IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARDA USA, INC., a Delaware corporation, and GARDA WORLD SECURITY CORPORATION, a Corporation Organized Under the Laws of Canada,	)	
Plaintiffs,	)	
v.	)	C.A. No. 7115-ML
SPX CORPORATION, a Delaware corporation,	)	
Defendant.	)	

MASTER'S REPORT
(Cross Motions for Summary Judgment)

Submitted: September 7, 2012
Draft Report: November 20, 2012
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Final Report: February 7, 2013

Peter B. Ladig, Esquire and Brett M. McCartney, Esquire, of Morris James LLP, Wilmington, Delaware; Attorneys for Plaintiffs. OF COUNSEL: Jeffrey A. Simes, Esquire, of Goodwin Procter LLP.

John V. Fiorella, Esquire, of Archer & Greiner, Wilmington, Delaware; Attorney for Defendant.

LEGROW, Master

INTRODUCTION

Parties to a stock purchase agreement agreed to adjust the purchase price after closing based on changes in the acquired company's working capital before closing, and included in the agreement a method for calculating working capital. As is often the case, a dispute arose between the parties regarding that price adjustment, and the parties submitted the dispute to arbitration before an independent accountant, as provided in the parties' agreement. The acquiror now contends that the arbitrator failed to apply the terms of the parties' agreement, and that in so doing, the arbitrator acted in manifest disregard of the law. Although the Court disagrees with the arbitrator's evident interpretation of the contract, the acquiror has not shown that the arbitrator's decision was anything more than a mere error of law. The risk of such errors, along with a limited scope of judicial review, is part of the bargain parties strike when they enter into arbitration agreements. Because the acquiror has not demonstrated any statutory basis to vacate the award, that award should be confirmed. This is my final report in this action.

BACKGROUND

Garda USA, Inc., and its parent company, Garda World Security Corporation, (collectively "Garda"), acquired all of the outstanding shares of Vance International ("Vance") from SPX Corporation ("SPX"), under a Stock Purchase Agreement initially signed on November 27, 2005 and later amended on January 13, 2006 (the "Amended Agreement"). The Amended Agreement required Vance to have a specified amount of working capital at the closing date, and provided for a corresponding adjustment to the

purchase price if Vance's working capital was more or less than the targeted amount. The contract specified a method of calculating working capital, including a particular method of calculating Vance's reserve for its workers' compensation liabilities (the "Vance Reserve"). That method, and whether it was properly applied, is at issue in this case.[1] Section 1.3 of the Amended Agreement required SPX to provide Garda with an estimate of working capital in a Pre-Closing Balance Sheet five or more days before closing, and again in an Effective Date Balance Sheet within sixty days after closing. Garda claims that because SPX failed to comply with the required method of calculating working capital, Garda paid an inflated purchase price for Vance.

Garda alleges that SPX violated two requirements of the Amended Agreement in its calculation of the Vance Reserve. First, Garda asserts that Section 1.3(a)(v) of the Supplementary Seller's Disclosure Schedule (the "Supplementary Schedule") required SPX to include in its calculation of current liabilities any workers' compensation liabilities that were Incurred But Not Reported ("IBNR") to its workers' compensation insurers. That section states:

> a) The calculation of current assets and current liabilities shall exclude the following accounts and balances:
>
> > (v.) Incurred but not reported and reported claims related to risk management programs, *with the exception of those claims related to workers' compensation liabilities, which shall*

[1] Garda also contested SPX's working capital calculation due to the omission of two items: 1) a sales tax item, and 2) other accrued liabilities. SPX has conceded these items should have been included in the working capital calculation, and so the Court need not analyze the appropriateness of their inclusion in that calculation. The arbitrator's determination as to those items is considered at the end of this report.

> *be included in the calculation of current liabilities.*[2]

Despite this specific language, SPX argues that the Amended Agreement did not require the inclusion of IBNR in the Vance Reserve because Section 1.3(c) of the Supplementary Schedule permitted SPX to calculate the Vance Reserve by whatever method SPX used to value accounts and reserves in the pre-closing period. Subsection (c) reads:

> c) In preparing the Closing Date Statement of Working Capital, the respective amounts included in the Closing Date Statement of Working Capital for all reserves (including, but not limited to, accounts receivable reserves and litigation reserves) and for asset valuation allowances (whether or not specified in this sentence) that were valued for the interim September 30, 2005 financial statements by subjective estimates shall be calculated using the same methodology in respect of such items on the interim September 30, 2005 financial statements but the application of the methodology shall reflect changes in circumstances or events occurring and based on the most current information known to SPX between the date of the interim September 30, 2005 financial statements and the Closing Date.[3]

SPX asserts that throughout the process of selling Vance, it consistently relied upon the Vance insurance carriers' workers' compensation liability reserve estimates to calculate the appropriate reserve liability for Vance. SPX concedes that these estimates do not include IBNR liabilities for workers' compensation, but asserts that Garda understood SPX's method at the time it submitted a bid to buy Vance.[4] Garda refutes SPX's assertion, and claims that SPX did not disclose its methodology for estimating the

[2] Joint Appendix for Cross Motions for Summary Judgment (hereinafter "Jt. App.") Vol. 1 at A-000296 (emphasis added).
[3] *Id.*
[4] Def. Br. at 20.

Vance Reserve until the accounting and that, because SPX did not prepare standalone GAAP financial statements for Vance, Garda was not able to discover the method until the arbitration. In any event, Garda claims that regardless of how SPX previously calculated the Vance Reserve, Section 1.3(a) of the Supplementary Schedule explicitly required SPX to include IBNR in its calculation of the Vance Reserve for purposes of calculating working capital under the Amended Agreement.

The second way in which SPX violated the Amended Agreement, according to Garda, was by failing to include all available "current information" as required by Section 1.3(c) of the Supplementary Schedule. Garda specifically points to a report issued by Aon Risk Consultants, Inc. ("Aon"), which was prepared at the request of SPX to "assist SPX's management in assessing its aggregated corporate reserves,"[5] and which estimated that the appropriate workers' compensation reserve for Vance was almost twice that which SPX estimated to be the Vance Reserve.[6] Garda claims that it was the conflicting estimates of the Vance Reserve contained in the SPX Effective Date Balance Sheet and the Aon report that prompted Garda to contest SPX's method of calculating the reserve. SPX argues that the Aon report was inapplicable to the issue of calculating the Vance Reserve for several reasons. First, SPX emphasizes that the inputs to the Aon report, such as the loss factors, reflected the loss experience of SPX as an entire company, which meant that they were weighted toward the heavy industrial manufacturing operations of SPX as a whole, and therefore reflected a higher workers'

[5] Def. Br. at 9.

[6] According to Garda, SPX estimated the Vance Reserve at $1.366 million in the Effective Date Balance Sheet. Aon's report found that the appropriate reserve for Vance to be $2,782,077 for policy years 2002 through 2005. *See* Compl. ¶ 10.

compensation loss experience than that experienced by its subsidiary Vance, a relatively low risk security guard business. Second, SPX asserts that regardless of its applicability, the Aon report did not constitute "current information" known to SPX as of the Effective Date, December 31, 2005, because the Aon report was produced on January 20, 2006, after both the Effective Date and the January 13, 2006 Closing Date. Garda responds to this by arguing that SPX has never refuted that it knew the results of the Aon report prior to its finalization. Garda also points out that SPX endorsed the Aon estimate in a post-closing audit by PricewaterhouseCoopers ("PwC").

Garda objected to the Effective Date Balance Sheet in the manner required by Section 1.3(d) of the Amended Agreement. Section 1.3(d)(ii) of the Amended Agreement provided that:

> [Garda] may dispute the Effective Date Balance Sheet only on the grounds that the Effective Date Balance Sheet has not been prepared in accordance with the methods, procedures, assumptions and adjustments set forth in Section 1.3 of the Seller Disclosure Schedule. … If the parties are unable to resolve any such dispute within 30 business days after notice is given by [Garda] to [SPX] … the parties shall submit the items remaining in dispute for resolution to the Independent Accountant.[7]

The parties selected Ernst & Young (the "Independent Accountant") in May 2011 and negotiated a Statement of Work setting forth the procedures to be followed by the Independent Accountant. Among other things, the Statement of Work provided: "The Independent Accountant shall not make any legal determinations or otherwise rule upon issues of law in rendering the Award. … None of the Services or any Reports will

[7] Jt. App. Vol. 1 at A-000168.

constitute any legal opinion or advice, or otherwise determine any issue of law."[8] The parties submitted opening and reply briefs for the Independent Accountant's consideration, which also are on record with this Court. On October 11, 2011, the Independent Accountant issued the arbitration award denying Garda's claim and providing for no adjustment to SPX's working capital calculation. Garda then commenced this action on December 15, 2011 in an effort to vacate the Independent Accountant's determination.

Garda argues that the Independent Accountant ignored the unambiguous terms of the contract and thereby acted outside of his authority. Garda asserts two grounds for vacatur based on SPX's improper calculation of the Vance Reserve. As an additional ground for vacatur, Garda also notes that the Independent Accountant failed to adjust SPX's working capital estimate for two items that SPX conceded: a sales tax item and other accrued liabilities, which yielded a total adjustment of $175,831. SPX argues that because these issues were not in dispute, it was not the responsibility of the Independent Accountant to make an adjustment to the Effective Date Balance Sheet. SPX further asserts that it has credited Garda for these two items by reducing its demand for payment arising from the arbitration determination by the amount conceded. The Court will address these three grounds in turn.

ANALYSIS

Summary judgment will be granted under Court of Chancery Rule 56 where there are no material issues of fact and the moving party is entitled to judgment as a matter of

[8] Jt. App. Vol. 1 at A-000004-5.

law. On cross-motions for summary judgment, where the parties have not argued that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for a decision on the merits based on the record submitted with the motions.[9] Summary judgment is the "common [method] for this [C]ourt to determine whether to vacate or confirm an arbitration award."[10]

Delaware's Uniform Arbitration Act ("DUAA") vests the Court of Chancery with exclusive jurisdiction to hear actions seeking confirmation, modification, or vacatur of an arbitrator's decision.[11] Garda brings suit under 10 *Del. C.* § 5714(a)(3) of the DUAA, which allows this Court to set aside an arbitration award where the arbitrator "exceeded [his] powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made."[12] This Court has held that an award may be vacated under Section 5714(a)(3) if the arbitrator, in "manifest disregard" of the law, was "cognizant of the controlling law but clearly chose to ignore it in reaching [his] decision."[13] Garda claims that the Independent Accountant acted in "manifest disregard of Seller's Disclosure Schedule § 1.3" and that his failure to adjust the Vance Reserve "finds no support in the arbitral record."[14]

Arbitration awards, however, are not lightly disturbed, and "[c]ourts must accord substantial deference to the decisions of arbitrators."[15] As a general rule, the merits of a

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[9] Ct. Ch. R. 56(h).
[10] *Beebe Med. Ctr., Inc. v. InSight Health Servs. Corp.*, 751 A.2d 426, 431 (Del. Ch. 1999).
[11] 10 *Del. C.* § 5702.
[12] 10 *Del. C.* § 5714(a)(3).
[13] *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc.*, 953 A.2d 726, 733 (Del. Ch. 2008).
[14] Compl. ¶ ¶ 74 and 79-81.
[15] *TD Ameritrade, Inc.*, 953 A.2d at 732.

dispute heard by an arbitrator are not to be considered by a reviewing court.[16] A party attempting to vacate the arbitration award bears the burden of showing that one of the required statutory grounds to vacate exists.[17] To succeed, Garda must show "something beyond and different from a mere error in the law or failure on the part of the arbitrator[] to understand or apply the law."[18]

A. Did the Independent Accountant Act in Manifest Disregard of the Amended Agreement by Failing to Adjust the Vance Reserve to Include IBNR?

In its complaint and in the summary judgment briefing submitted to the Court, Garda initially argued that the Arbitrator ignored and disregarded controlling contractual and legal authority regarding the proper interpretation of the Amended Agreement, namely Sections 1.3(a)(v) and 1.3(c), and therefore acted in "manifest disregard" of the law.[19] In its briefing on its exceptions to my draft report, Garda introduced two newly minted arguments: first, that by failing to make the adjustment under Section 1.3(a)(v), the Independent Accountant exceeded the authority granted to him under the parties' agreement, and second, that the Independent Accountant acted in manifest disregard for the law because he decided a legal question that was not within the parameters of the issues he was empowered to decide. I will address each argument in turn.

Garda first argues that the Independent Accountant ignored controlling contractual and legal authority in reaching his determination. Because this issue largely turns on the

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[16] *See Falcon Steel Co., Inc. v. HCB Contractors, Inc.*, 1991 WL 50139, at *1-2 (Del. Ch. Apr. 4, 1991).
[17] *See id*. at *3.
[18] *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 208 (2d Cir. 2002) (quoting *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967)). *See also Falcon Steel Co.*, 1991 WL at *3 (explaining that because 10 *Del. C.* § 5714(a)(3) is modeled after the Federal Arbitration Act, "federal cases interpreting this section are most helpful.").
[19] *See* Compl. ¶¶ 7, 60, 64; Pl. Op. Br. at 22; Pl. Reply Br. at 3, 6-9.

interpretation of Section 1.3 of the Supplementary Schedule, the Court must first consider the meaning of those contractual terms to determine whether the arbitrator acted in manifest disregard of the law. Section 1.3 contains the provisions governing the two primary issues in this case: subparagraph (a) discusses the inclusion of IBNR in the estimate of the Vance Reserve and subparagraph (c) discusses the methodology to be used in calculating reserves as well as the requirement that SPX base its calculation on "the most current information" known to it.[20] Concerning the inclusion of IBNR in the Vance Reserve, Garda argues that the Independent Accountant flatly ignored Section 1.3(a)(v), and in doing so "acted in direct contradiction to the express terms of the agreement,"[21] which, if correct, would constitute grounds for this Court to vacate the award. Despite the fact that SPX may not have included IBNR in its past calculations of the Vance Reserve, Garda contends that Section 1.3(a)(v) required inclusion of this figure for the purpose of calculating the Effective Date Balance Sheet. SPX argues, as it did to the Independent Accountant, that subparagraph (c) is equally specific to SPX's obligations regarding calculation of the reserve amounts and modifies subparagraph (a), with the result that SPX need not include IBNR in the Vance Reserve because it had not done so in preparing the interim financial statements. SPX contends that subparagraph (c) controls subparagraph (a), and Garda therefore cannot demonstrate that the arbitration record provides no support for the arbitrator's award.

[20] *See* Jt. App. Vol. 1 at A-000296.
[21] *Pryor v. IAC/Interactive Corp.*, Slip op. at 15, n.61 (Del. Ch. June 7, 2012).

Section 5713(a)(3) requires this Court to vacate an arbitration award if an arbitrator acts "in manifest disregard of the law." That statutory standard must be applied in a manner consistent with Delaware's public policy favoring arbitration and the finality of arbitration awards.[22] For that reason, it is not sufficient for Garda to demonstrate a mere error of law or fact. "It is recognized that inaccuracies as to the law or facts are possible and their existence is accepted implicitly by an agreement to submit the dispute to arbitration."[23] Rather, in order to prevail, Garda must demonstrate that "[the arbitrator] was cognizant of the controlling law but clearly chose to ignore it in reaching [his] decision."[24] The laws at issue are those governing the interpretation of the Amended Agreement and its Supplementary Schedule.

The facts are not in dispute in this case. There is plenty of evidence that the Independent Accountant was cognizant of the contract terms, and neither party argued that the contract was ambiguous. Each party had ample opportunity to argue to the Independent Accountant what portion of Section 1.3 governed the calculation at issue. There is no dispute that SPX did not include IBNR in its calculation of the Vance Reserve. Accordingly, the arbitrator must have concluded that SPX's calculation was consistent with Section 1.3 of the Supplementary Schedule.

The governing principles of contractual interpretation also are not in dispute. Contracts are to be read as a whole, giving each term and provision effect so as "not to

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[22] *See, e.g., Pettinaro Const. Co. v. Harry C. Partridge, Etc.*, 408 A.2d 957 (Del. Ch. 1979); *Falcon Steel Co.*, 1991 WL at *2 (stating that it is "well settled that the resolution of disputes by arbitration is strongly favored in this State").

[23] *Falcon Steel Co.*, 1991 WL at *2.

[24] *TD Ameritrade, Inc.*, 953 A.2d at 732. *See also, Wier v. Manerchia,* 1997 WL 74651, at *4 (Del. Ch. Jan. 28, 1997) (citation omitted), *aff'd,* 700 A.2d 736 (Del. 1997).

render any part of the contract mere surplusage."[25] In addition, a more specific provision prevails over a more general one.[26] Both parties call to the Court's attention the general principle that "a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless."[27]

The question before this Court is whether the Independent Accountant's conclusion that SPX's calculation was consistent with Section 1.3 was in "manifest disregard" of the parties' contract and the law governing interpretation of that contract. Interpreting subparagraph (c) in the manner advocated by SPX appears to render subparagraph (a)(v) almost entirely meaningless, a point SPX conceded during argument before this Court.[28] It is the opinion of this Court that to read subparagraph (c) as allowing SPX to omit from the Vance Reserve an estimate of IBNR for workers' compensation claims renders meaningless the portion of Section 1.3(a)(v) which provides, "with the exception of [incurred but not reported] claims related to workers' compensation liabilities, which shall be included in the calculation of current liabilities."[29] That section plainly carves out a workers' compensation exception to the

[25] *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *13 (Del.Ch. Oct 11, 2006). *See also* E. ALLEN FARNSWORTH, CONTRACTS § 7.11 (4th ed. 2004).
[26] *See Brinckerhoff v. Texas E. Products Pipeline Co., LLC*, 986 A.2d 370, 387 (Del. Ch. 2010). *See also* WILLISTON ON CONTRACTS § 32:10 (4th ed. 1999).
[27] *See* Pl. Reply Br. at 9 citing *Sonitrol Holding Co.v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del .1992). *See also* D. Reply Br. at 4 citing *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 287 (Del. 2001).
[28] Hearing Transcript 25: 3-6 (The Court: "So you're conceding that under your interpretation of it, [Section 1.3(a)(v)] has no meaning?" Mr. Fiorella (counsel for SPX): "I would have to concede that, your Honor."). SPX argued, however, that adopting Garda's interpretation of the Amended Agreement would render Section 1.3(c) meaningless. The language of Section 1.3(c) defeats that argument; that subsection applies to the methodology for calculating all reserves included in the Effective Date Balance Sheet, not just the calculation of a reserve for worker's compensation claims. Interpreting Section 1.3(a)(v) as an exception to Section 1.3(c) does not render Section 1.3(c) entirely meaningless, because it has continued application to the calculation of other reserves.
[29] Jt. App. Vol. 1 at A-000296.

general rule that allows for the exclusion of incurred but not reported claims from the calculation of every other reserve.[30]

This Court, however, does not sit as an appellate authority reviewing the arbitrator's substantive findings.[31] Garda's arguments effectively amount to a request for a merits review. This Court cannot engage in such a review because "parties electing to arbitrate generally waive their right to judicial review of the case's substantive merits."[32] The parties presumably heavily negotiated each term of the Vance purchase agreement documents. This includes the arbitration clause of the Amended Agreement. The parties, when bargaining for the Vance transaction, agreed to arbitrate certain disputes before an arbitrator trained in accounting rather than before a judge or lawyer trained to apply the law. As discussed below, the parties also submitted their dispute to the Independent Accountant without ever contending that the legal question of the proper interpretation of Section 1.3 first required resolution by a court. In so doing, they implicitly accepted that the arbitrator might not understand the intricacies of Delaware law that govern the interpretation of contracts. It is the case, generally, that in opting for an arbitration clause, "it is the arbitrator's view of the facts and of the meaning of the contract that [the parties] have agreed to accept."[33] Garda is not now entitled to vacatur simply because the

[30] In its exceptions to the draft report, SPX argued that Section 1.3(c) and 1.3(a)(v) cannot be reconciled, and that under settled principles of contractual interpretation a more specific clause should control over a more general clause. As an initial matter, I believe, as set forth above, that the clauses can be interpreted in a harmonious, albeit imperfect, manner. Even if they were conflicting, however, it would be nearly impossible to read Section 1.3(c) as more specific that Section 1.3(a)(v). As previously noted, Section 1.3(c) applies to the methodology for calculating all reserves in the Effective Date Balance Sheet, while Section 1.3(a)(v) contains very specific instructions for the inclusion of IBNR in the Vance Reserve.

[31] *Kuhn v. Hess*, 2000 WL 1336780, at *1 (Del. Ch. Aug.16, 2000).

[32] *Id*.

[33] *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-8 (1987).

arbitrator applied the contract differently than a Delaware court may have applied it.[34] "This is true even where the issue is a contractual term that has an established meaning under Delaware case law."[35] It follows, then, that this Court cannot vacate an award even where the interpretation determined by the arbitrator seems contrary to the established rules of contract interpretation applied by this Court. That this Court would likely interpret Section 1.3(a)(v) to require the inclusion of IBNR claims in the Vance Reserve is not relevant to the analysis of whether to set aside an arbitration award. As stated above, the standard that Garda must meet in order to obtain vacatur requires more than an error or misunderstanding of the law.

In addition, because the arbitrator need "not state the grounds for a grant of relief, and [because] it is normally inappropriate for a court to direct an [a]rbitrator to disclose the reasoning of his decision,"[36] this Court can only inspect the record to determine whether it shows any support for the arbitration award. In this case, the Independent Accountant did not state the grounds for his determination and so we cannot know his reasoning. It is arguable that the arbitrator misapplied the law by concluding that Section 1.3(c) controlled over Section 1.3(a)(v) for purposes of calculating the Vance Reserve. This Court, though it may not agree with that manner of interpretation, cannot conclude "simply by looking at the arbitrator's award that he had completely ignored the

[34] *See World-Win Mktg., Inc. v. Ganley Mgmt. Co*., 2009 WL 2534874 (Del. Ch. Aug. 18, 2009).
[35] *Id*. at *3.
[36] *Malekzadeh v. Wyshock*, 611 A.2d 18, 22 (Del. Ch. 1992).

contract."[37] Rather, the arbitrator reached an alternative interpretation that was grounded in some of the language in the contract, *i.e.*, Section 1.3(c).

The parties have "authorized the arbitrator to give meaning to the language of the agreement, [and] a court should not reject an award on the ground that the arbitrator misread the contract."[38] A court may vacate an award only if the arbitrator intentionally ignored the contract, and a court may only infer that the arbitrator intentionally disregarded the law if it finds that the error made by the arbitrator is "so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator."[39] But, "if there is even a barely colorable justification for the outcome reached, the court must confirm the arbitration award."[40] This Court finds a colorable, if flawed, justification in accepting SPX's reading of Section 1.3(c). For that reason, this Court must confirm the award because "as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision."[41]

In its exceptions to the draft report, and with the benefit of the preceding holding, Garda shifted its argument to focus on the authority given the Independent Accountant by the parties. Garda first argues that, because "the parties directed the Independent Accountant to include IBNR in his calculation of working capital, he was not at liberty

[37] *Kanuth v. Prescott, Ball & Turben, Inc.* 949 F.2d 1175, 1181 (D.C. Cir. 1991).
[38] *United Paperworkers Int'l Union, AFL-CIO*, 484 U.S. at 38.
[39] *In re Arbitration between Interdigital Communications Corp. and Samsung Electronics Co., Ltd*., 528 F. Supp. 2d 340, 355 (S.D. N.Y. 2007).
[40] *Id*.
[41] *RBC Capital Markets Corp. v. Thomas Weisel Partners, LLC*, 2010 WL 681669, at *8 (Del.Ch. Feb. 25, 2010).

simply to disregard that clear instruction and exclude IBNR."[42] To support that contention, Garda contends that I concluded that "no reasonable reading" of the Amended Agreement would permit the exclusion of IBNR. This argument, not surprisingly, overstates the Court's conclusion regarding the Amended Agreement. Although I concluded that a court applying principles of Delaware law likely would hold that Section 1.3(a)(v) required the inclusion of IBNR in the Vance Reserve notwithstanding the language in Section 1.3(c) regarding the use of consistent methodologies, I also concluded that the Independent Accountant's apparent conclusion that Section 1.3(c) controlled over Section 1.3(a)(v) was grounded in some language in the contract, and therefore the Independent Accountant had not "completely ignored" the parties' contract and had not acted in "manifest disregard" for the law.

Garda's second argument strikes a related chord. Garda contends, correctly, that the Statement of Work agreed to by the parties indicated that the Independent Accountant would not rule on any issues of law in rendering his decision. Garda therefore contends that nothing in the Amended Agreement or the Statement of Work empowered the Independent Accountant to resolve the legal question of the proper interpretation of the Amended Agreement, and his decision on that question therefore is not entitled to any deference from this Court. The argument, however, ignores the history of the arbitration proceedings. Whatever the Statement of Work provided, it is undisputed that the parties submitted to the Independent Accountant the issue of whether Section 1.3 required SPX to include IBNR worker's compensation claims in the Vance Reserve. Although Garda

[42] Pls' Op. Br. in Support of Exceptions at 3.

argued strenuously that Section 1.3(a)(v) plainly required the inclusion of IBNR, SPX argued that it was not required to do so because Section 1.3(c) permitted it to use the same methodologies it previously employed in calculating reserves. Neither party argued to the Independent Accountant that the interpretation of Section 1.3 was a legal question that he could not decide, or that required resolution in a court of law. Instead, the parties knowingly submitted their dispute to the Independent Accountant, and therefore waived any claim that he exceeded his authority in deciding that dispute.[43] Had Garda prevailed on the issue, it likely would not now be contending that the arbitrator exceeded the scope of his authority.

B. Does Section 1.3(c) Require SPX to Include the Aon Report as Current Information?

Garda's second ground for vacatur turns on whether the Aon report qualifies as "the most current information known to SPX" within the meaning of Section 1.3(c) of the Supplementary Schedule. SPX argues that because the Aon analysis officially was produced approximately one week after the Effective Date, it does not qualify as "the most current information" for purposes of Section 1.3(c). Garda responds by claiming that SPX knew the results of the report prior to finalization. To support that assertion, Garda points to its own rebuttal brief submitted to the Independent Accountant, in which Garda argued that "a report of the length and complexity of Aon's … [a]nalysis must

[43] *See, e.g. Audio Jam, Inc. v. Fazelli*, 1997 WL 153814, at *2 (Del. Ch. Mar. 20, 1997) (arbitrator derived his authority from the arbitration agreement and the submissions of the parties, and the parties evidenced their agreement to submit the issue to the arbitrator by presenting evidence and arguments about the claim).

have been commissioned (and discussed with SPX) prior to the Effective Date."[44] Garda further claims that since SPX was on notice of this report, it was obligated to take the information into account when estimating the Vance Reserve. Garda concludes that because SPX never disputed that it had knowledge of the report, the Independent Accountant must conclude that SPX knew the information contained in the Aon report, qualifying that information as "the most current information known to SPX."

This Court is not convinced by Garda's argument nor by its support for that argument. Without a clearer picture of what SPX actually knew regarding the contents of the Aon report, neither this Court nor the Independent Accountant can conclude that the Aon report qualifies as current information "known to SPX." (Emphasis added.) What is known and undisputed is that: (1) the Closing Date, the deadline for information to be considered "current information" under Section 1.3(c), was January 13, 2006, and (2) the Aon report officially was received by SPX on January 20, 2006.[45] Although it is troubling that SPX would later affirm to PwC that Vance's workers' compensation liability was the $2.782 million estimate Aon put forward in its report, not the $1.4 million estimate SPX presented to Garda in the Effective Date Balance Sheet, the letter from SPX to PwC was sent months after SPX actually received the Aon report. For these reasons, the Independent Accountant did not exceed his authority by acting in manifest

[44] Jt. App. Vol. 3 at A-000711 (Emphasis in original).
[45] SPX, in its briefs, recites Section 1.3 of the Supplementary Schedule as requiring the inclusion of the "most current information known to SPX between the date of the interim September 30, 2005 financial statements and the Effective Date." This refers to an earlier version of Section 1.3 of the Supplementary Schedule, which used the Effective Date instead of the Closing Date as the deadline for current information. The Effective Date was December 31, 2005, which also falls before the date SPX received the Aon report. As such, it does not change the foregoing analysis.

disregard of the law in denying Garda's claim that the Aon report was current information SPX was required to consider under Section 1.3(c).

C. The Independent Accountant's Failure to Determine the Two Conceded Items

Finally, Garda argues that the Independent Accountant acted outside the authority granted to him by failing to adjust the Effective Date Balance Sheet for two items conceded by SPX: the sales tax item and the other accrued liabilities amount. By way of background, these items were disputed by SPX during the parties' negotiations, and were included in the List of Disputed Items Subject to Arbitration that Garda initially submitted to the arbitrator. SPX conceded these items fairly early in the arbitration, and the arbitrator did not address them in his report.

Garda argues that because these items were included in its List of Disputed Items Subject to Arbitration, the Independent Accountant was required to include a decision as to them in his determination. According to Garda, this would mean that because these items were conceded by SPX, the Independent Accountant was required to adjust the Effective Date Balance Sheet by reducing it by the amount conceded. SPX responds that these two issues were not in dispute before the Independent Accountant because they were conceded.

In conducting the review of the arbitration record, this Court "must determine if the form of the arbitrators' award can be rationally derived from the agreement between the parties or from the parties' submissions to the arbitrators …."[46] Garda argues that these items were properly before the Independent Accountant because the Amended

[46] *Mutual Fire, Marine & Inland v. Norad Reinsurance,* 868 F.2d 52, 56 (3d Cir. 1989).

Agreement provided that, following a failure to resolve disputes in good faith, the parties would present any remaining items to the Independent Accountant and both parties did just that by addressing these issues in their presentations to the Independent Accountant. Garda further contends that SPX cannot unilaterally withdraw these issues from consideration by the Independent Accountant and thereby preclude the Independent Accountant from making a determination as to them.

As a preliminary matter, the Independent Accountant's determination letter states that "three issues ***are in dispute*** between the Parties."[47] Thus, it does not appear that the Independent Accountant overlooked the conceded items, but instead did not include them in the award because SPX had conceded those issues. Second, the Independent Accountant's decision not to address these undisputed issues left it to the parties to determine how Garda should be credited for those items. This form of award rationally can be derived from the Amended Agreement since Garda, as the losing party in the arbitration, is left indebted to SPX. SPX has deducted these items from its demand for payment from Garda, and the Court is satisfied that Garda will recover these items. Garda, therefore, has not provided any statutory basis to vacate this portion of the award. In fact, and tellingly, there is nothing for this Court to vacate because the issues were not part of the Independent Accountant's determination.

[47] Jt. App. Vol. 1 at A-000017 (emphasis in original).

CONCLUSION

For the foregoing reasons, I recommend that the Court deny Garda's motion for summary judgment and grant SPX's motion for summary judgment. This is my final report in this action. Exceptions should be taken in accordance with Rule 144.

Sincerely,

/s/ *Abigail M. LeGrow*
Master in Chancery