DELAWARE CORPORATE LAW BULLETIN

THE WORDS MEAN WHAT THEY SAY: CHANCERY COURT ADHERES TO PLAIN MEANING OF TYPICAL CONTRACT TERMS

Jilted seller not permitted to pursue breach-of-contract claims after terminating merger agreement which provided that termination waived liability for all claims other than fraud

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INTRODUCTION

At one point during the cinematic spoof film *Caddyshack*, a fight breaks out among a gaggle of caddies, resulting in the unintended destruction of a gumball machine. Caddy master Lou grabs one of the caddies by his shirt and asks him the meaning of a sign posted nearby that reads "No Fighting." The young man, his nose bleeding, hesitates before answering, in the form of a question, "No fighting?" He is, of course, correct in his interpretation. The sign meant what it said.

Although the Delaware Court of Chancery ("*Chancery Court*") might not appreciate the comparison, this is the approach the Chancery Court takes when faced with competing claims over the relative rights and obligations of contracting parties. Of course, if the disputed contract language is ambiguous, difficult interpretative issues may arise. However, contract disputes do not always involve ambiguities.

In *Yatra Online, Inc. v. Ebix, Inc.*, C.A. No. 2020-0444-JRS (Del. Ch. Aug. 30, 2021), Vice Chancellor Joseph R. Slights III ruled that a merger agreement provision stating "there shall be no liability on the part of any party" following termination meant precisely that. Accordingly, he dismissed the terminating party's breach of contract claims at the pleading stage. In so ruling, the Vice Chancellor rejected various interpretations proffered by the terminating party that either ignored the plain meaning of the termination provision or sought to explain why the plain meaning was inapplicable under the circumstances. It is of no small comfort to M&A practitioners, who value consistency and certainty from the judiciary, that the Chancery Court gives tried and true contract provisions their meanings as accepted in the marketplace.

I. FACTUAL BACKGROUND

A. Yatra and Ebix Negotiate a Merger

In February 2019, the CEO of Ebix, Inc. ("*Ebix*"), an "international supplier of on-demand infrastructure exchanges to the insurance, financial and healthcare industries," approached the CEO of Yatra Online, Inc. ("*Yatra*"), an "online travel space serving both leisure and business travelers," to discuss Ebix's interest in acquiring Yatra. Negotiations moved quickly and, within two weeks, Ebix sent Yatra's board of directors a proposal to purchase the company via a stock-for-stock merger ("*Merger*") in which Yatra stockholders would receive Ebix stock in exchange for their Yatra shares. As proposed, the Merger would include "a put right that would be exercisable [twenty-five] months after closing and would allow former Yatra stockholders to sell [Ebix] stock they received as merger consideration back to [Ebix] at 90%" of the issue price ("*Put Right*"). This valuable right "was a key feature of the deal . . . because it gave Yatra stockholders a floor under which the price for their shares could not fall."

The two companies finalized and signed a merger agreement ("*Merger Agreement*") in July 2019. The Merger Agreement included three provisions relevant to the postsigning dispute that would arise between the parties:

- Ebix agreed to file a registration statement on Form S-4 ("*Form S-4*") with the Securities and Exchange Commission ("*SEC*") as "promptly as practicable" to register the transaction, and to "use 'reasonable best efforts' " to have the SEC declare the Form S-4 effective "as promptly as practicable after such filing . . . ." Effectiveness of the Form S-4 was one of the Merger Agreement's enumerated conditions to closing the Merger.
- Closing would occur on the third business day following the day that all closing conditions set forth in the Merger Agreement were satisfied, but in no event later than April 12, 2020 ("*Original Outside Date*").
- Each party retained the right under Section 8.1 to terminate the Merger Agreement if closing did not occur before the Original Outside Date, subject to the condition that "[i]n the event of any termination of this Agreement as provided in Section 8.1, the obligations of the parties shall terminate and there shall be no liability on the part of any party with respect thereto . . . ." ("*Effect of Termination Provision*"). The only exception to this liability cut off was "for damages arising out of any fraud occurring prior to such termination" ("*Fraud Exception*").

B. Ebix Gets Cold Feet As Circumstances Change

Problems arose soon thereafter. Ebix did not, despite its contractual undertaking, promptly prepare and file the Form S-4. Thus, in March 2020, with the Original Outside Date fast approaching, the SEC had not declared the Form S-4 effective, and the parties could not close the Merger. Then, about a month before the Original Outside Date, the COVID-19 pandemic began to wreak havoc on global markets in general and the travel and leisure industry in particular. Understandably, the prospect of acquiring an international travel agency when borders were closing and business was suffering became far less appealing to Ebix than it was mere months earlier. Moreover, the "pandemic depressed [Ebix's] stock price, ballooning the value of the Put Right relative to [Ebix's] market capitalization."

After Yatra "reluctantly" agreed to renegotiate the terms of the Merger, Ebix "sought repeated extensions of the [Original] Outside Date and proposed revisions to a number of material deal terms, including an attempt to eliminate the Put Right." At the same time, and "unbeknownst to Yatra," Ebix "secretly" renegotiated the terms of its lending arrangements in a way that "effectively eliminated" Ebix's ability to honor the Put Right if the Merger closed.

As renegotiations continued over the next few months, Ebix and Yatra extended the Original Outside Date several times. The parties eventually signed a letter agreement in May ("*Extension Agreement*"), extending the Original Outside Date for a fourth time and providing for Ebix to, among other things, "promptly provide revised drafts of transaction documents [to] . . . and negotiate in good faith with Yatra." Subsequently, the parties agreed to yet another extension, setting the contractual outside date for June 4, 2020 ("*Final Outside Date*"). As the Final Outside Date "came and went," the SEC still had not declared the Form S-4 effective and Ebix continued to stretch out negotiations.

C. Litigation Ensues

Fed up with these delays, on June 5, Yatra terminated the Merger Agreement and immediately sued Ebix in the Chancery Court. Ironically, on June 19, Ebix "secured clearance of all of its SEC comment letters" with respect to the Form S-4. In its suit, Yatra alleged, among other things, that Ebix (i) breached the Merger Agreement's provisions relating to the filing and effectiveness of the Form S-4, and (ii) breached its covenants in the Extension Agreement. Ebix moved to dismiss. As discussed below, Vice Chancellor Slights awarded Ebix pleading stage dismissal on both counts.

II. VICE CHANCELLOR SLIGHTS'S ANALYSIS

A. Breach of Merger Agreement

To avoid pleading stage dismissal, Yatra had to defeat Ebix's "showcase argument . . . that Yatra's decision to terminate the Merger Agreement bars its claims for breach of contract under the unambiguous terms of the Effect of Termination provision." After analyzing various rejoinders offered by Yatra, Vice Chancellor Slights relied on the Effect of Termination Provision's plain meaning in concluding that "Yatra agreed that termination of the Merger

Agreement would terminate liability for breach of that contract. Accordingly, its post-termination claim for breach . . . must be dismissed."

As noted above, Yatra offered several arguments in opposition to the plain meaning construction proffered by Ebix. Vice Chancellor Slights rejected each one in turn:

- *First*, Yatra argued the phrase "with respect thereto" in the Effect of Termination Provision modified the earlier phrase "any termination of this Agreement" rather than the word "obligations," with the effect that "the Effect of Termination Provision cannot be understood to eliminate damages owed for prior breaches of 'obligations,' but only damages caused by the act of terminating the Merger Agreement." For Vice Chancellor Slights, this interpretation "stretche[d] the words beyond their tolerance." Specifically, he noted that "[t]he comma following 'Section 8.1' breaks the sentence," revealing that "the Merger Agreement's drafters intended the phrase 'with respect thereto' to modify 'the obligations of the parties' as opposed to 'any termination of this agreement.' " Not only was Yatra's construction "inconsistent with the language that immediately followed the phrase 'with respect thereto,' " including the Fraud Exception, but it rendered the entire Effect of Termination Provision "superfluous if the effect of the provision was to limit liability only arising from the act of terminating the Merger Agreement." Further, the Vice Chancellor noted that in *AB Stable VIII, LLC v. Maps Hotels & Resorts One, LLC*, 2020 WL 7024929 (Del. Ch. Nov. 30, 2020), *aff'd* 268 A.3d 198 (Del. 2021) ("*AB Stable*"), the Chancery Court recognized that "when parties include a provision stating that 'there shall be no liability on the part of either party' upon termination, they 'alter[ ] the common law rule' and 'broadly waive[ ] contractual liability and all contractual remedies.' " According to Vice Chancellor Slights, *AB Stable*'s interpretation of this "pretty standard" provision effectively "endorsed Ebix's construction of the Effect of Termination Provision here."
- *Second*, Yatra contended that Ebix's construction of the Effect of Termination Provision conflicted with the Merger Agreement's standard provision that "a party need not sue for specific performance before terminating the Merger Agreement." The Vice Chancellor recognized no such conflict, explaining instead that the Merger Agreement "contemplated termination as a remedy distinct from others," allowing a party to choose "*either*

[to] terminate the Merger Agreement (one contractual remedy for breach) *or* 'pursue any other remedies.' "

- *Third*, Yatra argued that the section of the Merger Agreement providing that the obligations of the parties "shall not survive . . . the termination of this Agreement" served to "cut off the parties' continuing obligations to comply with the Merger Agreement's provisions *after* . . . the termination of the Merger Agreement, but d[id] not affect the parties' rights to sue for *prior* breaches." Again, citing Chancery Court precedent, Vice Chancellor Slights explained that such typical nonsurvival provisions terminate not only specific provisions of a merger agreement, but also "any remedies for breach of those" provisions.
- *Fourth*, "[i]n a last gasp" to preserve its claim, Yatra complained that a literal construction of the Effect of Termination Provision produced an "absurdity": Yatra would have had to "sue[ ] for breach of contract without terminating the Merger Agreement." To the contrary, the Vice Chancellor found "nothing absurd about a contract that, in essence, requires parties to sue for breach without terminating the agreement." In effect, the Merger Agreement "provided a choice to a party faced with a breach by the counterparty: either (a) sue for damages (or specific performance) or (b) terminate the Merger Agreement and extinguish liability for all claims arising from the contract (except those specifically carved-out, including claims for fraud)." And the latter choice could be "perfectly logical" for a terminating party concerned "it had some liability exposure of its own and would prefer to terminate the Merger Agreement to eliminate that risk." In any event, "it is not for this Court to redline the parties' bargained-for limitations of liability because one party now regrets the deal it struck."

B. Breach of Extension Agreement

Yatra also contended that, even if it had waived its claims under the Merger Agreement by terminating the contract, its claim that Ebix breached covenants contained in the Extension Agreement should survive inasmuch as "the Extension Agreement is a standalone agreement unaffected by any limitations the parties may have agreed to in other contracts." Yet, as Vice Chancellor Slights pointed out, "Yatra's argument cannot be squared with the plain text of either the Merger Agreement or the Extension Agreement."

In this connection, the Extension Agreement provided that "[w]ith the sole exception of the amendment of the Outside Date set forth in this letter agreement, the Merger Agreement remains unchanged and continues in full force and effect." According to the Vice Chancellor, this "language clearly indicates the Extension Agreement was intended narrowly to modify the Merger Agreement's provisions, with all rights and obligations therein otherwise expressly reserved." Further, he explained, "[c]onspicuously absent from the Extension Agreement . . . is an integration clause" providing that the Extension Agreement superseded the Merger Agreement in any way. "Indeed," he wrote, "there in nothing in the Extension Agreement that provides or even suggests it stands apart from the terms and structure of the Merger Agreement." And the Merger Agreement itself foreshadowed the signing of future, related agreements such as the Extension Agreement, providing "that any representations in 'other writings' 'shall not survive the . . . termination of this Agreement.' " Thus, "Yatra's decision to terminate the Merger Agreement insulated Ebix from liability for alleged breaches of the Extension Agreement."

CONCLUSION

While Vice Chancellor Slights' opinion does not break new ground, his adherence to the plain meaning of contract terms regularly used in M&A transaction documents is certainly reassuring. The best efforts of Yatra's litigation counsel to champion alternative interpretations or explain why the plain meanings were not applicable under the circumstances were insufficient to produce a result which likely would have been perceived as inconsistent with M&A market understandings.

In fact, Yatra probably could have avoided the need to retain litigation counsel through either better drafting of the Merger Agreement or stricter adherence to its terms:

- *First*, the Fraud Exception is a narrow formulation of the typical carve out to an Effect of Termination Provision, which usually also carves out liability for a willful breach. While it is by no means certain that Yatra would have prevailed on a claim that Ebix willfully breached the Merger Agreement, it presents a lower bar than proving fraud.
- *Second*, Yatra could have proceeded directly to litigate Ebix's alleged breach rather than first terminating the Merger Agreement. In that case, it would not have had to rely on the Fraud Exception. Unless Yatra feared it was exposed to a claim by Ebix that Yatra, too, had breached the Merger Agreement,

then terminating the Merger Agreement was a bad move. In the end, Yatra had two choices: sue for damages or terminate the transaction. The Merger Agreement, however, according to its plain terms, did not permit it to do both.