DECISIONS IN THE COMMERCE CASE MANAGEMENT PROGRAM

by

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One objective in creating business courts is to obtain decisions by informed judges in individual cases. Another objective is to issue opinions forming a body of law that will provide guidance beyond those individual cases, reaching all potential litigants and counsel. The nearly seven year old Commerce Case Management Program has met these objectives. As of May 3, 2006, there are over 670 Opinions on the Commerce Program's website.[2] These cases, many of which are available on Westlaw and Lexis, are indexed on the website,[3] searchable on that website by topic,[4] and summarized by category in an over 280 page "Summary of Opinions" link.[5]

As to the decision-making function, recognizing the unfairness that accompanies "common wisdom" and the comfort of generalizations, there had been a common belief that dispositive motions had little chance of being granted in the Court of Common Pleas; and that denials of Summary Judgment Motions or Preliminary Objections were seldom accompanied by Opinions. In looking at 148 Commerce Program Opinions issued in 2005, there were 60

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[2]http://courts.phila.gov/common-pleas/trial/civil/commerce-program.html. The first Opinion dates back to March 7, 2000.

[3]http://courts.phila.gov/cgi-bin/opinions/comcrtsearch.cgi?dropdown=cptcvcom

[4]http://courts.phila.gov/opinions/topicsearch.html

Opinions involving summary judgment motions.[6] Summary judgment was granted 32 times, granted in part and denied in part 21 times and denied 7 times.[7] Judgments on the Pleadings were granted 3 times and granted in part and denied in part 2 times. Preliminary Objections of various kinds were sustained 23 times, sustained in part and overruled in part 23 times and overruled 7 times.[8] Without getting into the finer details of how meaningful the partial grant of any motion was in a case, the foregoing record shows a willingness to make and explain decisions in individual cases.[9]

As set forth above, the Commerce Program website includes a Summary of Opinions by topic that runs over 280 pages. This is a valuable resource for anyone practicing in the Commerce Program; and this pool of cases provides a substantial body of case law for the Bench and Bar generally. Further, over time, cases on the same or related subjects have accumulated,

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[5]http://courts.phila.gov/pdf/cpcvcomprg/opinions.pdf

[6]In coming to this number, I am not including opinions written for appeal where there was an opinion written on the motion initially. Further, where there are cross-motions, I am treating this as a single motion that was granted, if one was granted and one was denied. Cases where two summary judgment motions are granted are counted separately, thus the number of cases with summary judgment motions is slightly less than 60, as I have counted the grant of two summary judgment motions as two different cases. Where there are two motions and one is denied and one is granted in part and denied in part, the later is counted. Uncontested motions are not included.

[7]Again, this is only an analysis of published opinions and not cases in which a summary judgment motion may have been decided without an Opinion.

[8]These numbers may vary slightly depending upon how one would classify motion practice concerning arbitration and jurisdiction.

[9]It was also interesting to observe the diversity of law firms in the 133 distinct cases in which Opinions were issued in 2005. While there were approximately 60 cases in which at least one firm of 150 or more lawyers was involved -- including national firms with a Philadelphia presence below that number -- there were approximately 100 cases out of 133 in which at least one firm of 10 lawyers or less was involved. At least one firm of the following sizes appeared in the following percentage of these 133 cases: 11-25, approximately 20%, 26-75, approximately 27%, and 76-150, approximately 23% of these cases. Please note that under the way I have set out the foregoing, it would be possible for law firms of less than 10, 11-25, 76-150 and/or over 150 lawyers to be in the same case, each of which were counted once; thus, the foregoing numbers are not to be cumulated to reach 100%.

forming distinct bodies of case law. I will provide a summary and some analysis of one distinct area of law, arbitration. I am hopeful that this truncated analysis will initiate an effort to compile a complete set of more detailed case summaries and analyses on all Commerce Program cases.

ARBITRATION

The Commerce Program Judges have issued a significant number of Opinions concerning arbitration issues. The most typical questions involve the grant or denial of motions to compel arbitration, but there are also cases addressing arbitration awards. The following summaries are brief in nature for the most part, and do not catch all of the contours of these Opinions; but they do provide a point from which those facing these issues can gather and scrutinize the cases. Although expecting that the number of Opinions compelling arbitration would definitively exceed the Opinions rejecting efforts to compel arbitration, in fact, the Opinions were about equally divided.

ARBITRATION COMPELLED

Commerce Program Opinions ruling in favor of arbitrability are reflected in the following cases: Delta/B.J.D.S. v. Williard, a Division of Limbach Co., November Term, 2005, No. 3242 (Abramson, J.) (April 3, 2006)[10] (the fact that an agreement with an arbitration provision was incorporated into a surety bond, which bond stated that no suit or action by a claimant could be brought except in a state court of competent jurisdiction, did not preclude the arbitration provision's applicability; the Court finding that the bond's language did not address the question of arbitrability one way or the other); Majestic Steel Constriction Corp. v. Market Street Constructors, July Term, 2005 No. 3408 (Jones, J.) (December 29, 2005)[11] (parties bound by agreement to submit to mediation and then binding arbitration if mediation failed);

[10]http://courts.phila.gov/pdf/cpcvcomprg/051103242.pdf

Delta/B.J.D.S. **v.** St. Paul Fire and Marine Insurance Co., September Term 2004 No. 1521 (Sheppard, J.) (06/10/05)[12] (broad arbitration agreement incorporated into surety bond enforced); Janco v. First Union Capital Markets, Corp., June Term 2004, No. 0560 (Jones, J.) (March 14, 2005)[13] (the Court enforced an arbitration provision under both State and Federal law, addressing the existence of a confidential relationship as possible exception); A.T. Chadwick Co. v. PFI Construction Corp., September Term 2003, No. 01998 (Jones, J.) (July 30, 2004)[14] (mandatory mediation clause required dismissal pending mediation; defendant had preserved claim under Pa.R.C.P. 1030 and 1032, and Court found no express or implied waiver of provision by defendants); Summit Park East Associates v. Urban Cable Works of Philadelphia September Term 2004, No. 0139 (Sheppard, J.) (January 26, 2005), appeal quashed, 889 A.2d 125 (Pa. Super. 2005)[15] (Court permitted arbitration under Tenant's Right to Cable Television Act to go on at same time as the issue of access was being litigated in Court); Atlantic Concrete Cutting, Inc. v. Turner Construction Co., June Term, 2004, No. 00830 (Jones, J.) (January 5, 2005)[16] (parties required to abide by clause to participate in good faith effort at non-binding ADR, even where that process could be selected unilaterally by one of the parties if they could not jointly agree); Proscape Technologies, Inc. v. Infologix, Inc. March Term, 2004 No. 01902 (Abramson, J.) (August 15, 2005)[17] (arbitration could not be avoided where the agreement mandated arbitration, but limited arbitrable remedies, and a party attempted to seek remedies beyond what arbitrator could award); Bassett Expansion Corp. v. TDK Holdings, September Term 2003, No.

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[11]http://courts.phila.gov/pdf/cpcvcomprg/050703408.pdf
[12]http://courts.phila.gov/pdf/cpcvcomprg/040901521.pdf
[13]http://courts.phila.gov/pdf/cpcvcomprg/040600560.pdf
[14]http://courts.phila.gov/pdf/cpcvcomprg/030901998.pdf
[15]http://courts.phila.gov/pdf/cpcvcomprg/040900139-1.pdf
[16]http://courts.phila.gov/pdf/cpcvcomprg/040600830.pdf
[17]http://courts.phila.gov/pdf/cpcvcomprg/040301902.pdf

0315 (Jones, J.) (December 18, 2003)[18] (dispute under a franchise agreement was subject to arbitration where the non-arbitrable trademark issues were only ancillary to real dispute); CGU Insurance Co. v. Pinkerton Compute Consultants, Inc., June Term 2000, No. 2178 (Sheppard, J.) (August 31, 2000)[19] (question of whether a contract was terminated and whether its arbitration clause applied was subject to determination by arbitrators); Stern v. Prudential Financial, Inc., January 2002, No. 0571 (Sheppard, J.) (February 4, 2003)[20] (securities arbitration provision not waived)[21]; Weiner v. Pritzker, August Term, 2001 No. 2846 (Sheppard, J.) (December 11, 2001)[22] (the Court permitted non-signatories to an agreement to invoke its arbitration provision, looking to federal law for the proposition that "'non-signatories to an arbitration agreement can enforce such an agreement where there is an obvious and close nexus between the non-signatories and the contract or the contracting parties.'"); Children's Services, Inc. v. Fullman, July Term 2001, No. 1627 (Herron, J.) (October 24, 2001)[23] (the Court rejected the argument that an arbitration agreement could be put at issue because one party did "not recall" signing it, as opposed to denying that they signed it); Cohen v. First Financial Planner, Inc., April Term 2002, No. 1990 (Cohen, J.) (January 15, 2003)[24] (an addendum to an agreement which included an arbitration provision applied to the entire agreement).

[18]http://courts.phila.gov/pdf/cpcvcomprg/bassett-op.pdf
[19]http://courts.phila.gov/pdf/cpcvcomprg/cgu-op.pdf
[20]http://courts.phila.gov/pdf/cpcvcomprg/ste-op.pdf
[21]In a 2 to 1 decision, the Superior Court reversed the case on the basis that further discovery and facts should have been presented on the issue of whether Prudential agreed to waive the arbitration provision. Stern v. Prudential Inc., 836 A.2d 953 (Pa. Super. 2003). After remand, the Trial Court considered deposition testimony and oral argument, among other things, and ordered the case to arbitration.
[22]http://courts.phila.gov/pdf/cpcvcomprg/weiner-o.pdf (quoting Dayhoff Inc. v. H.J. Heinz Inc., 86 F.3d 1287 (3d Cir.1996) cert denied, 519 U.S. 1028, 117 S.Ct. 583, 136 L.Ed.2d 513 (1996)).
[23]http://courts.phila.gov/pdf/cpcvcomprg/childrens-1031.pdf
[24]http://courts.phila.gov/pdf/cpcvcomprg/cohen03.pdf

In Taylor Hospital Corp. v. Blue Cross of Great Philadelphia, April Term 2000, No. 923 (Herron, J.) (April 23, 2001),[25] there was no question that an arbitration provision would apply; but the parties were in dispute over which of two contracts applied, and so which specific arbitration clause applied. They each argued that the arbitration provision from the contract which most favored their outcome should apply, and in that way tried to have the Court rule on substantive issues by cloaking the decision as one concerning arbitrability. The Court made clear that the decision over which contract controlled the case's substantive issues was solely for the arbitrators, and rendered a decision in favor of the arbitration provision which best covered all of the disputes at issue. The Court refused to be drawn into either side's efforts to obtain a resolution on which contract controlled the substantive outcome, specifically stating that no substantive ruling as to which contract applied was implicated by the decision as to which arbitration clause applied.

In Sagot Jennings & Sigmond v. Sagot, April Term 2002, No. 3099, June Term 2002, No. 3098 (Sheppard, J.) (December 31, 2002)[26] the argument was raised that an arbitration clause should not apply to tort claims, since the clause covered only claims arising out of a contract. The Court rejected the argument in a detailed analysis. Another argument was made that the arbitration provision should not apply to efforts seeking equitable relief. The Court observed that arbitrators "may dispense equitable relief." However, there may be circumstances that require a party to seek equitable relief from a court to maintain the status quo and/or to protect the meaningfulness of the arbitration itself; and, in fact, the Court granted limited injunctive relief, e.g., concerning the destruction of files. Next, the Court rejected the argument that filing a counterclaim in court acted to waive arbitration when the party moved promptly to seek

[25]http://courts.phila.gov/pdf/cpcvcomprg/taylor.pdf

arbitration, and the new matter invoked the arbitration provision. The Opinion addresses a second, related, action with some different parties, wherein it refused to compel arbitration. See below.

CASES WHERE ARBITRATION NOT REQUIRED

Despite the law favoring arbitrability, there are a significant number of cases where arbitration was not required. These cases are described with some greater detail than the summaries above.

In Sagot Jennings & Sigmond v. Sagot, April Term 2002, No. 3099, June Term 2002, No. 3098 (Sheppard, J.) (December 31, 2002),[27] discussed immediately above, the Court refused to compel arbitration of a related but distinct matter, after ruling that the parties to the first action had to arbitrate. Thus, a motion to consolidate was denied. The Court would not treat an individual and a close corporation, entirely owned by that individual, as one and the same for purposes of applying the arbitration clause. The Court further rejected the arguments that other defendants were assigned rights to arbitrate, as that would stretch the meaning of the word "assignee," as found in the agreement, beyond any proper construction of the contract's express language.

In American Special Risk Insurance Co. v. Factory Mutual Insurance Co., November Term 2004, No. 3833 (Abramson, J.) (June 30, 2005),[28] the case involved a dispute between insurance companies. Their agreement provided that "Should an irreconcilable difference of opinion arise as to the *interpretation* of this Certificate, it is hereby mutually agreed that as a condition precedent to any right of action hereunder, such difference shall be submitted to

[26]http://courts.phila.gov/pdf/cpcvcomprg/sa-op.pdf
[27]http://courts.phila.gov/pdf/cpcvcomprg/sa-op.pdf
[28]http://courts.phila.gov/pdf/cpcvcomprg/041103833.pdf

arbitration...." (Emphasis added) One of the carriers sought to enforce that provision in a case involving a claim for reimbursement. The Court found that the act of seeking to enforce an agreement is not always synonymous with a dispute over interpretation of that agreement, and did not require arbitration.

In BDO Seidman, LLP v. Kader Holdings Co., May Term 2004, No. 973 (Jones, J.) (03/11/05),[29] an auditor included an arbitration provision in an engagement letter with its client. A subsequent action was brought against that auditor by the corporate client, its parent company and related entities. The Court refused to pierce the corporate veil to require the parent company to participate in an arbitration because the agreement was solely between the auditor and its wholly owned subsidiary, distinguishing cases where a principal signs an arbitration agreement and agents are later sought to be included in the arbitration. The Court also rejected estoppel and third party beneficiary theories in this case.

In Downes v. Morgan Stanley Dean Witter, September Term 2001, No. 2985 (Herron, J.) (September 23, 2002),[30] a client-broker dispute, the basic customer agreement had no arbitration clause. The only agreement with an arbitration clause was a margin agreement. The customer asserted that she never agreed to a margin agreement, claiming that the broker checked the margin box off on her basic agreement, without her knowledge or consent. The Court analyzed the issue as one of fraud in the execution, as opposed to fraudulent inducement; and, after considering the evidence, found that the margin agreement, and the arbitration clause therein, were not enforceable.

[29]http://courts.phila.gov/pdf/cpcvcomprg/040500973-03112005.pdf
[30]http://courts.phila.gov/pdf/cpcvcomprg/downop.pdf

In Zoological Society of Philadelphia v. Intech Construction, Inc., February Term 2002, No. 1008 (Sheppard, J.) (May 16, 2000),[31] the contract provided for arbitration of claims of up to $100,000. A contractor made claims in an aggregate of $2.5 Million, but asserted that these amounted to at least 350 individual claims of $100,000 or less. The Court rejected the argument that the matter was arbitrable.

In University Mechanical & Engineering Contractors Inc. v. Insurance Company of North America, November Term, 2000, No. 1154 (Sheppard, J.) (October 28, 2002),[32] the Court observed the difference between "substantive arbitrability" (whether the parties have an agreement to arbitrate), which is to be decided by the courts; and procedural arbitration issues, including whether arbitration has been timely invoked, which are to be decided by the arbitrators. However, the Court refused to order arbitration where some parties were subject to the clause and some were not, and where to order arbitration would create piecemeal litigation in an arbitral and in the courts, and would defeat the purpose of having joined indispensable parties.

In Nationwide Insurance Co. v. Henry, June Term 2004, No. 3064 (Cohen, J.) (February 9, 2005),[33] the contractual arbitration clause was waived where the movant failed to timely assert arbitrability in accord with Pa.R.C.P. 1032. In James J. Gory Mechanical Contractors, Inc. v. PHA, February Term 2000, No. 453 (Herron, J.) (April 10, 2001),[34] the Court found that an otherwise tenable right to demand arbitration could be waived, and was in fact waived in that case. In OneBeacon Insurance Group v. Liberty Mutual Insurance Co., August Term 2004, No. 2670 (Cohen, J.) (January 21, 2005),[35] some of the parties' relationships to the underlying

[31]http://courts.phila.gov/pdf/cpcvcomprg/zoo-mop.pdf
[32]http://courts.phila.gov/pdf/cpcvcomprg/univ-op2.pdf
[33]http://courts.phila.gov/pdf/cpcvcomprg/040603064.pdf
[34]http://courts.phila.gov/pdf/cpcvcomprg/gory.pdf
[35]http://courts.phila.gov/pdf/cpcvcomprg/040802670.pdf

contract were not sufficiently clear to permit a final ruling on arbitrability under state or federal law, including issues related to intertwining and a clause that might permit the case to be taken out of arbitration if some claims were not arbitrable. In Manchel v. Hochberg, December 1999, No. 1277 (Sheppard, J.) (March 31, 2000),[36] the Court did not permit an arbitration clause to extend to non-parties to the agreement, who were parties to the dispute.

In Koch v. First Union Corp., May Term 2001, No. 549 (Herron J.) (January 10, 2002),[37] the arbitration clause did not explicitly exclude the type of dispute at issue from arbitration -- consumer lending fraud -- but the clause was located in a form construction repair contract; thus, the overall context caused the Court to conclude that the parties did not intend the arbitration provision to go beyond construction disputes and apply to consumer actions. In Omicron Systems, Inc. v. Weiner, August Term 2001, No. 669 (Heron, J.) (March 14, 2002),[38] the arbitration provision in a contract was not controlling where another section of the contract permitted the party seeking arbitration to obtain relief in court for certain specific types of claims. In 4701 Concord, LLC v. Fidelity National Title Ins. Co. of New York., April 2001, No. 1481 (Herron, J.) (August 28, 2001),[39] the Court would not permit a defendant to move to dismiss a case on the basis of a permissive arbitration clause, but then fail to seek arbitration leaving the case in limbo; rather, the Court required the defendant to make a choice between arbitration or litigation in Court within a specified time period.

In Thermacon Enviro Systems, INC. v. GMH Associates of America, Inc., March 2001, No. 4369 (Herron, J.) (July 18, 2001),[40] the Court found that an unsigned purchase order with an

[36]http://courts.phila.gov/pdf/cpcvcomprg/manchel.pdf
[37]http://courts.phila.gov/pdf/cpcvcomprg/kochpo1.pdf
[38]http://courts.phila.gov/pdf/cpcvcomprg/omicron.pdf
[39]http://courts.phila.gov/pdf/cpcvcomprg/4701.pdf
[40]http://courts.phila.gov/pdf/cpcvcomprg/therma.pdf

arbitration clause could not bind the seller. In Marks v. E. Franks Hopkins, Inc., June Term 2003, No. 3618 (Jones, J.) (September 29, 2003),[41] the Court found that the right to inspect corporate books under 15 Pa.C.S. § 1508 was not subject to the arbitrations provisions at issue.

POST ARBITRATION CASE LAW

In Republic Western Ins. Co. v. Legion Ins. Co., July Term 2000, No. 3342 (Sheppard, J.) (January 25, 2001),[42] the petition attacked the arbitrator's award on the basis that it was denied a fair hearing since the arbitrator refused to hear material evidence, that the hearings themselves were improperly conducted and that the arbitrator made manifest errors of law and fact, The Court first determined, providing detailed discussion, that the arbitration review process was governed by statutory arbitration, 42 Pa.C.S. §§ 7301-7320, the "Pennsylvania Uniform Arbitration Act", which requires express inclusion in the arbitration provision to be applicable; rather than common law arbitration standards, 42 Pa.C.S. §§ 7341-7342, which is the default provision and provides narrower grounds, and a more difficult standard, upon which to have an award set aside. Discussing the challenges in detail, the Court found that the arbitrator's evidentiary decisions were not grounds to vacate the award, including, among other issues rulings on expert testimony and limiting cross-examination. The Court further questioned whether the federal doctrine of manifest disregard of the law likewise applied to vacating an award under Pennsylvania law.

In Lundy v. Manchel, June Term 2002, No. 932 (Cohen, J.) (August 21, 2002),[43] the Court rejected a number of preliminary objections procedurally attacking a petition to vacate an arbitration award, but sustained a preliminary objection for legal insufficiency. Looking at the

[41]http://courts.phila.gov/pdf/cpcvcomprg/marks-003618-op.pdf
[42]http://courts.phila.gov/pdf/cpcvcomprg/rw0007-3342.pdf
[43]http://courts.phila.gov/pdf/cpcvcomprg/lundyo901.pdf

strict standards of 42 Pa.C.S. § 7341, and the bare averments in the petition, the Court rejected the arguments that the petitioner was denied an adequate arbitration hearing because he did not obtain all of the venues or means to be heard that this party desired; that there was any fraud, collusion or bias; or that there were "irregularities" that required vacating the award.

In Lang Tendons, Inc. v. American Spring Wire Corp., November Term 2000, No. 2695 (Herron, J.) (March 6, 2001),[44] a petition to vacate addressed the procedural means by which such petition is to be addressed, but found that the petitioner's failure or inability to provide any record of the arbitration process itself left no material issues of fact which would have required any further discovery or hearings. In Holmes School Limited Partnership v. The Delta Organization June Term 2002, No. 03512 (Cohen, J.) (June 10, 2004), [45] the Court ruled that case must go back to arbitrator who failed to follow terms of the arbitration agreement. In Levin v. Gauthier, May Term, 2001, No. 0374 (Sheppard, J.) (January 14, 2002),[46] the Court stated that allegations of fraud in an arbitration award are within the Court's jurisdiction to review. In David P. McLafferty v. Craig A. Cohen, September 2000, No. 3321(Herron, J.) (May 10, 2001),[47] while a liquidator was subject to appointment by arbitrators under certain circumstances, the liquidator's decisions were not reviewable under statutes governing review of arbitration awards.

[44]http://courts.phila.gov/pdf/cpcvcomprg/lang2.pdf
[45]http://courts.phila.gov/pdf/cpcvcomprg/020603512.pdf
[46]http://courts.phila.gov/pdf/cpcvcomprg/levin-op.pdf
[47]http://courts.phila.gov/pdf/cpcvcomprg/mclaff.pdf, aff'd, 797 A.2d 1031 (Pa.Super. 2002).