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Court of Chancery Continues Line of Pro-Arbitration Cases

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Parties intending to enter into arbitration agreements should take note of the recent Delaware Court of Chancery decision in *In re Good Technology Stockholder Litigation*, No. CV 11580-VCL, 2017 WL 4857341 (Del. Ch. Oct. 27, 2017). In *Good Technology*, the parties agreed that "any disputes arising out of [a term sheet] shall be referred to" a specified individual "who shall have sole authority and exclusive jurisdiction to resolve any such disputes." The Court of Chancery opined that if the individual selected to resolve disputes was unavailable to do so, substituting another arbitrator would be appropriate under the terms of the agreement.

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In *Good Technology*, the parties created a term sheet for a pending settlement agreement and the term sheet designated the parties' prior mediator as the person to resolve all disputes arising out of the agreement. However, when disputes about the term sheet arose, the prior mediator recused himself because of his familiarity with the case and the parties. He instructed the parties to select another neutral arbitrator and, if they could not agree, he would select an alternate arbitrator himself.

The defendants argued that "they did not agree to a generic alternative dispute provision," but instead agreed only to having the prior mediator resolve their disputes in his capacity as their mediator. In the event that he was unavailable to resolve any disputes, they believed the dispute resolution clause would fail and they could exercise their right to seek a resolution in court. The plaintiffs disagreed, arguing that the dispute resolution clause "required the parties to arbitrate any disputes arising out of the" agreement.

Despite the fact that the dispute resolution clause never used the word "arbitration" nor referred to the prior mediator as an arbitrator, the Chancery Court found for the plaintiffs, and found it lacked jurisdiction. The court held that, although the dispute resolution clause specified a person who would resolve any disputes, the clause constituted "an agreement to arbitrate" even if the selected arbitrator was unavailable. The court reasoned that "'the public policy of Delaware favors arbitration,'" and in keeping with that policy, "any doubt as to arbitrability is to be resolved in favor of arbitration," (citing *SBC Interactive v. Corporate Media Partners*, 714 A.2d 758,

761 (Del. 1998)). The court did not find persuasive the defendants' arguments that they specifically chose only the prior mediator because of his familiarity with the case and that they intended the individual to retain his function as a mediator and never agreed to arbitration. The court also noted that once into the realm of arbitration, the selected person could have authority to appoint a successor, or other neutral rules under the Federal Arbitration Act (FAA) could otherwise resolve the issue rather than the court having jurisdiction to do so.

To those familiar with Delaware's general approach to arbitration, *Good Technology*'s outcome is consistent with that. In Delaware, when parties "select a form of private dispute resolution," even when the language of the selection is narrower than a typical arbitration clause, the court's role is to "supply details in order to make arbitration work." Even when the "issue of arbitrability is a close one … courts should err on the side of enforcing arbitration," as in *Hough Associates v. Hill*, No. CIV.A. 2385-N, 2007 WL 148751, at *13 (Del. Ch. Jan. 23, 2007).

Hough is instructive as to the level of clarity needed for the court not to compel arbitration. In *Hough*, the Court of Chancery did not compel arbitration because the agreement contained no arbitration clause. The parties entered into two separate agreements with integration clauses indicating they were distinct—one contained an arbitration clause and the other did not. The plaintiff in *Hough* attempted to enforce a claim under the agreement that did not contain an arbitration clause nevertheless through arbitration. While the *Hough* Court recognized that generally it should err on the side of compelling arbitration, it would not do so when it would have to "re-write" the agreement in order to make arbitration necessary.

In keeping with Delaware's policy of favoring arbitration when a dispute resolution agreement is ambiguous, *Good Technology* expressed some doubt regarding the "integral-or-ancillary" test proposed by some federal courts. See 2017 WL 4857341, at *4 (citing *Green v. U.S. Cash Advance Ill.*, 724 F.3d 787 (7th Cir. 2013)). Under the "integral-or-ancillary" test, if an aspect of an arbitration clause appears "integral to the arbitration agreement" as opposed to an "ancillary logistical concern," and that aspect fails, arguably the arbitration clause fails with it. See generally *Brown v. ITT Consumer Financial*, 211 F.3d 1217, 1222 (11th Cir. 2000).

For example, when a dispute resolution agreement specifies that arbitration "*shall be* conducted by … an authorized representative" of the Cheyenne River Sioux Tribal Nation, if a tribal representative is unavailable to conduct the arbitration, arbitration cannot be compelled because the selection of the tribe as arbitrator is specific and appears to be more than an "ancillary logistical concern," as in *Inetianbor v. Cashcall*, 768 F.3d 1346, 1350-52 (11th Cir. 2014.) In *Inetianbor*, the court read the arbitration agreement to mean that the parties were willing to give up their right to seek relief in court if, and only if, a tribal representative was available to resolve any disputes. On the other hand, under the "integral-or-ancillary" test, if a forum is selected without any demonstration that it was integral to the agreement, the arbitration clause will not fail if the forum selection fails. *Brown*, 211 F.3d at 1222.

By questioning this line of reasoning and distinction, *Good Technology* makes clear that when an intent to participate in alternative dispute resolution is expressed, even if an element of the clause fails, arbitration should generally be expected in Delaware.

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