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An Arbitrator, and not the Courts, Should Decide the Question of Substantive Arbitrability if "The Parties' Contract Provides 'Clear and Unmistakable Evidence' of Their Intent That an Arbitrator Should Decide the Question"

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In *The Innovation Institute, LLC v. St. Joseph Health Source, Inc., et al.*, C.A. No. 2019-0156-JRS, the Court of Chancery decided to stay an action, pending the decision of an arbitrator on whether the underlying claims of the action are subject to mandatory arbitration, due to the parties agreeing to mandatory arbitration in the controlling LLC agreement. The action was brought by Innovation Institute, LLC ("Innovation") against St. Joseph Health System, Inc. ("Health System") and St. Joseph Health Source, Inc. ("Health Source"), a wholly owned subsidiary of Health System, seeking specific performance of Health Source's obligation to contribute funding to Innovation in accordance with Innovation's LLC agreement.

Health System was the founding member of Innovation and entered into an LLC agreement with Innovation that (1) required Health System to transfer certain funds to Innovation upon Innovation's request for such funds and (2) included a broad arbitration provision. Subsequently, Health System transferred its interest in Innovation to Health Source and Innovation's initial LLC agreement was amended and restated to account for this transfer. In early 2019, Innovation requested the additional funding from Health Source, but the requested funding was not provided.As such, Innovation filed a complaint seeking specific performance of Health Source's obligation to contribute the requested funding. Health Source and Health System filed a motion to dismiss and claimed that the Court (1) lacked personal jurisdiction over the defendants, (2) lacked subject matter jurisdiction over the plaintiff's claim and (3) could not provide a proper venue for the litigation because the parties contracted for mandatory arbitration.

With respect to the questions of subject matter jurisdiction and mandatory arbitration, the Court emphasized that "Delaware courts lack subject matter jurisdiction to resolve disputes that litigants have contractually agreed to arbitrate." Thus, the Court was left to determine whether the arbitration provision in Innovation's LLC agreement requires the parties to submit their dispute regarding substantive arbitrability to an arbitrator. To determine the applicable statutory law, the Court first looked to whether Innovation's LLC agreement referenced the Delaware Uniform Arbitration Act, but, since it did not, the Court turned to the Federal Arbitration Act ("FAA"). Pursuant to the FAA, in "deciding whether the parties agreed to arbitrate a certain matter (including arbitrability)… [the Court

should] apply ordinary state-law principles that govern the formation of contract." Under Delaware law, an arbitrator, and not the courts, should decide the question of substantive arbitrability if "the parties' contract provides 'clear and unmistakable evidence' of their intent that an arbitrator should decide the question."

To determine if clear and unmistakable evidence existed, the Court applied the *Willie Gary* test, which is a two-part test to see if (1) the arbitration provision generally provided for arbitration of all disputes and (2) the provision incorporated a set of arbitration rules that empower the arbitrator to decide arbitrability. Relying on a clarification to the *Willie Gary* test, the Court concluded that the arbitration provision met both prongs of the two-part test as the arbitration provision expressly incorporated the American Arbitration Association's arbitration rules and included only a limited exception. Thus, the Court stayed Innovation's claim pending the decision of an arbitrator pursuant to the LLC agreement's arbitration provision. Lastly, the Court chose not to address the personal jurisdiction questions in light of its holding on substantive arbitrability, but noted that the question of "whether an entity can assign its jurisdictional contacts to a wholly owned subsidiary" was interesting and new to the Court.

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