Control # 111060
Control # 101510

IN THE COURT OF COMMON PLEAS

OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

TAYLOR HOSPITAL CORPORATION	:	**APRIL 2000**
	:	**No. 923**
v.	:	
	:	**Commerce Case Program**
BLUE CROSS OF GREATER PHILADELPHIA d/b/a INDEPENDENCE BLUE CROSS	:	

O R D E R

AND NOW, this 23rd day of April, 2001, upon consideration of the Petition to Compel Arbitration of Taylor Hospital Corporation ("Taylor"), the Cross-Petition to Compel Arbitration by Independence Blue Cross ("Blue Cross") and the responses thereto, it is hereby ORDERED for the reasons set forth in a contemporaneously filed opinion that the Petition to Compel Arbitration of Blue Cross is GRANTED and arbitration shall proceed as set forth in section 16 of the 1992 Hospital Agreement.

Within thirty (30) days of this Order, Taylor shall designate one arbitrator and Blue Cross shall designate a second arbitrator, with a third arbitrator to be selected by the two thus designated arbitrators within thirty (30) days of their appointment. If the two designated arbitrators cannot mutually agree upon a third person within forty-five (45) days, either of the two arbitrators may request the American Arbitration Association to provide a panel or panels from which the third arbitrator shall be selected by the two designated arbitrators in accordance with the rules of the AAA.

It is further ORDERED that Taylor's Petition to Compel Arbitration is GRANTED in so far as it seeks arbitration of its Loss on Sale Dispute but DENIED in so far as it seeks arbitration by a single arbitrator pursuant to section 10 of the 1988 Hospital Agreement.

BY THE COURT:

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John W. Herron, J.

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MEMORANDUM OPINION

Introduction

This case involves a dispute between Taylor Hospital Corporation ("Taylor") and Independence Blue Cross ("Blue Cross")[1] over Taylor's claim for retroactive reimbursement for depreciation of its capital assets determined at the time of their sale on September 30, 1997. Taylor asserts its claims under a 1988 Hospital Agreement that Blue Cross maintains has

[1] Defendant Independence Blue Cross in its Cross-Petition to Compel Arbitration states that Plaintiff mistakenly referred to it as Blue Cross of Greater Philadelphia. Defendant's 11/21/2000 Cross-Petition, Introductory paragraph. Blue Cross filed identical Cross-Petitions/Answers with different control numbers and stamped dates: November 20 and November 21, 2000. For clarity, references throughout this opinion will be to the 11/21/2000 filing (i.e. petition or memorandum). In fact, Blue Cross itself references this filing. See Defendant's 1/8/2001 Memorandum at 2.

expired and been superseded by a subsequent 1992 Hospital Agreement which does not provide for this reimbursement.

Both sides agree that this dispute should be sent into arbitration. In fact, both have filed cross-petitions to compel arbitration. It would seem that these petitions would be easily resolved but not so. Like Homer's sirens who tried to distract Odysseus and his oarsmen from their proper course with their songs, each party has interjected substantive arguments that divert attention from the narrow standard for reviewing motions to compel arbitration. The proper course is to focus, inter alia, on the scope of the arbitration provisions of the 1988 and 1992 Hospital Agreements. Under this standard and the relevant arbitration provisions, arbitration should be compelled pursuant to section 16 of the 1992 Hospital Agreement. It remains for the arbitrators to resolve the substantive issues raised by the parties.

<u>Factual Background</u>

On October 19, 2000, plaintiff Taylor filed a Petition to Compel Arbitration with Defendant Blue Cross to resolve a Loss on Sale ("LOS") dispute involving Taylor's sale on September 30, 1997 of the assets used in the operation of Taylor Hospital to

the Crozer Keystone Health System.[2] Taylor specifically sought arbitration pursuant to the arbitration provisions, Section 10, of the 1988 Hospital Agreement. Taylor's Petition at ¶ 5-6.

Blue Cross responded to Taylor's Petition by filing its own Cross-Petition to Compel Arbitration on November 21, 2000, but it seeks arbitration pursuant to a different agreement-- the 1992 Hospital Agreement. In so doing, Blue Cross asserts that the 1988 Hospital Agreement has expired and the transaction at issue -- Taylor's sale of its capital assets on September 30, 1997 -- occurred while the 1992 Agreement was in effect. Defendant's Cross-Petition, ¶¶ 6, 27.

Taylor and Blue Cross agree that they entered into the 1988 Agreement which governed their respective obligations during the period from July 1, 1988 through June 30, 1991. This agreement was extended by mutual agreement through June 30, 1992.[3] The 1988 Hospital Agreement, Taylor explains, was a standard form of Hospital Agreement for hospitals such as Taylor within the Philadelphia region. It was negotiated by Blue Cross with a

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[2] **Taylor's Petition to Compel ¶¶ 3-7; Taylor's 10/19/2000 Memorandum at 5 & 12-13. Blue Cross more specifically identifies these assets as Taylor's acute care medical facility. Defendant's 11/21/2000 Memorandum at 1.**

[3] **Taylor's Petition ¶ 4 (1988 Hospital Agreement extended "until July 1, 1992"); Defendant's Cross-Petition ¶¶ 3-4 (1988 Hospital Agreement extended through June 30, 1992).**

trade association known as the Delaware Valley Hospital Counsel ("DVHC"), but each hospital member of DVHC then negotiated its own separate per diem rates with Blue Cross. Taylor's 10/19/2000 Memorandum at 3.

Taylor maintains that under the 1988 Agreement, Blue Cross was required to reimburse it for covered services that it provided during the period from July 1, 1988 through July 1, 1992. The reimbursement schemes were complex and derived from Medicare reimbursement procedures. At the heart of its dispute with Blue Cross is Taylor's attempt to gain reimbursement for uncompensated depreciation to its assets which could only be determined at the time of their sale in September 1997 and in accordance with Medicare principles. Id. at 2-3. Specifically, Taylor emphasizes and relies on Section 1.1.4 of the 1988 Hospital Agreement which provides:

> Gains and losses realized by a Provider from the disposal of depreciable assets shall be included when computing allowable costs, which calculation shall be made in the same manner as provided by the Medicare Program. 1988 Hospital Agreement, Ex. A, part II, §1.1.4.

Under the 1988 Agreement, Taylor maintains, Blue Cross made annual estimated payments to it and other hospitals to compensate them for depreciation on buildings and other assets or equipment. Blue Cross calculated its share of the hospital's depreciation expenses by considering "the ratio of Blue Cross

patient days to total patient days times the estimated annual depreciation." Taylor's 10/19/2000 Memorandum at 3. Taylor argues that the 1988 Agreement provided for an eventual readjustment of these estimated payments--"advances" or "allowance"-- when the assets were sold and the actual depreciation could be more practically determined. A key point for Taylor is that the 1988 Agreement assures that this "retrospective adjustment for all prior years would be effected at the time of the asset sale."[4]

Taylor therefore maintains that when it sold its assets in the operation of its hospital on September 30, 1997 to Crozer Keystone Health System in an "arms length" sale, Blue Cross was required under the 1988 Hospital Agreement[5] to make a retroactive adjustment of its estimated depreciation payments and the actual

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[4] Taylor's 10/19/2000 Memorandum at 4. Taylor points to Ex., A, Part II, Section 2.4 of the 1988 Hospital Agreement as providing for this "retroactive adjustment" even after the Agreement expired. Moreover, according to Taylor, the 1988 Hospital Agreement, Ex. A., Part II, §1.1.4, and the Medicare rules it incorporates (42 C.F.R. §413.341(f)) do not set forth specific deadlines for a sale date but only require that it take place within one year of termination of any contract with Blue Cross. Taylor's 12/21/2000 Memorandum at 14-15.

[5] Taylor maintains that it is entitled to compensation for depreciation costs by virtue of §1.1.4 of the 1988 Hospital Agreement which incorporated the Medicare program rules in 42 C.F.R. §413.134(f) for adjusting estimated depreciation payments upon the sale of a hospital. Taylor's 10/19/2000 Memorandum, Ex. A, Complaint ¶ 15.

depreciated value of the hospital. Taylor, however, is careful to limit its claim to the period "through and including" June 30, 1992, the period prior to the effective date of the subsequent 1992 Hospital Agreement.[6] The amount Taylor seeks to recover for this period is nonetheless considerable: $2,029,143.[7] To recover the amount allegedly owed to it by Blue Cross, Taylor seeks to compel arbitration pursuant to the arbitration provisions of the 1988 Agreement.

Blue Cross, in contrast, argues that Taylor is not entitled to any depreciation compensation under the "expired and superseded" 1988 Hospital Agreement.[8] The 1988 Agreement, for instance, contained section 20 setting forth "Obligations after Termination" which do not include arbitration:

> Obligations after Termination
>
> In the event this Agreement terminates for any reason the Provider, if paid in accordance herewith, shall continue to furnish those services and facilities contemplated hereby in accordance with the terms hereof to all persons who were Subscribers at the time of their admission to the Provider, and who were inpatients on the date of termination. 1988 Hospital Agreement §20.

Moreover, although Blue Cross agrees that its dispute should be resolved through arbitration, it urges this court to compel

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[6] Taylor's 10/19/2000 Memorandum at 2-6.

[7] Taylor's 10/19/2000 Memorandum, Ex. A., Complaint ¶ 19.

[8] See, e.g., Defendant's Cross-Petition ¶ 6 & 7.

arbitration pursuant to the 1992 Hospital Agreement that Blue Cross and Taylor entered into after the expiration of the 1988 Hospital Agreement. Defendant's Cross-Petition ¶ 6 & 27. The Arbitration Provisions of the 1992 Hospital Agreement apply, Blue Cross reasons, because they were in effect at the time when Taylor sold its facility. Id. ¶ 18 & 27.

Taylor concedes that "on or about" August 25, 1992, it entered into a "new" contract with Blue Cross, the 1992 Hospital Agreement, which established rates of payment for the period beginning on or after July 1, 1992. Under the 1992 Agreement, Blue Cross ceased making estimated depreciation payments to Taylor. Instead, it substituted fixed per diem payments to cover both operating costs and depreciable capital costs related to services to patients admitted after July 1, 1992. Taylor's 10/19/2000 Memorandum at 4-5. The 1992 Agreement also contains the following integration clause:

> **This Agreement and amendments thereto, as added from time to time pursuant to the terms of this Agreement, constitute the entire understanding and agreement of the parties hereto and supersedes any prior written or oral agreement pertaining to the subject matter hereof. 1992 Hospital Agreement, §22.8.**

Taylor nonetheless maintains that arbitration must be compelled pursuant to section 10 of the 1988 Hospital Agreement because its dispute with Blue Cross "pertains to the time period

governed by the 1988 Hospital Agreement." Taylor's 10/19/200 Memorandum at 7.

Legal Analysis

A. Standard of Review

The standard of review for a petition to compel arbitration is well established. When there is a dispute as to whether arbitration should be compelled "judicial inquiry is limited to determining (1) whether a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration agreement." Midomo Company, Inc. v. Presbyterian Housing Development Co., 739 A.2d 180, *186 (Pa. Super. 1999). See also Santiago v. State Farm Insurance Co., 453 Pa. Super. 343, 683 A.2d 1216, *1217-1218 (1996).[9] Thus, when considering a Petition to Compel Arbitration,

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[9] Taylor argues that the proper standard for compelling arbitration limits judicial inquiry to determining whether an agreement to arbitration was entered into and not just whether one exists. Taylor's 12/21/2001 Memorandum at 5 (quoting Hazleton Area School Dist. v. Bosak, 671 A.2d 277, 282 (Pa.Cmwlth. 1996)). Taylor asserts that Blue Cross misrepresented the applicable standard as whether an arbitration agreement "exists" as a means of diverting the court's attention to the substantive issue of whether the 1988 Hospital Agreement expired. Id.

In fact, the standard is variously stated as whether an arbitration agreement "exists" or whether one was "entered into." Compare Midomo, 739 A.2d at 186 with Hazleton, 671 A.2d

a court may not consider the merits of the dispute. Messa v. State Farm Insurance Co., 433 Pa. Super. 594, 641 A.2d 1167, *1168 (1994).

As the Pennsylvania Supreme Court observed, agreements to settle disputes by arbitration are not only valid but favored by state statute. Borough of Ambridge Water Authority v. Columbia, 458 Pa. 546, 328 A.2d 498, *500 (1974). In fact, arbitration may proceed under either common law or statutory principles depending on whether the arbitration provision so provides. If the agreement does not specify that statutory rules apply, then common law principles are applicable. Brennan v. General Accident Fire & Life Assurance Corporation, 524 Pa. 542, 574 A.2d 580,*583 (1990).[10]

See also Lowther v. Roxborough Memorial Hosp., 738 A.2d 480, *483-84 (Pa. Super. 1999), app.denied sub nom. Childs v. Lowther, 563 Pa. 637, 758 A.2d 1194 (2000). Interpretation of an arbitration provision is controlled by rules of contractual construction. The primary object is to discern the intent of the

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at 282. Taylor is correct, however, that the substantive issue of which Agreement controls the reimbursement claim should not be resolved by this court if the parties agreed that this dispute should be arbitrated.

[10] The Brennan court noted that 42 Pa.C.S.A. § 7341 et seq. outlines the law governing common law arbitration, while statutory arbitration is provided for under 42 Pa.C.S.A. §§ 7301-20.

parties as set forth in the language of the contract. In so doing, a court should consider "the four corners of the contract and its express language." Hazleton Area School District v. Bosak, 671 A.2d 277, *281 (Pa. Cmwlth. 1996).

The dispute between Taylor and Blue Cross is somewhat unique because neither party denies that arbitration is appropriate; rather, they disagree over whether the arbitration provisions of the 1988 Hospital Agreement or the 1992 Hospital Agreement apply. As a threshold issue, the applicable law must be determined by focusing on the language of each Agreement. The arbitration provisions of both the 1988 and the 1992 Hospital Agreements provide that the Rules of the American Arbitration Association should be applied to an arbitration.[11] Common law principles therefore apply in interpreting this agreement since the parties did not provide for arbitration under the Uniform Act. DiLucente v. Pennsylvania Roofing, 440 Pa. Super. 450, 655 A.2d 1035, *1037, n.2 (1995), app. denied, 542 Pa. 667, 666 A.2d 1056 (1995); 42 Pa.C.S.A. § 7302(a). As a practical matter, however, the same analysis applies in analyzing petitions to compel arbitration under either common law or statutory

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[11] See 1988 Hospital Agreement §10.2 and 1992 Hospital Agreement §16.4. The 1992 Hospital Agreement also provides that Pennsylvania law is applicable. 1992 Hospital Agreement §22.10.

principles:[12]

> **No examination of the merits - An application for a court order to proceed with arbitration shall not be refused, nor shall an application to stay arbitration be granted, by the court on the ground that the controversy lacks merit or bona fides or on the ground that no fault or basis for the controversy sought to be arbitrated has been shown. 42 Pa.C.S. A. §7304(e)(Statutory Arbitration); 42 Pa.C.S.A. §7342 (Section 7304 applies to Common Law Arbitration).**

Both parties concede that a court may not address the merits of a dispute when ruling on a petition to compel arbitration.[13] **They nonetheless seek to lure this court into making such determinations of the merits**[14] **sub silentio by deciding whether**

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[12] Messa v. State Farm Ins. Co., 433 Pa. Super. 594, 641 A.2d 1167, *1168 (1994). Different standards apply, however, in reviewing arbitration awards under common law or statutory principles. Brennan v. General Accident Fire & Life Assurance Corp., 542 Pa. 542, 574 A.2d 580, **583 (1990).

[13] See Taylor's 10/19/2001 Memorandum at 9 & 13; Defendant's 11/21/2000 Memorandum at 6, n.4. In fact, Blue Cross warns that Taylor seeks "to intertwine" the procedural issue of whether the arbitration provision survived termination of the 1988 Hospital Agreement with the substantive issue of its depreciation reimbursement claims. Id. Taylor rebuts by characterizing the Blue Cross petition to compel arbitration as a "grandiose claim that the 1988 Hospital Agreement is terminated and attempt to divert this court from its proper inquiry which would result in the rejection of IBC's contentions." Taylor's 12/21/2000 Memorandum at 4-5. Elsewhere, Taylor characterizes the Blue Cross Petition as "all smoke and mirrors." Id. at 14.

[14] Taylor, for instance, directs this court to a ruling by an arbitration panel in a dispute between Philadelphia College of Osteopathic Medicine and Blue Cross involving the 1988 Hospital Agreement. See Taylor's 12/21/2000 Memorandum at 16 & Ex. C. In presenting this case, Taylor focuses on its substantive ruling: "The PCOM panel found that: the 1988

the 1988 Agreement (with its provisions for reimbursing for depreciation of assets upon sale) is still in effect or whether it has been superseded by the subsequent 1992 Hospital Agreement (which both parties concede eliminated that reimbursement scheme).[15] Rather than falling into the trap of inadvertently deciding whether Taylor is entitled to reimbursement for depreciation of its assets as calculated after their sale on September 30, 1997 by ruling on which Hospital Agreement controls that issue, it is necessary to focus more precisely on

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Hospital Agreement requires 'in mandatory, non-discretionary terms' a 'retroactive' adjustment of estimated capital depreciation payments made pursuant to that contract and prior reasonable cost contracts at the time the assets are sold." Taylor's 12/21/2000 Memorandum at 16 (quoting Ex. C).

The PCOM arbitration panel necessarily addressed the substantive issues which differ from those of the instant case because the plaintiff hospital in PCOM did not subsequently enter into a formal 1992 Agreement but instead signed a less comprehensive letter agreement. The panel thus was not confronted with the issue before this court: deciding between 2 arbitration provisions. See The Hospital of Philadelphia Osteopathic Medicine v. IBC, No. 14193002496B/I (Arbitration 9/21/98), Taylor's 12/21/2000 Memorandum, Ex. C. More to the point, Blue Cross asserts that the PCOM arbitration was not conducted by a single arbitrators--as required by the 1988 Hospital Agreement--but by a tripartite panel pursuant to the rules of the AAA. Defendant's 1/8/2001 Memorandum at 5.

[15] **See, e.g., Taylor's 10/19/2000 Memorandum at 5 ("In its 1992 Hospital Agreement at §2.2, IBC, as Medicare had done, ceased paying hospitals a separate stream of income for their annual depreciation costs, and substituted a comprehensive, fixed, prospectively determined per diem payment which covers both operating costs and depreciation capital costs in connection with hospital services provided to patients admitted to hospitals on or after July 1, 1992").**

the proper, albeit narrow, focus of judicial review: Is there an agreement to arbitrate and does the parties' dispute fall within it?

B. Existence of Agreement to Arbitrate

Clearly, both the 1988 Hospital Agreement and the 1992 Hospital Agreement provide for arbitration of certain disputes although the procedure and number of arbitrators differ in each.

The 1988 Hospital Agreement contains the following provisions for submitting disputes to arbitration:

> **Any disagreement between the parties concerning this Agreement or its application, operation or interpretation (except as to matters involving Exhibit B or those provisions contained in Subsections 10.4 and 10.5 below which shall initially be the responsibility of the Contract Administration Committee ("CAC") as described in Section 15) shall be referred to a disinterested arbitrator assigned by the CAC from a list of arbitrators jointly selected by Blue Cross and the DVHC on behalf of the Providers contracting hereunder (subsequent additions or deletions from this list will be made only upon the unanimous approval of the CAC). Assignment of an arbitrator by the CAC shall be made seriatim from the approved list in accordance with the sequence established at the time the list is initially presented to the CAC, except upon the unanimous approval of the CAC. 1988 Hospital Agreement §10.1.**

The dispute between Taylor and Blue Cross involves matters falling within subsection 10.5[16] Consequently, it appears that

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[16] **Section 10.5 sets forth "CAC Responsibilities: The CAC shall be responsible for the review, interpretation and application of any provision set forth in Exhibit A, including but not limited to, disputes involving base year costs, prospective rate calculations, adjustments for long stay cases,**

any dispute regarding the alleged depreciation underpayments and "LOS" adjustments would first be reviewed by four members of the Contract Administration Committee ("CAC"); if three of the four members were unable to agree, the dispute would then go to arbitration before a single disinterested arbitrator that the CAC selected from a list provided by Blue Cross and the DVHC. The 1988 Hospital Agreement further provides that this procedure is the exclusive means for settling contract disputes and "no action at law or in equity shall be maintainable by either party against the other with respect to this Agreement." 1988 Hospital Agreement §10.6.

The 1992 Hospital Agreement likewise provides for arbitration of "[a]ny dispute or question arising between the parties hereto and involving the application, interpretation, or performance of this Agreement." 1992 Hospital Agreement §16.1. Under the 1992 Agreement, however, three arbitrators--and not

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adjustments for new programs and services, annual changes in case mix and reimbursable cost determinations after audit as requested by a Provider, Blue Cross or DVHC. If the CAC is unable to reach a decision by three of its four members on any matter, the dispute shall be referred directly to arbitration in accordance with this Section 10." 1988 Hospital Agreement §10.5. In seeking reimbursement from Blue Cross for the alleged depreciation underpayments or "LOS", Taylor relies, inter alia, on section 1.1.4 in Exhibit A to the 1988 Hospital Agreement, thereby implicating the CAC. See, e.g., Taylor Complaint, ¶ 19 (citing section 1.1.4 without indicating that it falls within Ex. A., Part II of the 1988 Hospital Agreement).

just one--would consider the dispute. The arbitration panel, therefore, would consist of "one arbitrator designated by Hospital, one arbitrator designated by Blue Cross, and a third person chosen by the two thus designated within thirty (30) days of their appointment." !992 Hospital Agreement §16.3.

From a purely procedural perspective, therefore, the 1988 Agreement provides for one arbitrator selected by the CAC[17] from a list created by Blue Cross and the DVHC while the 1992 Agreement would allow Blue Cross and Taylor to select their own arbitrators who would then choose a third neutral arbitrator. Exactly why either party prefers one procedure over the other is not addressed;[18] rather, both parties argue that determination of

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[17] **Taylor acknowledges that the CAC is no longer in existence but that it has attempted to overcome this hurdle by asking Blue Cross to appoint a neutral arbitrator. Although it expresses a willingness to devise alternative procedures for selecting an arbitrator, it is adamant that arbitration should be conducted by a single arbitrator. Taylor 10/19/200 Memorandum at 16-17.**

The nonexistence of the CAC is not a factor in this court's analysis because the proper scope of review is limited to whether there is an agreement to arbitrate and whether the dispute falls within it. The Sacred Heart Bankruptcy Court, in contrast, found the nonexistence of the CAC as a "logical reason" why the 1992 Agreement rather than the 1988 Hospital Agreement should control. In re Sacred Heart Hospital, 200 B.R. 826, *831 (Bankr. E.D.Pa. 1996).

[18] **The Sacred Heart Bankruptcy Court suggests how the review procedures of arbitration awards differ under the 1988 and 1992 Agreements. See In re Sacred Heart Hospital, 200 B.R. at *829. Neither party, however, has raised this issue and it is premature to do so now.**

the applicable procedure necessitates a ruling as to whether the arbitration provisions of the 1988 persist or whether they were superseded by the 1992 Hospital Agreement.

In arguing the arbitration provisions of the 1988 Hospital Agreement have expired and have been superseded by the 1992 Hospital Agreement, Blue Cross asserts that the 1988 Agreement expired by its own terms on June 30, 1992 -"more than five years before Taylor sold its facility." Defendant's 11/21/2000 Memorandum at 2. Moreover, although the Agreement identified certain obligations that continued after the contract's expiration, it did not provide that its arbitration provisions were among those continuing obligations. Id. at 3; see 1988 Hospital Agreement, §20. Blue Cross more broadly asserts that the 1992 Hospital Agreement "extinguished Taylor's right to reimbursement for capital losses." Defendant's 11/21/2000 at 4. This final assertion clearly goes to the merits that must be decided by arbitration under either the 1988 or 1992 Hospital Agreement. More relevant to the proper scope of judicial inquiry, however, is the argument by Blue Cross that the 1988 arbitration provisions cannot be extended into perpetuity.

To support this argument, Blue Cross cites, inter alia, Leet v. Vinglas, 366 Pa. Super. 294, 531 A.2d 17 (1987), app. denied, 518 Pa. 626, 541 A.2d 1138 (1988) and Merriam v. Cedarbrook

Realty, Inc., 266 Pa. Super. 252, 404 A.2d 398 (1979) for the proposition that courts will not impose "perpetual obligations" upon a party without "clear and unequivocal terms" in their contract. Defendant's 11/21/2000 Memorandum at 5. Neither of these cases, however, involved the issue of the scope or duration of an arbitration provision in relation to the underlying contract. Rather, they set forth substantive principles that would undeniably be of use to arbitrators asked to determine whether a particular contractual provision had expired.

In Merriam v. Cedarbrook, for instance, the court analyzed a written participation agreement to determine whether a stay of execution provision persisted despite another provision that limited the duration of the agreement as a whole. There was no challenge to the court's authority to address the merits of the controversy by examining the parties' intent as set forth in their contract. Likewise, in Leet v. Vinglas, the court was asked to determine at a bench trial whether plaintiff's action to quiet title should be granted as to property leased to defendant for mining where the lease continued as long as the lessee continued to mine the tract. In deciding in the plaintiff's favor and concluding that the lease should not be construed in perpetuity absent clear language to that effect,

the trial court reached the substantive issue of the lease's termination by analyzing not only the lease provisions but factual evidence and testimony concerning the tenant's abandonment of mining operations. While this thorough review of the substantive issues was appropriate in the procedural context of the bench trial in the Leet case, it would be improper for a court asked to determine whether arbitration should be compelled to resolve the substantive issues in the instant "LOS" dispute.

C. Scope of the 1988 and 1992 Arbitration Agreements

1. The Arguments Concerning the Expiration of the 1988 Hospital Agreement Actually Implicate the Timeliness of Taylor's Demand for Arbitration Which Is an Arbitrable Issue That Is Not Dispositive as to the Parties' Rights and Obligations Under the 1988 and 1992 Hospital Agreements

In precedent more to the point, the Pennsylvania Supreme and Superior Courts have focused on the issue of whether an arbitration provision is still applicable after the expiration or termination of the underlying contract. That precedent has consistently focused on the precise language of the arbitration provision to determine its scope. See Waddell v. Shriber, 465 Pa. 20, 348 A.2d 96 (1975); Chester City School Authority v. Aberthaw Construction Co., 460 Pa. 343, 333 A.2d 758 (1975); Emmaus Municipal Authority v.Eltz, 416 Pa. 123, 204 A.2d 926 (1964); Shamokin Area School Auth. v. Farfield Company, 308 Pa.

Super. 271, 454 A.2d 126 (1982). But see Allstate Insurance Co. v. McMonagle, 449 Pa. 362, 296 A.2d 738 (1972)(focusing on the general policy that questions arising under uninsured motorist policies should be determined by arbitration as well as on the arbitration provision).

In Waddell v.Shriber, the Pennsylvania Supreme Court concluded that disputes concerning the dissolution of a security brokerage partnership should be submitted to arbitration despite a former partner's argument that because the dispute arose after the partnership dissolved, the arbitration provision no longer applied. In rejecting this argument, the Waddell court focused on the language of the relevant arbitration provision. The arbitration provision in Waddell did not derive directly from the partnership agreement. Instead, it flowed from the partners' membership in the New York Stock Exchange (NYSE) and its membership application which required the partners to adhere to the NYSE constitution. That constitution contained an arbitration provision requiring that "any controversy between the parties who are members" should be submitted to arbitration. Waddell v. Shriber, 348 A.2d at *99.

The Waddell court concluded that this arbitration provision persisted after the dissolution of the partnership. In response to the argument that the former partners' dispute arose after

the partnership had dissolved so that none of the parties were members of the stock exchange and the arbitration provision therefore would no longer apply, the Waddell court reasoned that because the scope of the arbitration provision was so broad--extending to "any controversy" between the parties--it applied to the dispute involving the relationship of the former partners as members of the stock exchange. Id., 348 A.2d at *100.

Similarly, in Chester City School Authority v. Aberthaw Construction Company, the Pennsylvania Supreme Court when asked to determine whether an arbitration provision persisted after termination of a construction contract focused on the broad arbitration provision within that contract. This provision referred "[a]ll claims, disputes and other matters in question arising out of or relating to, this Contract," to arbitration. The court concluded that this language, in combination with the demand provisions limited only to a "reasonable time" after "the dispute arises," clearly and unambiguously "set forth the perimeters of the obligation to arbitrate and in so doing did not state that the termination or repudiation of the agreement should be a factor. To the contrary, it set time limits, such as the applicable statute of limitations, which in most instances would be expected to extend well beyond the termination of the contract." Chester City School Authority v.

Aberthaw Construction Co., 333 A.2d at *764 (emphasis added).

An example of language which would limit the time for arbitration to the existence of the underlying contract is identified in Emmaus Municipal Authority v. Eltz, 416 Pa. 123, 204 A.2d 926 (1964). There the Pennsylvania Supreme Court concluded that where an arbitration provision required that the demand for arbitration should occur "in no case later than the time for final payment," the parties had expressed the intent that the arbitration clause did not persist after termination of the construction contract. However, in a subsequent case, the Superior Court concluded that arbitration should be compelled even after completion of the construction contract because the scope of the arbitration provision was so broad. That provision required that "[a]ll claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof. . . shall be decided by arbitration...." Shamokin Area School Authority v. Farfield Co., 308 Pa. Super. 271, 454 A.2d 126 (1982). In explaining its conclusion that the parties' dispute should be submitted to arbitration even though the demand for arbitration was not made until completion of the work and contract, the Shamokin court emphasized "where, as here, the parties have agreed to arbitrate all issues arising from the contractual relationship, procedural questions such as

timeliness are reserved for the arbitrators." Id., 454 A.2d at *127.

These principles support the conclusion that under the broad arbitration provision of the 1988 Hospital Agreement, the issue of the timeliness of Taylor's demand for arbitration under it must be decided by the arbitrator/s. Like the arbitration provisions in Chester City School Authority, Waddell, and Shamokin, the 1988 Hospital Agreement contains a broad arbitration provision which falls within section 10 "Appeals Procedures." Under this provision, "[a]ny disagreement between the parties hereto concerning this Agreement or its application, operation or interpretation. . . shall be referred to a disinterested arbitrator." 1988 Hospital Agreement, §10.1. Moreover, as in Chester City School Authority where the court noted that the only time limit imposed for arbitration was the statute of limitations,[19] the only time limits imposed within the 1988 Hospital Agreement's arbitration provision are fixed on events that might occur after the termination of the Hospital Agreement:

> **No appeal hereunder shall be maintainable unless brought within two years of the date the cause of action first arose. An appeal shall be deemed commenced when written notice thereof is received by the CAC. 1988 Hospital**

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[19] See Chester City School Authority, 333 A.2d at *764.

Agreement, §10.6.

The bottom line, therefore, is that the issue of whether the arbitration provisions of the 1988 Hospital Agreement persist is arbitrable. It is not, however, dispositive of which Agreement applies to the substantive dispute between the parties. Further analysis of that issue is thus necessary.

2. <u>The Substantive Legal Dispute Concerning Taylor's Claims for Depreciation Reimbursement From Blue Cross Falls Within the Arbitration Provisions of Section 16 of the 1992 Hospital Agreement</u>

The pivotal issue of determining whether the parties' substantive dispute fails within the arbitration provisions of the 1988 or 1992 Hospital Agreement must finally be addressed. A threshold task is outlining the parameters of the substantive dispute between Taylor and Blue Cross. In deciding whether the dispute falls within the 1988 or the 1992 Hospital Agreement, it is also essential to focus on the precise language of each agreement. <u>See generally,</u> <u>Shadduck v. Kaclik, Inc.,</u> 713 A.2d 635, *637 (Pa. Super. 1998)("whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide" and "[i]n so doing, the court must carefully review the contractual language and determine whether the disagreement falls within the provision's scope").

Both sides offer convincing reasons why their substantive

dispute falls within either the 1988 Hospital Agreement or the 1992 Hospital Agreement. Taylor, for instance, argues that it has carefully limited its demand for damages to the period prior to 1992 when the provisions of the 1988 Hospital Agreement clearly controlled.[20] Blue Cross, however, counters that the sale of assets took place in 1997 when the relationship between the parties was controlled by the 1992 Hospital Agreement.[21] Both of these positions have merit, yet the substantive legal dispute between the parties spans the time periods both prior to and after 1992, so that mere temporal guideposts do not suffice.

Blue Cross urges this court to follow the bankruptcy court in In re Sacred Heart Hospital, 181 B.R. 195 (Bankr. E.D.Pa. 1995) in compelling arbitration under the 1992 Hospital Agreement. The analysis in the Sacred Heart opinions, however, is generally inapposite for various reasons: it did not strictly apply the Pennsylvania standard for compelling arbitration but was necessarily concerned with issues specific to bankruptcy

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[20] **Taylor's Petition ¶ 8 and 10/19/2000 Memorandum at 6 & 12/21/2000 Memorandum at 2. Taylor requested reimbursement under §1.1.4 of the 1988 Agreement and "limited its request for an adjustment under the 1988 Hospital Agreement" up "to the period which ended June 30, 1992 which was the last date on which capital reimbursement had been previously paid by IBC on an estimated basis." Taylor's 10/19/2000 Memorandum at 6.**

[21] **Defendant's 11/21/2000 Memorandum at 1-2.**

procedures;[22] it was swayed by factors of expediency outside the Agreements in its analysis;[23] and it seemingly digressed into a substantive determination as to which Agreement "controlled the parties' present relationship."[24]

A key point on which the Sacred Heart court's analysis is relevant, however, is its articulation of the substantive dispute between the parties: Taylor's reimbursement claim and the terms of the 1992 Agreement raise questions "as to whether, in entering the 1992 Agreement, IBC intended to continue to be responsible for any outstanding obligations to" Taylor arising

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[22] Instead of considering whether the parties had entered into an arbitration agreement or whether their dispute fell within it, the Sacred Heart court focused initially on the strong federal policy favoring arbitration and an analysis of whether the proceeding before it was core or noncore. In re Sacred Heart Hospital, 181 B.R. at *201-*203. In Sacred Heart II, the court focused on the standards for reviewing an arbitration award. See In re Sacred Heart, 200 B.R. 826, 833 (Bankr. E.D.Pa. 1996).

[23] The Sacred Heart court noted, for instance, that the 1988 Agreement provided that the list of arbitrators would be prepared by the Contract Administration Committee (CAC) which no longer existed. This seemed a factor in its conclusion that it was "logical" to order arbitration pursuant to the 1992 Hospital Agreement. In re Sacred Heart Hospital, 181 B.R. at *203.

[24] See In re Sacred Heart Hospital, 200 B.R. at *829 ("In Sacred Heart I we denied substantive relief to both parties. In so doing, we found that the 1992 Agreement controlled the parties' present relationship"). In the instant case, it is for the arbitrators, not the court, to determine which Agreement controls the parties' present relationship and in particular Taylor's claim for loss on sale "LOS" reimbursement.

under the 1988 Agreement. In re Sacred Heart Hospital, 181 B.R.at *200.[25]

It is useful to consider, as well, the parties' own articulation of the parameters of their substantive dispute. While Taylor seeks to limit the dispute to issues preceding June 1992 and within the 1988 Agreement, it acknowledges that the 1992 Hospital Agreement is also implicated in its dispute with Blue Cross when it argues:

> **IBC's (Blue Cross) obligation to pay Taylor a LOS adjustment to reconcile the prior "estimated" annual depreciation payments it made to Taylor through and including June 30, 1992 was not eliminated when the parties entered into the 1992 Hospital Agreement. Taylor's 10/19/2000 Memorandum at 14 (emphasis added).**

In addition, Taylor addresses such issues as whether the 1992 Agreement superseded the 1988 Hospital Agreement by virtue of the integration clause in the 1992 Agreement and whether Taylor waived any rights under the 1988 Agreement by entering into the

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[25] **Taylor urges this court to follow the findings of fact of the Sacred Heart arbitration panel, which it characterizes as concluding that Taylor's claim for reimbursement arose out of the 1988 Hospital Agreement. Taylor's 12/21/2000 Memorandum at 17 (citing Ex. B., Conclusions of Law at 58-66). This point is incomplete, however, since it is clear that Taylor premises its claim on the 1988 Agreement, but this is only one element in the parties' dispute. Equally important is the contention by Blue Cross that the 1988 reimbursement provisions were superseded--or waived--by Taylor when it entered into the 1992 Hospital Agreement.**

1992 Hospital Agreement.[26]

Blue Cross, for obvious reasons, consistently implicated the 1992 Hospital Agreement into its articulation of its dispute with Taylor. Blue Cross thus repeatedly asserts that the 1992 Hospital Agreement extinguished Taylor's right to reimbursement for capital losses by Blue Cross. See, e.g., Defendant's 11/21/2000 Memorandum at 4. For these reasons, the dispute between Taylor and Blue Cross spans both the 1988 and 1992 Agreements and can be variously framed: whether the terms of the 1992 Hospital Agreement supersede those of the 1988 Hospital Agreement or whether Taylor waived its depreciation reimbursement rights pursuant to the 1988 Agreement by entering into the 1992 Hospital Agreement. This dispute raises complex legal and factual issues for the arbitrators to resolve.

It remains, therefore, to determine which arbitration procedures apply by analyzing the scope of each arbitration provision. In so doing, the Pennsylvania Superior Court in Midomo Company, Inc. v. Presbyterian Housing Development Company, 739 A.2d 180 (Pa. Super. 1999) emphasized the utility of applying "two basic and seemingly contradictory propositions when deciding whether the parties have agreed to arbitrate a

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[26] See Taylor's 10/19/2000 Memorandum at 15 (integration clause) and Taylor's 12/21/2000 Memorandum at 16-17, 20-26 (waiver and integration clause).

particular dispute:

> **(1) arbitration agreements are to be strictly construed and not extended by implication; and (2) when parties have agreed to arbitrate in a clear and unmistakable manner, every reasonable effort should be made to favor the agreement unless it may be said with positive assurance that the arbitration clause involved is not susceptible to an interpretation that covers the asserted dispute. Midomo, 739 A.2d at *190 (citations omitted). See also School District of Monessen v. Apostolou Assocs.,Inc., 761 A.2d 597, *601 (2000).**

In resolving the tension between these principles, contract principles apply. Midomo, 739 A.2d at *190-91. The contract language should be interpreted to give effect to the parties' intent. Hazleton Area School Dist. v. Bosak, 671 A.2d at *282.

A comparison of the relevant provisions in the 1988 and the 1992 Hospital Agreements leads to the conclusion that while the issue is close, the parties' dispute is more fully embraced by the arbitration provisions of the 1992 Agreement so that its procedures calling for three arbitrators should apply.

As previously discussed, the 1988 Hospital Agreement contains the following arbitration provision:

> **Any disagreement between the parties hereto concerning this Agreement or its application, operation or interpretation (except as to matters involving Exhibit B or those provisions contained in Subsections 10.4 and 10.5 below which shall be initially the responsibility of the Contract Administration Committee ("CAC") as described in Section 15) shall be referred to a disinterested arbitrator assigned by the CAC from a list of arbitrators jointly selected by Blue Cross and the DVHC on behalf of the**

> **Providers contracting hereunder (subsequent additions or deletions from this list will be made only upon the unanimous approval of the CAC). 1988 Hospital Agreement, §10.1 (emphasis added).**

This provision clearly states that any disagreement concerning the interpretation of the 1988 Hospital Agreement would fall within the arbitration/appeals procedures of Section 10. The dispute between Taylor and Blue Cross, however, also implicates the 1992 Hospital Agreement and its impact on the prior agreement. The arbitration provisions of Section 16 in the 1992 Hospital Agreement are somewhat broader:

> **Any dispute or question arising between the parties hereto and involving the application, interpretation or performance of this Agreement, shall be settled, if possible, by amicable and informal negotiations. However, if any such issue(s) cannot be resolved in this fashion, said issue(s) shall be submitted to binding arbitration, following the procedures set forth below. 1992 Hospital Agreement §16.1.**

This arbitration provision embraces "any dispute or question arising between the parties hereto and involving the application" of the 1992 Agreement. Its express terms are thus broader than those of Section 10 of the 1988 Agreement: Section 16 encompasses the dispute concerning the 1988 Hospital Agreement to the extent that it relates to the application of the 1992 Hospital Agreement. The full parameter of Taylor's reimbursement claim falls squarely within the scope of Section

16. In contrast, Section 10 of the 1988 Agreement more narrowly limits its scope to "any disagreements between the parties concerning this [1988] Agreement." 1988 Hospital Agreement §10.1.

Admittedly, this is drawing the very fine lines suggested by Midomo, but the parties have compelled this court to so. Because their substantive dispute over LOS depreciation reimbursement payments is inextricably linked to an analysis of the interrelationship of the 1988 and the 1992 Hospital Agreements, Section 16 of the 1992 Hospital Agreement more easily encompasses all the elements of their dispute. Arbitration is therefore compelled pursuant to section 16 of the 1992 Hospital Agreement.

In so doing, no decision whatsoever is rendered on the substantive issue of which agreement controls the parties' present relationship and Taylor's substantive claims. The issues of whether Taylor is entitled to LOS depreciation reimbursement payments from Blue Cross or whether one agreement supersedes the other remain. Those are for the arbitrators to decide. Borgia v. Prudential Ins. Co., 561 Pa.434,750 A.2d 843, *846 (2000)("Once it has been determined that a substantive dispute is arbitrable, the arbitrators normally have the authority to decide all matters necessary to dispose of the

claim); Brennan v. General Accident Fire & Life Assurance Corp, 524 Pa. 542, 574 A.2d 580, *583 (1990)("It is well settled law in Pennsylvania that unless restricted by their submission, the arbitrators are the final judges of law and fact and their award will not be disturbed for mistake of either").

BY THE COURT:

DATE: April 23, 2001

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John W. Herron, J.