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## Arbitration May Not Be as Efficient as It Seems

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Many business contracts have binding arbitration clauses and most lawyers are familiar with the less formal and more streamlined procedure as compared with more conventional litigation through the court system.

Although it is beyond the scope of this short article, there is a good argument to be made that binding arbitration may not always be quicker and less expensive than conventional litigation in the court system. Among the reasons are the risk of the added cost and time of binding arbitration awards being contested, and the lack of adequate procedures to enforce deadlines and pre-trial rules.

The narrow purpose of this short article is to briefly summarize a recent decision in the Delaware Court of Chancery that may prove the point. In *Daisy Construction Co. v. Mumford & Miller Concrete Inc.*, after a final arbitration award was granted, based on a binding arbitration agreement, one of the parties filed a lawsuit to ask the court to overturn the arbitrator's decision based on the argument that the arbitrator had

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exceeded his authority and there were not sufficient grounds for the arbitration award. The court reviewed the very high standard that needs to be met when a party seeks to overturn the decision in a binding arbitration.

The court noted that it did not serve as an appellate court for the arbitration, but rather if, as here, grounds for the award can be inferred from the facts of the case, then the arbitration decision will be upheld.

The court's decision is a reminder that one of the risks of binding arbitration is that if an arbitrator makes a bad decision, it is very difficult to ask a court to overturn the decision in the binding arbitration.

In essence, the court determined that it would not second guess the arbitrator because there was at least some basis to reject the claim that the arbitrator exceeded the scope of his authority. One party in the case argued that the work that they did and were not paid for was beyond the scope of the subcontract.

The other party admitted that it may have been extra work but that such deter-

mination and the amount to be paid, if any, had to be decided pursuant to the prime contract which allowed the executive director of the owner of the project to make a final determination about both when final payment would be made and when work was complete such that retainage could be released. The arbitrator awarded payments for extra work and a portion of the retainage. At the time of the arbitration the executive director of the DBA had not yet made his determination about whether any of the work was extra or whether the work was complete such that retainage could be released.

The arbitrator's decision was apparently based on the subcontract and disregarded the terms in the prime contract that required a determination by the executive director of the DBA before payment for extra work or retainage could be made. Still, the arbitrator's decision was upheld by the Chancery Court.

Although the limited purpose of this short article is to summarize the recent Chancery Court case referenced above, there are other examples of cases where the intent of choosing binding arbitration as a

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quicker and less expensive method has been frustrated by ancillary litigation at the beginning, during the middle and after the arbitration proceedings have been completed.

For example, in the case of *Fidelity & Deposit Company of Maryland v. State of Delaware*, in the midst of the arbitration process, protracted legal proceedings were filed when one party contested a procedural decision the arbitrator made about certain issues relating to consolidation of complaints involved in a mandatory binding arbitration. Of course there are many other reported opinions about whether arbitration should be compelled or commenced at all. Thus, it is not true that arbitration is always faster and cheaper if ancillary litigation prolongs the eventual

decision on the merits or if the decision on the merits is contested in the courts.

Another benefit that some proponents of arbitration often emphasize is the reduced expenses in light of the limited discovery allowed in arbitration. This article is not about the Rule 16.1 arbitration in the Delaware Superior Court which is not binding and which does not allow normal discovery. The more common arbitration under the American Arbitration Association, however, allows some discovery, but typically does not allow for the extensive discovery that is provided under the Rules of Civil Procedure.

Although in some cases this may be favorable, there are many cases where full discovery is necessary in order to properly prepare for trial, but unless agreed upon by the parties pursuant to a private agreement or expressly allowed by the arbitrator, it will not be an entitlement in all arbitrations and may restrict the ability of parties

to argue their case.

Nonetheless, there are statistics in the Delaware courts indicating that non-binding arbitration does settle more cases prior to conventional trials. This short overview indicates, however, that binding arbitration may not be a panacea in all disputes.

As a practical matter, it is next to impossible to succeed in having a court overturn binding arbitration unless the circumstances are egregious, as described in more detail in the Delaware Uniform Arbitration Act or its federal counterpart. One should also know that it is also almost impossible to obtain expedited injunctive relief in conventional binding arbitration at least pursuant to the American Arbitration Association rules. These factors should be kept in mind when drafting or entering into a contract with binding arbitration. •