

## Delaware Supreme Court Finds Breach Claims Covered by ADR Provision in Merger Agreement



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On February 13, 2026, in *Fortis Advisors, LLC v. Stillfront Midco AB*,<sup>[1]</sup> the Delaware Supreme Court held that an alternative dispute resolution (“ADR”) provision in a Merger Agreement allowed an arbitrator—from an accounting firm, BDO USA, LLP (“BDO”)—to resolve all issues, including legal issues, with respect to earnout calculations.

Specifically, the Court concluded that the ADR provision permitted BDO USA to resolve the seller’s claims that the buyer had allegedly breached earnout-related operational covenants and acted in bad faith, notwithstanding the fact that the claims purportedly did not concern “calculation of the earnout.” Thus, the Delaware Supreme Court enforced the accounting firm’s conclusion that no change was needed to Stillfront Midco AB’s (“Stillfront”) post-closing earnout payment calculations.

While ADR provisions in merger agreements can be particularly useful in discouraging litigation of post-closing earnout disputes, these provisions are often sloppily drafted, leading to disputes over the ADR provisions themselves. This decision illuminates the importance of parties drafting unambiguous ADR provisions and making it clear how specific issues are to be resolved when a dispute erupts.

### Background

In 2019, Stillfront acquired Kixeye (an online video game company that creates strategy games for computers and cell phones). Pursuant to the Merger Agreement, Stillfront paid \$90 million at closing and agreed to pay an earnout of up to \$30 million provided that Kixeye’s post-closing “2019 Adjusted EBITDA” exceeded \$15 million.” The parties consented to ‘the exclusive jurisdiction of any court of the State of Delaware, sitting in New Castle County, or the [U.S.] District Court for the District of Delaware . . . in any action or proceeding arising out of or relating to’ the [M]erger [A]greement.”<sup>[2]</sup> Further, the Merger Agreement contained an ADR provision whereby either party could submit any dispute regarding “calculation of the earnout amount” to an arbitrator.<sup>[3]</sup>

Following the closing, Stillfront calculated that the 2019 Adjusted EBITDA did not exceed \$15 million, and therefore, no earnout payment was owed to Kixeye. In October 2021, Fortis Advisors, LLC (“Fortis”), the Seller Representative under the Merger Agreement, brought an action against Stillfront in the Delaware Court of Chancery, alleging that Stillfront (1) breached operational covenants in the Merger Agreement and acted in bad faith (i.e., reducing the Adjusted EBITDA to avoid paying the earnout) when it (i) cut Kixeye’s marketing expenditures and (ii) retroactively increased Kixeye’s operating expenses attributable to the pre-merger 2019 period in excess of the monthly amounts outlined in the Merger Agreement and (2) breached the information access provision when it neglected to provide information Fortis had requested to prepare its Earnout Disagreement Notice.<sup>[4]</sup>

Stillfront invoked the ADR provision, which refers a dispute over earnout calculations to an accounting firm arbitrator, and moved to compel arbitration and

dismiss Fortis's Complaint. In opposition to Stillfront's motion, Fortis argued that the Court of Chancery had exclusive jurisdiction.

According to Fortis, "[t]he parties never agreed that claims for bad faith or breach of the Merger Agreement's information access provisions—neither of which require any calculation—would be adjudicated by an accountant[.]"<sup>[5]</sup> The Court of Chancery granted Stillfront's motion to compel arbitration and dismissed Fortis's Complaint with prejudice. In the Court of Chancery's view, Fortis's bad faith claim was grounded in a dispute about Stillfront's earnout calculations and therefore fell within the ambit of the ADR provision.<sup>[6]</sup> The Court of Chancery also found that the alleged violation of Fortis's information access was an issue of procedural arbitrability (an issue for the arbitrator and not the court).<sup>[7]</sup>

Subsequently, the parties retained BDO USA to resolve their dispute. BDO USA found that: (1) no change was needed to Stillfront's calculation with respect to the 2019 Adjusted EBITDA; (2) there was insufficient evidence of bad faith by Stillfront; and (3) Kixeye was not entitled to any earnout payment from Stillfront.<sup>[8]</sup>

The Court of Chancery granted Stillfront's motion to confirm BDO USA's findings and denied Fortis's motion for summary judgment. Fortis appealed, contending that the Court of Chancery erred by interpreting the ADR provision as providing for arbitration, as opposed to a narrow expert determination. In particular, Fortis argued that even assuming that the earnout calculation provision mandates arbitration, the claims do not fall within its "narrow scope."<sup>[9]</sup>

### **The Delaware Supreme Court's Decision**

The Delaware Supreme Court (Hon. Gary F. Traynor) affirmed the Court of Chancery's orders granting both (1) Stillfront's motion to compel arbitration and to dismiss Fortis's Complaint, and (2) its motion to confirm the arbitration award.

On appeal, Fortis principally argued that the Court of Chancery erred by treating the ADR provision as an arbitration clause, relying heavily on three decisions—*Terrell v. Kiromic Biopharma, Inc.*,<sup>[10]</sup> *ArchKey Intermediate Hldgs. Inc. v. Mona*,<sup>[11]</sup> and *Sapp v. Indus. Action Servs., LLC*<sup>[12]</sup>—that address how courts should classify contractual ADR provisions and how that classification affects the decision-making process.

The Court observed, however, that all three decisions were issued in the year following the Court of Chancery's order compelling arbitration in this case, and that Fortis, in the Court of Chancery proceedings, was "emphatic that the parties agreed to submit the earnout dispute to arbitration."<sup>[13]</sup> Indeed, Fortis's counsel asked himself rhetorically whether "the parties agree[d] to arbitrate something?" and answered: "No dispute here on that issue."<sup>[14]</sup> The Court therefore "[held] Fortis to its identification of [the ADR provision] as an arbitration provision."<sup>[15]</sup>

Fortis's fallback argument was that, even if the ADR provision is interpreted as an arbitration provision, it did not permit the arbitrator to decide the claims set forth in the Complaint. The Supreme Court explained that it agreed with the Court of Chancery—"especially in light of Fortis's acknowledgement in that court that the calculation of the Earnout Amount was to be arbitrated"—that *Viacom Int'l Inc. v. Winshall*,<sup>[16]</sup> a case that addressed an ADR provision in an earnout context, is a "suitable analog to the issues presented in this case."<sup>[17]</sup>

The Court concluded that the bad faith breach of contract claims fell within the ambit of the ADR provision. The Court pointed out that the "subject matter of the issue referred to the Arbitrator" under the ADR provision is the "calculation of the Earnout Amount."<sup>[18]</sup> Moreover, the Court pointed to *Viacom*, namely its holding that, "if the subject matter to be arbitrated is the calculation of an earn-out, . . . all issues as to what financial or other information should be considered in performing the calculation are decided by the arbitrator."<sup>[19]</sup>

In the Court's estimation, Stillfront's post-merger conduct underlying Fortis's bad faith breach claims "had a direct bearing on how the Earnout Amount should be determined."<sup>[20]</sup> The Court rejected Fortis's argument that the "actual Earnout Amount" was a term tied solely to Kixeye's Adjusted EBITDA, and not to any breach

of the operational covenants. Fortis contended that the arbitrator was empowered to calculate the actual earnout amount but was precluded from determining that Stillfront's bad faith breaches triggered the presumptive maximum earnout amount under § 2.14(g). The Court was "not swayed by the fine distinction Fortis draws between a calculation of the earnout amount linked to Kixeye's Adjusted EBITDA and a determination that, because Stillfront manipulated the EBITDA figure in bad faith, it must pay the presumptive earnout amount," concluding that "[i]n both cases, the Arbitrator is determining the earnout amount to which Fortis is actually entitled."<sup>[21]</sup>

The Court maintained that the Court of Chancery did not err in its decision to compel arbitration of Fortis's breach claim related to the information access provisions.<sup>[22]</sup> The information access provisions "provide a link between Fortis's contractual right to information and access to personnel, on the one hand, and the earnout determination, on the other."<sup>[23]</sup>

According to Fortis, its ability to enforce its information access "was critical because that access was necessary *before* submitting its Earnout Determination Notice, not afterward—when it would be too late."<sup>[24]</sup> As the Court noted, *Viacom* explained that "all issues as to what financial or other information should be considered in performing the [earnout] calculation are decided by the arbitrator."<sup>[25]</sup>

Finally, the Court addressed Fortis's argument that the Court of Chancery erred by concluding that BDO's failure to disclose its relationships with DLA Piper ("DLA"), Stillfront's counsel, did not warrant vacatur of BDO's determination on grounds of "evident partiality." The Court reiterated that to demonstrate evident partiality sufficient to require vacatur, the record must reflect that an arbitrator failed to disclose "a *substantial* personal or financial relationship with a party, a party's agent, or a party's attorney that a reasonable person would conclude was powerfully suggestive of bias."<sup>[26]</sup> The moving party must identify an undisclosed relationship that is "so intimate—personally, socially, professionally, or financially—as to cast serious doubt on the arbitrator's impartiality," and the alleged conflict "must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative."<sup>[27]</sup>

Fortis advanced three grounds for its partiality claim: (1) emails between DLA and BDO, sent shortly after BDO's engagement, regarding a separate engagement that never materialized; (2) DLA's disclosure in a federal bankruptcy proceeding that a BDO affiliate was a current client on matters unrelated to the bankruptcy; and (3) an expert affidavit from Dr. Douglas Carmichael opining that BDO violated the American Institute of Certified Public Accountants ("AICPA") ethical and auditing standards by failing to make certain disclosures. The Court rejected each argument in turn.

As to the emails, the Court found they constituted an arm's-length transaction between two market professionals that, far from suggesting bias, actually highlighted BDO's awareness of bias concerns and attempts to maintain neutrality. As to DLA's bankruptcy disclosure, the Court found it too attenuated—at most suggesting that DLA represented an affiliate of BDO, not BDO itself—and noted that Fortis failed to show how, or even if, the relationship extended to Arbitrator Katz.

As to the expert affidavit, the Court declined to equate a violation of professional accounting standards (AICPA standards) with a violation of an arbitral body's disclosure rules. The Court emphasized that BDO's engagement letter specifically provided that Katz was not required to follow generally accepted auditing standards and that Fortis provided no authority supporting the proposition that professional accounting standards should receive the same treatment as arbitral-body rules.

The Court further noted that Fortis and Stillfront were sophisticated actors who knowingly engaged BDO, whose engagement letter expressly reserved BDO's right to be engaged by either party in future matters and disclaimed responsibility for continuously monitoring potential conflicts. In the Court's view, these contractual

provisions undermined Fortis's assertion of surprise regarding BDO's interactions with DLA.

### Takeaways

- This decision underscores the importance of precise drafting of ADR provisions. If parties intend for breach claims to be resolved by a court and not an accounting-firm arbitrator or expert, the parties should ensure that the merger agreement reflect that intention. And if the parties intend a broad delegation, the ADR provision should be crafted accordingly.
- It behooves parties to clarify the expert's scope of authority to resolve calculation disputes. As evidenced by this decision, a provision that calls for resolution of disputes over "calculation" of an earnout may be interpreted as conferring broad authority to resolve disputes that do not concern actual calculations. Thus, when providing an ADR process for resolution of calculation disputes, parties should be crystal clear as to whether the expert (g., an accounting firm) will have power only to make accounting-based computational-type determinations or to also make legal determinations.
- Sellers should not hesitate to seek comprehensive informational rights. In arbitration, the expert can resolve disputes over what information has to be handed over. As a result, a seller should consider including language in the agreement—on top of general statements regarding access to information—laying out specific information that the seller ought to be entitled to before it has to provide a Notice of Disagreement to the buyer's earnout statement.

That said, as evidenced in this case, the arbitrator ultimately granted Fortis's expansive request for production (Stillfront produced over 10,000 pages of documents), and Fortis did not claim that its rights were prejudiced by an inadequate production—suggesting that arbitrators can effectively manage discovery even absent detailed pre-arbitration informational provisions.

This decision underscores that Delaware courts will enforce negotiated dispute resolution provisions, treating them as binding contractual bargains between sophisticated parties. Indeed, Delaware courts carefully distinguish between arbitration and expert determination based on the contractual language.[\[28\]](#)

- Parties should exercise caution in how they characterize ADR provisions in lower-court proceedings, as they may be bound by those characterizations on appeal. In this case, the Court held Fortis to its concession before the Court of Chancery that § 2.14 was an arbitration provision, notwithstanding post-ruling decisions from the Delaware Supreme Court (*Terrell*), the Court of Chancery (*ArchKey Intermediate Holdings*), and the U.S. Court of Appeals for the Third Circuit (*Sapp*) that drew significant distinctions between arbitration and expert determination.

The key distinction between expert determination and arbitration is that the latter involves a broad delegation of authority to resolve the entire controversy, while the former concerns a narrow, targeted delegation to resolve particular, technical disputes, usually of an accounting nature.

Fortis's prior framing foreclosed its ability to invoke these favorable authorities on appeal. If the Court had viewed the provision as an expert determination rather than an arbitration, Fortis's arguments regarding Stillfront's bad faith may have been deemed outside the accounting firm's scope, enabling judicial review of those claims.

- The evident partiality standard remains a high bar for vacating arbitral awards in Delaware. The Court's decision confirms that (a) arm's-length interactions between large-scale institutional actors are generally insufficient to demonstrate bias; (b) violations of professional accounting standards (AICPA) are not equivalent to violations of arbitral-body disclosure rules for purposes of vacatur analysis; and (c) sophisticated parties who jointly select an arbitrator whose engagement letter reserves the right to future

engagements will be presumed to have knowingly accepted that risk. Parties concerned about potential conflicts should negotiate more restrictive engagement terms at the outset of the arbitration.

[1] --- A.3d ----, 2026 WL 406073 (Del. Feb. 13, 2026).

[2] *Id.* at \*2 (internal citations omitted).

[3] *Id.*

[4] *Id.* at \*3.

[5] *Id.* at \*4 (internal citations and quotations omitted).

[6] *Id.* (“These claims, in the court’s view, were subsumed within the parties’ agreement to refer disputes over the calculation of the Earnout Amount to an ‘Arbitrator.’”).

[7] *Id.* at \*9 (“In its bench ruling, the court saw this claim as presenting ‘an issue as to what information must be considered in making the arbitrator’s decision’ and, as such, an issue of procedural arbitrability within the arbitrator’s purview.” (internal citations omitted)).

[8] *Id.* at \*4.

[9] *Id.* at \*5.

[10] 297 A.3d 610 (Del. May 4, 2023).

[11] 302 A.3d 975 (Del. Ch. Oct. 3, 2023).

[12] 75 F.4th 205 (3d Cir. 2023).

[13] --- A.3d ----, 2026 WL 406073, at \*6 (Del. Feb. 13, 2026).

[14] *Id.* (internal quotations and citations omitted).

[15] *Id.*

[16] 72 A.3d 78 (Del. 2013).

[17] 2026 WL 406073 (Del. Feb. 13, 2026), at \*8.

[18] *Id.*

[19] *Id.* (internal quotations and citations omitted).

[20] *Id.*

[21] *Id.* at \*9.

[22] *Id.*

[23] *Id.* (“The information provisions themselves—§§ 2.12(g) and 2.14(a)—provide a link between Fortis’s contractual right to information and access to personnel, on the one hand, and the earnout determination, on the other.”).

[24] *Id.* (internal quotations and citations omitted).

[25] *Id.* (internal quotations and citations omitted).

[26] *Id.* at \*10 (internal quotations and citations omitted).

[27] *Id.* (cleaned up).

[28] See, e.g., *Penton Business Media Holdings, LLC v. Informa PLC*, 252 A.3d 445, 465 (Del. Ch. 2018) (“The parties evinced their clear intent in the Dispute Resolution Provision by using ‘expert not arbitrator’ language.”).