in respect of purchase price adjustments and that any such resolution will be final and binding).

Clifford Chance represented the buyer in this case.

"In the case of a typical expert determination, the authority granted to the expert is limited to deciding a specific factual dispute concerning a matter within the special expertise of the decision maker, usually concerning an issue of valuation...The parties are not, however, normally granting the expert the authority to make binding decisions on issues of law or legal claims, such as legal liability...If the proceeding is an arbitration, this means that the parties have intended to delegate to the decision maker authority to decide all legal and factual issues necessary to resolve the matter."

**N.Y.C. Bar Comm. on Int'l
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