

Practical Advice on Escrow Disputes

February 2019 : Andrew Pearce



Case No. 1: A Ten-Year Odyssey

Key Takeaways:

- **Materiality language in SPA was material**
 - What is “material”?
 - How do you determine “material”?
- **Anticipated damages were insufficient**
 - Should a buyer be entitled to claims against an escrow fund based only on anticipated damages, or must they be actual damages already incurred?
- **Right of Set-Offset enabled Buyer to avoid paying on Seller Notes**
 - Should a buyer be entitled to set-off amounts owed in seller notes or should claims be limited to the escrow fund ?
- **Litigation costs were brutal**
 - Litigation vs. Arbitration vs. Independent Accountant?
 - Defined time period?
 - Limited discovery?

Key Takeaways:

Trial Time vs. Arbitration Time

Federal courts take much longer to resolve cases by trial and appeal than arbitration by the AAA. These differences are systematic across almost all states and sections of the country and are especially significant in the states with the highest arbitration and federal court caseloads. As budget cuts close courtrooms and reduce judicial and court staff, delays will only increase.

- On average, U.S. district court cases took more than 12 months longer to get to trial than cases adjudicated by arbitration (24.2 months vs 11.6 months).
- U.S. district and circuit court cases required at least 21 months longer than arbitration to resolve when the case went through appeal (33.6 months vs 11.6 months).

<http://go.adr.org/impactsofdelay.html>



Case No. 2: What Does “Normal” Mean?

Key Takeaways:

- **Did the Reps & Warranties mean the business could be run as it had been run, or did they require more?**
- **No “sandbagging” provision in the purchase agreement**
 - A party’s right to indemnification is not impacted by any knowledge acquired at any time (Pro-Sandbagging)

VS.

- A party loses its right to indemnification for losses arising out of a breach of any representation or warranty if, prior to or at closing, the party had knowledge of such breach (Anti-Sandbagging)
- **Reliance provision was the key provision given the issues**



Case No. 3: Looking for Nothing

Key Takeaways:

- **Third-Party Claims vs. Self-Reporting?**
 - Should the indemnification provision apply if the only liability is based upon self-reporting?
- **Recovery of Fees?**
 - Should Seller be responsible for fees incurred as part of the investigation?
 - Who is the prevailing party under these circumstances?

Questions?

Answer: It depends.

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