Laurent Capital

LAURENT CAPITAL / RESEARCH & PRACTICAL GUIDANCE

Earnout Dispute Resolution: Accountant, Arbitrator or Court?

> Laurent Capital is an independent M&A advisory firm headquartered in San Jose, California. It advises owners of founder-owned, family-owned and sponsor-backed B2B companies on sales, acquisitions and recapitalizations.

Published by Laurent Capital · 2026-11-02 · earnout dispute resolution · earnout dispute · independent accountant vs arbitrator · expert determination vs arbitration · earnout arbitration clause · earnout dispute delaware · earnout protections for sellers · purchase agreement dispute resolution · m&a earnout

Original article: https://laurent.capital/articles/who-decides-earnout-dispute-accountant-arbitrator-court



In this article

1. Executive Summary
2. Introduction and Background
3. Three Questions, Not One: Arithmetic, Evidence and Conduct
4. Expert Determination, Arbitration and Court: What Each Is Delegated
5. The Issue-Routing Matrix
6. A Hypothetical Mixed Dispute and Its Sequence
7. Deadlines, Review, Remedies and Finality
8. Seller Protections and the Buyer's View
9. Questions to Take to Counsel: A Preparation Checklist
10. Data Analysis and Evidence
11. Implications and Future Directions
12. Frequently Asked Questions (FAQs)
13. Conclusion

Executive Summary

An earnout dispute is rarely one dispute. A seller who believes the buyer's earnout statement is wrong may be disagreeing about **arithmetic** (a sum was added incorrectly), about **evidence** (supporting records were not provided), or about **buyer conduct** (the business was run in a way that suppressed the payout). Each question can be delegated to a different decision-maker, and the label on that decision-maker (independent accountant, arbitrator, court) does not settle what it may actually decide. Practitioners describe the core difference between expert determination and arbitration as the "type and scope of authority" delegated (corpgov.law.harvard.edu). As of November 2026, Delaware commentary stresses that scope turns on the contract text, not the label (ma-litigation.sidley.com).

The commercial stakes are real. SRS Acquiom reports that **24%** of 2025 non-life-sciences private-target deals carried an earnout (srsacquiom.com). In its 2024 claims dataset of 100 non-life-sciences deals with an earnout due, sellers contested the earnout in **28%** of deals (learn.srsacquiom.com). The same study family reports that about one in five earnout dollars is ultimately paid, at 21 cents on the dollar (srsacquiom.com). Those figures describe different cohorts and should not be merged into one rate.

A narrow accounting expert is typically confined to the items in dispute (dwt.com) and is not usually given power to interpret the contract or decide issues of law (sheppard.com). Commentary also notes that an accountant cannot order specific performance or award damages (ma-litigation.sidley.com). That is a default observation, not a rule: a clause can broaden the accountant's role.

This report gives owners and CFOs a **seller-facing issue-routing matrix**, a **sequence diagram** of how parallel processes can interlock, a hypothetical mixed dispute, and a **preparation checklist** for recording counsel's interpretation before signing. It is education, not legal advice, and it recommends no forum. Delaware law is the reference point because Delaware's code lets parties agree in writing that it governs

(delcode.delaware.gov), but the actual agreement text controls. Timing is a recurring risk: practitioners warn that the parties can take months simply to agree on and engage the expert (cooley.com), so the process should be designed before closing, not after a statement arrives.

Introduction and Background

An earnout is additional purchase price that depends on post-closing performance. It exists because buyer and seller disagree, at signing, about the future. Cooley's transaction practitioners note that earnouts often delay an inevitable dispute rather than prevent it, and that disputes frequently arise about the dispute resolution process itself (cooley.com).

This report is written for founders, family owners and CFOs selling companies of roughly $5 million to $150 million in revenue in North America, with a secondary audience of corporate buyers structuring the same process. It starts from the problem to be decided and the authority actually delegated, not from the professional label of the person deciding. The purpose is narrow: to help an owner decide which questions to take to M&A counsel about decision-maker authority, records access, deadlines, remedies and sequencing before accepting an earnout dispute mechanism. It does not offer a model clause, a recommendation of a forum, or advice on any dispute.

Laurent Capital is an independent M&A advisory firm, not a law firm, accounting practice, valuation firm or tax adviser. Questions about how a clause will be read belong with the owner's M&A attorney, accounting methods with a CPA, and tax treatment with a tax adviser.

Two limits shape what follows:

- **Contract text controls.** No general statement here substitutes for reading the actual clause, any incorporated rules, and the governing law.
- **Delaware is a reference point.** Delaware commentary and statutes are used as the reference point; other states differ.

Three Questions, Not One: Arithmetic, Evidence and Conduct

The first mistake owners make is to treat "the earnout is wrong" as a single issue. It is usually at least three, and the agreement may route each differently.

Arithmetic and accounting method

These are questions such as whether an invoice was omitted from net revenue, or whether revenue should be recognized in one period or another. Revenue recognition under US generally accepted accounting principles (GAAP) is a judgment-heavy area: the standard-setter's own review acknowledges that some areas require significant judgment or estimation (storage.fasb.org) and that conclusions reached by one entity may differ from those reached by another (storage.fasb.org). A second layer arises when a purchase agreement says "consistent with past practice" and also says "in accordance with GAAP": an accounting principle once

adopted is to be applied consistently (viewpoint.pwc.com), while a voluntary change must be justified as preferable (viewpoint.pwc.com). Which of those two instructions wins is a contract-interpretation question wrapped inside an accounting one.

Evidence and records access

A seller cannot dispute what it cannot see. After closing, the seller usually no longer controls the books. Practitioners advise that agreements specify what records the buyer must keep, how frequently the seller can request access, and in what form (natlawreview.com). Cooley similarly recommends spelling out what rights sellers have to the information buyers used to prepare earnout statements (cooley.com). Whether a refused request is a calculation issue, a covenant issue or both depends on the text.

Buyer conduct

Efforts and operating covenants (obligations about how the buyer runs the business) are a different species of question. Cooley's practitioners advise that drafters clarify whether the buyer has an obligation to operate the acquired business to maximize the earnout opportunity, and warn that an undefined efforts clause can lead to uncertainty (www.cooley.com). Commentary on how to keep an accountant to financial metrics suggests excluding questions of whether the buyer used the requisite level of efforts (deallawyers.com). Fried Frank similarly advises stating whether the decision-maker will decide compliance with operational, good faith or efforts covenants (corpgov.law.harvard.edu).

The practical point: one event, such as a customer moving between business units, can raise all three questions at once.

Expert Determination, Arbitration and Court: What Each Is Delegated

Expert determination

In an expert determination the parties contract for a specialist (often an independent accounting firm) to decide a defined technical question. A typical purchase price adjustment clause limits the expert to unresolved items in an objection notice, states that the expert acts as expert and not as arbitrator, and makes the result final absent manifest error (corpgov.law.harvard.edu). Practitioners observe that such an expert lacks authority to make binding decisions on issues of law or legal liability (corpgov.law.harvard.edu). Signs commentators associate with expert determination include no discovery or hearing and no authority to award relief (corpgov.law.harvard.edu).

Institutions describe the expert function in similar terms. The International Chamber of Commerce (ICC) rules for appointing experts allow parties to agree to a contractually binding expert determination (iccwbo.org), and the ICC states that it does not administer proceedings under those rules (iccwbo.org). That contrasts with institutional arbitration, where a body administers the case.

Arbitration

Arbitration is a broader delegation. One practitioner summary describes it as a broad delegation of authority to resolve the entire controversy, in contrast to a narrow expert delegation (legal500.com). Institutional rules carry consequences that an owner should recognize before signing. Under the American Arbitration Association (AAA) Commercial Rules, the arbitrator has power to rule on his or her own jurisdiction (adr.org) and may take interim measures deemed necessary (adr.org). JAMS rules similarly give the arbitrator authority over jurisdiction and arbitrability as a preliminary matter (jamsadr.com) and may grant interim measures (jamsadr.com). Naming such rules and a sponsoring organization can signal an intent to confer broader, arbitration-like authority on an accountant (ma-litigation.sidley.com). Incorporating such rules may therefore mean agreeing to something wider than a quick accounting check.

Delaware also has statutory frameworks, such as the Delaware Rapid Arbitration Act, which applies only if the agreement includes an express reference to it, among other requirements (delcode.delaware.gov), and which, absent a different agreed time, calls for a final award within 120 days of the arbitrator's acceptance (delcode.delaware.gov). Whether such a framework suits an earnout is a question for counsel; the point is that "arbitration" is not one thing.

Court

A court is the default decision-maker for anything not delegated elsewhere. The Delaware Court of Chancery has jurisdiction over matters in equity (delcode.delaware.gov) but not where a sufficient remedy exists at common law (delcode.delaware.gov), and describes itself as a non-jury trial court that exclusively handles civil cases (courts.delaware.gov). Which Delaware court has jurisdiction over a particular claim is itself a counsel question. Courts are also where remedies an expert cannot grant are typically sought: where parties stipulate that specific performance is an appropriate remedy for breach, practitioners note Delaware courts have enforced that bargain (jdsupra.com).

Table 1 compares the three decision-makers by the dimensions an owner can actually negotiate. It describes common patterns reported in practitioner and institutional sources, not fixed rules.

Dimension	Independent accounting expert	Arbitrator (or accountant acting as arbitrator)	Court
Source of authority	Contract only; scope is whatever the clause delegates (corpgov.law.harvard.edu)	Contract plus arbitration law and any incorporated rules (jamsadr.com)	Law and the parties' choice of forum
Typical subject	Specified calculation or accounting items (dwt.com)	Potentially the whole controversy, if drafted that way (legal500.com)	Claims not delegated elsewhere
Legal interpretation	Not usually granted unless expressly conferred (sheppard.com)	Within the delegated scope	Yes, subject to any valid delegation
Process features	Often no discovery or hearing (corpgov.law.harvard.edu)	Rules-based; interim measures possible (adr.org)	Court procedure and discovery

Dimension	Independent accounting expert	Arbitrator (or accountant acting as arbitrator)	Court
Remedies	An accountant cannot order specific performance or award damages (ma-litigation.sidley.com)	Depends on the clause and rules	Damages and, where available, equitable relief
Review of result	Manifest error standard is narrow (mayerbrown.com); legal questions can get plenary review (deallawyers.com)	Limited statutory grounds (law.cornell.edu)	Appeal under court rules

The table's main lesson is that each row has an "it depends on the clause" qualifier. The review row deserves emphasis: because the standard of review differs by label, a mislabeled clause can change not only who decides, but how much a loser can challenge afterward. Commentators have noted that an expert determination can be subject to more court oversight than the parties might anticipate (corpgov.law.harvard.edu), while a 2012 commentary, written before the 2026 commentary summarized below, warned parties to assume finality under the narrow Federal Arbitration Act grounds (corpgov.law.harvard.edu). Those two views, written more than a decade apart, do not fully reconcile, which is itself a reason to ask counsel which standard the specific clause invites.

What recent Delaware commentary adds

Recent practitioner commentary, which this report cites only for general principles, converges on two points:

- **Substance over label.** Courts look to the substantive provisions of the clause rather than the labels the parties provide (corpgov.law.harvard.edu), and an arbitration label does not change what the accountant was empowered to decide (ma-litigation.sidley.com).
- **Reframing has limits.** Whether a post-closing dispute goes to the accountant turns on the scope of authority the clause confers rather than on how the dispute is described, so parties should not assume that any dispute can be routed to the accountant (ma-litigation.sidley.com).

These points should not be flattened into a universal rule that an accountant decides all accounting questions and a court all legal ones. The same words can be read differently depending on the rest of the clause, the incorporated rules, and what the parties argued. As of early November 2026, later appeals or treatment of the 2026 Delaware decisions that the cited commentary discusses had not been verified for this report, so counsel should confirm current status and read the opinions themselves.

The Issue-Routing Matrix

The matrix below is a working tool, not an answer key. Its columns are things to fill in with counsel against the actual draft agreement. The cells are intentionally left as prompts: **no universal legal answers are prefilled**, because they depend on contract text, rules, governing law and what the parties concede in the proceeding.

Table 2 lists six example rows. Each row begins with the act in dispute, not with a professional label.

Disputed act	Relevant agreement section	Factual evidence	Legal interpretation needed?	Authority expressly delegated	Decision-maker to confirm	Available remedy	Notice trigger	Dependency	Responsible advisor
Invoice omitted from net revenue	Net revenue definition; earnout statement mechanics	Invoice, shipment or service records, ledger entries	Possibly, if the definition is ambiguous	Confirm whether "calculation" items are listed	Confirm with counsel (expert, arbitrator, court)	Corrected figure; payment of difference if authorized	Objection notice window after the earnout statement	Access to workpapers	M&A counsel and CPA
Different revenue-recognition treatment	Accounting principles clause; "consistent with past practice" language	Prior-period statements, policy memos	Yes, if GAAP and past-practice instructions conflict	Confirm which instruction controls and who decides	Confirm with counsel	Recomputed figure	Same objection window	Whether past practice is documented	CPA and counsel
Refused workpapers or records	Information and audit rights; covenant sections	Written requests and responses	Yes (what the access clause requires)	Confirm whether the expert may order production	Confirm with counsel; may differ from calculation forum	Production order or specific performance only if some forum is empowered	Possibly a request timeline in the clause	Calculation may stall without records	Counsel
Alleged sales diversion or changed operations	Efforts and operating covenants	Customer, pricing and staffing records	Yes (what the covenant requires)	Confirm that covenant disputes are not silently excluded or included	Confirm with counsel	Damages or equitable relief only where a forum is authorized	Any notice-and-cure period in the covenant	Often needs discovery	Counsel
Breach damages	Remedies and exclusive-remedy provisions	Financial model, causation evidence	Yes	Confirm whether any decision-maker may award damages	Confirm with counsel	Damages, if authorized	Claim notice periods; limitations	Depends on the covenant forum	Counsel and CPA
Arithmetic after scope is resolved	Calculation mechanics; payout formula and cap	Corrected inputs from the earlier ruling	Lower, once inputs are set	Confirm that the expert may apply an earlier ruling	Confirm with counsel	Final payment amount	Payment due date after final determination	The earlier scope decision	CPA

The matrix is useful because it forces the "delegated authority" column to be filled before signing. A blank or "confirm" entry marks an unresolved question that should be recorded and, where possible, resolved in the draft. The column for **notice trigger** deserves particular care. Practitioners describe common patterns, such as a buyer calculation window of 60 to 90 days (dwt.com), a seller review period usually 30 to 60 days (dwt.com) and a negotiation period typically 30 days (dwt.com). These are drafting patterns reported by one firm, not market rules, and they should not be copied into a deal without counsel review.

Two reading notes follow. First, rows can interact: the refused-records row is a precondition for the omitted-invoice row, since a seller cannot prove an omission without access. Commentary indicates that questions about what information should be considered in a calculation can sit with the arbitrator under some clauses (corpgov.law.harvard.edu), which is why practitioners advise sellers to seek broad informational rights in the text (corpgov.law.harvard.edu). Second, the last row assumes the scope question was resolved first; if scope is itself disputed, the arithmetic row waits.

A Hypothetical Mixed Dispute and Its Sequence

Hypothetical Example: omitted revenue, denied records, alleged customer diversion

All figures, dates and terms in this example are **assumptions for illustration** and do not reflect any observed market payout. Assume a seller sold a business with an earnout paying **$2 of additional purchase price for each $1 of qualifying net revenue above a threshold**, up to a stated cap. The buyer's earnout statement, delivered on a hypothetical day, omits a $100,000 invoice the seller considers qualifying. The seller also asked for supporting workpapers and was refused, and separately believes a large customer was moved into another buyer business unit.

If the omitted $100,000 qualified and the threshold had already been exceeded, the incremental payout would be $100,000 × $2 = **$200,000** before the stated cap. If the cap had already been reached on the buyer's numbers, the incremental payout would be $0 whatever the invoice's status. The example separates three things the dollar figure can hide:

- **Eligibility.** Whether the invoice is "qualifying net revenue" is a definitional and accounting question. It may be a calculation item, an interpretation item, or both.
- **Arithmetic.** Once eligibility is settled, multiplying and applying the cap is mechanical.
- **Legal liability.** Whether refusing records or moving a customer breached any covenant is left unresolved here. The example does not assert that any such breach occurred.

Because the example mixes categories, it could be split across several decision-makers, depending entirely on the hypothetical clause. The diagram below shows one possible interlock. Every date is hypothetical, and business-day definitions, notice methods, weekends and tolling are all points that counsel must verify against the actual text.

```
HYPOTHETICAL SEQUENCE (illustrative only; all dates assumed)

Day 0    Buyer delivers earnout statement
           |
```

```
Day 0-45 Seller review window (if the clause sets one)
           |--> Seller requests workpapers (records question)
           |--> Seller sends objection notice listing disputed items
           |--> Seller sends protective notice on conduct concerns
                (if the clause requires one; verify method and form)
           |
Day 45-75 Negotiation period (if any)
           |
Day 75   Branch point: which items does the clause delegate to whom?
           |
           +--> Calculation items: referral to the named expert
           |      (expert selection, conflicts check, fee terms)
           |
           +--> Interpretation / records / conduct items:
           |      arbitrator or court, per the clause
           |
           +--> Question: does either track pause the other?
                  (answer depends on contract text; do not assume)
           |
Later    Expert applies scope rulings to the numbers
           |
           Payment date, set-off, review or confirmation steps
```

Three features of the diagram matter. First, the **protective notice** line reflects that a contract may demand parallel notices for different claim types. A notice sent to start the calculation track may not satisfy a separate notice requirement for a conduct claim, and sending a notice cannot be assumed to preserve every claim. Second, the **branch point** is where an ambiguous clause becomes expensive: commentators warn that imprecise drafting can produce a two-front proceeding, with risks of complexity, error, uncertainty and delay (clsbluesky.law.columbia.edu). Third, whether a completed expert ruling ends other claims depends on the authority the clause gave the expert, a question for counsel when drafting the scope.

In this report's own drafting observation, sequencing is also a drafting choice: a clause can say whether legal and information-right questions are resolved before any calculation or alongside it, and whether the accountant's work waits for that decision. The order is not fixed by the labels, so it belongs on counsel's list.

Deadlines, Review, Remedies and Finality

Deadlines and limitations periods

Several clocks can run at once: the seller's review period, the objection window, a negotiation period, any deadline to start an expert or arbitration process, and the legal limitations period. Delaware's general limitation for contract claims is three years from accrual (delcode.delaware.gov), but for a written contract involving at least $100,000 the statute allows an action within a contractually specified period (delcode.delaware.gov), capped at 20 years from accrual (delcode.delaware.gov). A clause might therefore shorten or lengthen the time to bring a claim. Whether an expert process tolls any period, and whether a short contractual deadline to commence a proceeding runs while an objection is pending, are questions this report cannot answer and that commentary reviewed for it does not resolve. They belong on counsel's list.

Cooley's advice is to state exactly what triggers escalation so that the parties do not litigate over whether a dispute is ripe for referral (cooley.com).

Who decides whether a dispute is in scope

The gateway question, whether a particular claim falls within the expert's or arbitrator's authority, can be allocated by the contract. Wachtell's recommendation is that the agreement say who decides whether a dispute falls within the accountant's authority (clsbluesky.law.columbia.edu). Rules matter here: AAA and JAMS rules give arbitrators power over their own jurisdiction (adr.org), and the Delaware Rapid Arbitration Act routes arbitrability to the arbitrator (delcode.delaware.gov). By contrast, commentary on one framework says a court presumptively decides whether arbitration applies to the claims (corpgov.law.harvard.edu). Naming the rules in the clause may therefore change who decides scope.

Selection, conflicts and fees

Practitioners advise naming the expert and a backup in case of conflict (cooley.com), listing the CPA firm or firms in the agreement (natlawreview.com), and addressing conflicts, since accounting firms often provide audit, tax and other services to the parties (jonesday.com). One suggested approach has each party represent that it has had no business relationship with the selected neutral (gouldratner.treepl.co).

On fees, two common patterns are that each party bears its own costs, or that costs are split by the relative success of each party (dwt.com). Another commentator notes an equal split offers no incentive to either party to avoid or use the mechanism (gouldratner.treepl.co). The same source describes a baseball-style mechanism in which the decision-maker must pick one side's position in its entirety (gouldratner.treepl.co). Whether any of these suits a given deal is for counsel.

Review, finality and enforcement

If an arbitrator's award is challenged, the Federal Arbitration Act allows vacatur where arbitrators exceeded their powers (law.cornell.edu) and modification where they awarded on a matter not submitted to them (law.cornell.edu); a party may apply to confirm an award within one year after it is made (law.cornell.edu). Delaware's Uniform Arbitration Act similarly provides for vacatur when arbitrators exceeded their powers (delcode.delaware.gov) with an application generally due within 90 days after delivery of the award (delcode.delaware.gov). Under the Rapid Arbitration Act, a challenge to a final award must be taken within 15 days (delcode.delaware.gov). These windows vary sharply by framework, which is one reason the label matters.

For an expert determination, the standard is different. Delaware commentary describes a narrow manifest-error test, requiring a plain and obvious error on which the record shows strong reliance (mayerbrown.com), and Mayer Brown suggests requiring a detailed written report so a reviewing court can assess it (mayerbrown.com). Day Pitney's review of the area describes expert determinations as binding except in cases of fraud or manifest error, and warns that unclear drafting can unintentionally expand or limit the accountant's authority (daypitney.com).

Seller Protections and the Buyer's View

The dispute mechanism works best alongside substantive protections. Commentary lists the usual seller asks. These include periodic reporting, access to supporting records, and audit and inspection rights (gesmer.com); a covenant to maintain separate books and records for the acquired business (dwt.com); and acceleration triggers, such as a material breach of operating covenants (dwt.com). Exclusive-remedy and set-off language also affect the dispute: practitioners note that buyers often seek to offset indemnity claims against earnout payments (mintz.com), which can create leverage in a dispute about the payout.

Buyers have counterpoints too. Buyers want flexibility to operate the business as they see fit (dwt.com), and Holland & Knight cautions that excessively restrictive covenants may prevent buyers from realizing anticipated synergies (hklaw.com). A buyer structuring the same process benefits from the same clarity: a clause that precisely confines the expert protects the buyer from an unexpectedly broad ruling, just as it protects the seller from a ruling it did not bargain for.

Holland & Knight's practitioners recommend, for many agreements, a bifurcated approach: calculation to an expert, and interpretation or covenant questions to arbitration or a court (hklaw.com), noting expert determination is less effective where disputes require witness testimony or document discovery (hklaw.com). Freshfields adds that sending disputes to an arbitrator or expert does not necessarily foreclose litigation, because a disagreement over the clause's scope may itself have to be resolved (freshfields.com).

Questions to Take to Counsel: A Preparation Checklist

The checklist below is designed to **record counsel's interpretation**, not to dictate an outcome. For each item, write down who answered, on what date, and what the answer was. Where counsel cannot give a firm answer, record that as an unresolved matter before signing.

Decision-maker authority

- **Who decides?** For each issue type in Table 2, which decision-maker is named, and is the label (expert, arbitrator) consistent with the powers actually listed?
- **Who decides scope?** Does the clause say who decides whether a dispute falls within the expert's authority, and do any incorporated rules change that?
- **Which rules are incorporated?** If arbitration rules are named, what do they add? AAA and JAMS rules, for example, address interim measures (www.adr.org) (www.jamsadr.com).
- **Legal questions.** If a contract term is ambiguous, who interprets it, and is the interpretation binding on the other track?
- **Default.** Is there a fallback provision if the label and the powers conflict?

Records access

- **Automatic or on request?** Does the buyer deliver supporting records with the earnout statement, or only when asked?
- **Format and frequency.** What may the seller request, how often, and in what form?
- **Personnel access.** Are finance staff available to answer questions?

- **Separate books.** Must the buyer keep separate books for the acquired business?
- **Enforcement.** If records are refused, which forum can compel production, and what does the clause say about interim relief?

Deadlines and notices

- **Windows.** What are the review, objection, negotiation and referral periods, and how are business days defined?
- **Method.** What counts as valid notice (method, address, form)?
- **Parallel notices.** Does a separate notice need to be sent for conduct claims?
- **Tolling and stays.** Does any process toll another? Is there a stay, or can both run?
- **Outside date.** Is there a deadline to start a proceeding, and how does it interact with the limitations period?

Remedies and sequencing

- **Remedy map.** For each issue type, what can the decision-maker award (corrected figure, damages, specific performance)?
- **Order of operations.** Does a court or arbitrator rule on scope before calculation, or in parallel?
- **Effect of rulings.** Does a calculation ruling bind later claims, and does a scope ruling bind the expert?
- **Set-off and acceleration.** Can the buyer set off against earnout payments, and does any breach trigger acceleration?

Process mechanics

- **Selection.** How is the expert selected, who checks conflicts, and who is the backup?
- **Fees.** Who pays, and is there a loser-pays or proportional rule?
- **Report.** Must the expert issue a reasoned written report?
- **Review.** What is the standard of review and the deadline to challenge?
- **Mediation.** Is there a mediation step, and does it pause any clock?

Two cautions apply. A completed checklist records what was understood; it does not guarantee an outcome. And it should be completed with M&A counsel, a CPA and, for payout timing, a tax adviser: the IRS describes a contingent payment sale as one in which the total selling price cannot be fixed by year-end (www.irs.gov) and warns that part of later payments may be treated as interest (www.irs.gov).

Data Analysis and Evidence

SRS Acquiom's current study covers 2,300+ private-target acquisitions (www.srsacquiom.com). Quantitative evidence on earnouts comes mainly from deal-data providers and bar-association surveys, each with its own sample. The figures below are reported with sample and date, and they should not be combined across rows.

Table 3 summarizes the principal published figures reviewed for this report.

Source and edition	Sample and method	Reported finding	Caveat
SRS Acquiom 2026 Deal Terms Study	2,300+ private-target acquisitions worth $569 billion, closed 2020 to 2025, with SRS Acquiom services (srsacquiom.com)	24% of 2025 non-life-sciences private-target deals report an earnout, up from 19% in 2014 (srsacquiom.com)	Deals with SRS Acquiom services only; the sample comes from the deal-terms-study page and the 24% figure from the earnout-trends page, so do not assume a shared cohort
SRS Acquiom 2024 Deal Terms Study	Prior edition, deals through 2023	One-third of private-target deals carried an earnout (srsacquiom.com)	Different edition and basis; do not attribute to the 2026 cohort
SRS Acquiom 2026 earnout trends	Lower middle market deals (upfront value of $50 million or less)	Median payout of 43 cents on the dollar where any earnout was achieved (learn.srsacquiom.com)	Conditional on some achievement
SRS Acquiom 2026 Earnouts & Claims Study	405 earnout metrics or milestones with $6 billion at play (srsacquiom.com)	About one in five dollars paid, 21 cents on the dollar (srsacquiom.com)	Non-life-sciences; dispute detail is gated; deals closed from 2009 to mid-2026, most within the last three years; keep this cohort separate from the others
SRS Acquiom 2024 Claims Insights Report	100 non-life-sciences deals with an earnout due (learn.srsacquiom.com)	Sellers contested in 28% (learn.srsacquiom.com); sellers succeeded in 17% of contested earnouts (learn.srsacquiom.com); 3% resolved by litigation or arbitration to final judgment (learn.srsacquiom.com)	Single small dataset; "contested" means at least in writing to the buyer
ABA 2023 Private Target Deal Points Study	108 definitive agreements (americanbar.org)	Earnouts rose from 20% to 26% (americanbar.org)	Different deal-size band than SRS
ABA 2025 Private Target Deal Points Study	139 deals, described in secondary reporting as middle-market (mondaq.com)	Earnouts fell from 26% to 18% (deallawyers.com)	Secondary reporting of the study

The sources disagree on levels, and the disagreement is informative rather than a flaw to be averaged away. SRS Acquiom's 2024 edition said one-third of deals carried an earnout, with the Cooley article citing the same edition's finding that 33% of analyzed deals included earnouts, up from 21% in 2022 and 18% in 2021 (cooley.com). The current page reports 24% for 2025 deals. The ABA's agreement-based samples show 26% and then 18%. Different cohorts, deal sizes, life-sciences treatment and definitions explain much of the spread. The current SRS study describes a different cohort than the historical edition Cooley cited, so the older statistic is attributed only to its own dated edition.

Two observations follow for an owner. First, prevalence has moved over time and by dataset, so no single "market" earnout rate should anchor a negotiation. Second, SRS Acquiom reports that 68% of earnout deals in its dataset included multiple earnout metrics (the page does not state a closing-year cohort for this figure)

(www.srsacquiom.com), and more metrics mean more potential disputed items to route. The data do not establish how often each forum is used, how long it takes, or what it costs, and this report does not estimate those.

Implications and Future Directions

Several practical implications follow for owners and for buyers.

Design the process like a commercial term. The dispute mechanism is often drafted late and from a template. Given that sellers contested the earnout in 28% of deals in the SRS Acquiom 2024 dataset (learn.srsacquiom.com), and that about one in five earnout dollars is paid (www.srsacquiom.com), it merits attention comparable to the payout formula. A well-drafted metric can still produce a poorly routed dispute.

Define by issue, not by title. An owner should ask what happens to each row of the matrix. If counsel cannot answer for a row, that row is a negotiation topic or a recorded risk.

Expect interaction between tracks. Parallel notices, stays, tolling and the order of rulings are the least settled points in the commentary reviewed. Practitioners note the two-front risk, but there is no general rule. The checklist treats these as open questions.

Treat the case law as moving. Commentary on 2026 Delaware decisions is current as of October 2026, and later appeals or treatment were not verified. Counsel should check current authority at signing, and again if a dispute arises.

An independent M&A advisor can help an owner organize these questions alongside the commercial negotiation: the metric, the payout curve, the cap, the operating covenants and the dispute mechanism are connected terms. Legal interpretation remains with counsel, calculations with accountants, and tax effects with tax advisers.

Frequently Asked Questions (FAQs)

How do you resolve an earnout dispute?

Start by identifying the type of dispute (arithmetic, evidence or conduct), then follow the process the agreement sets: typically an earnout statement, a review period, an objection notice, a negotiation period, and then referral to whatever decision-maker the clause names for that issue. The common pattern reported by one firm has a negotiation period of about 30 days before referral to a neutral accounting firm (dwt.com). Counsel should confirm every step against the actual text.

What is the difference between an independent accountant and an arbitrator in an earnout?

The difference lies in the type and scope of authority delegated, not in the professional title (corpgov.law.harvard.edu). An accountant acting as expert typically decides specified items; an arbitrator may have broader authority if the clause so provides.

What is expert determination versus arbitration in M&A?

Expert determination is a contractual process in which a specialist decides a defined question and the result is binding as a matter of contract; the ICC rules, for example, permit a contractually binding expert determination (iccwbo.org). Arbitration is a broader adjudicative process governed by arbitration law and, often, institutional rules.

Does an earnout dispute arbitration clause send everything to arbitration?

Not necessarily. Whether a clause reaches covenant or information-right claims depends on its wording, and Freshfields notes that such a clause does not necessarily foreclose litigation (freshfields.com).

How does earnout dispute litigation work in Delaware?

The Court of Chancery is a non-jury civil court (courts.delaware.gov) with jurisdiction over equity matters (delcode.delaware.gov). Which Delaware court is proper for a given claim is a question for counsel.

What is the independent accountant's scope in an earnout dispute?

Usually the specified items in dispute (www.dwt.com), with legal interpretation not usually granted unless expressly conferred (www.sheppard.com). Cooley recommends stating clearly that an expert serves as expert and not arbitrator where that is the intent (www.cooley.com).

What earnout protections exist for sellers?

Common asks include reporting and audit rights, separate books, operating covenants and acceleration triggers, as described above. Their enforceability, and which forum enforces them, depend on the text.

What should a purchase agreement's dispute mechanism say?

At minimum, it should state who is the decision-maker for each issue type, who decides scope, what triggers escalation, who selects the expert and handles conflicts, who pays, and what remedies are available, as the checklist lists.

Conclusion

An earnout dispute is a bundle of questions. Arithmetic, evidence and conduct can each be delegated to a different decision-maker, and the label attached to that decision-maker is a weak guide to what it can decide. Delaware commentary through October 2026 consistently points back to the contract: its text, any incorporated rules, and the parties' procedural choices. A narrow accounting expert is generally confined to specified items and is not usually empowered to interpret the contract or award damages or specific performance, but a clause can say otherwise, and neither categorical statement ("accountants decide accounting, courts decide law") is safe to rely on.

For an owner, the useful work happens before signing. Fill in the issue-routing matrix with counsel, record who answered each question and when, and treat blanks as negotiation topics or documented risks. Check the clocks, the notice mechanics and the records rights, because a seller who cannot see the books cannot

dispute the numbers. Remember the limits of this report: it describes common drafting patterns from named sources, it does not predict outcomes, speed or cost, and it does not replace M&A counsel, a CPA or a tax adviser.

Source links

Links cited in this article, in order of first appearance. Full addresses are provided for readers using extracted text.

1. https://corpgov.law.harvard.edu/2025/09/17/what-to-keep-in-mind-for-your-next-purchase-price-adjustment-provision
2. https://ma-litigation.sidley.com/2026/10/still-experts-after-stillfront-two-chancery-decisions-confine-independent-accountants-to-accounting-disputes
3. https://www.srsacquiom.com/our-insights/ma-earnout-milestone-trends
4. https://learn.srsacquiom.com/rs/664-KLJ-520/images/SRSA_2024_Claims_Insights_Report_Interactive.pdf?version=1
5. https://www.srsacquiom.com/our-insights/ma-earnouts-claims-study
6. https://www.dwt.com/insights/2026/06/earnouts-mergers-acquisitions-deals
7. https://www.sheppard.com/insights/blogs/expert-or-arbitrator-resolving-purchase-price-adjustment-disputes
8. https://delcode.delaware.gov/title6/c027/sc01/index.html
9. https://www.cooley.com/news/insight/2024/2024-06-21-4-tips-for-drafting-earnouts-to-avoid-disputes
10. https://storage.fasb.org/Post-Implementation%20Review%E2%80%94Revenue%20from%20Contracts%20with%20Customers%20%28Topic%20606%29.pdf
11. https://viewpoint.pwc.com/dt/us/en/pwc/accounting_guides/financial_statement_/financial_statement___18_US/chapter_30_accountin_US/304_change_in_accoun_US.html
12. https://natlawreview.com/article/earnout-burnout-drafting-earnout-agreements-minimize-disputes-following-sale
13. https://www.deallawyers.com/blog/2025/07/drafting-earnouts-dispute-resolution-mechanisms.html
14. https://corpgov.law.harvard.edu/2026/03/19/delaware-supreme-court-guidance-on-adr-provisions-to-resolve-earnout-disputes-stillfront
15. https://corpgov.law.harvard.edu?p=176341
16. https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/experts/appointment-of-experts-and-neutrals/rules-for-the-appointment-of-experts-and-neutrals
17. https://www.legal500.com/intelligence/united-states/litigation-mediation-arbitration/delaware-supreme-court-finds-breach-claims-covered-by-adr-provision-in-merger-agreement
18. https://www.adr.org/media/r53l4f2a/commercial_rules.pdf
19. https://www.jamsadr.com/rules-comprehensive-arbitration
20. https://delcode.delaware.gov/title10/c058/index.html
21. https://delcode.delaware.gov/title10/c003/sc03/index.html
22. https://courts.delaware.gov/chancery/clerkship/clerkship.aspx
23. https://www.jdsupra.com/legalnews/delaware-courts-sharpen-focus-on-earn-2712448
24. https://www.mayerbrown.com/en/insights/publications/2024/10/a-delaware-law-alert-m-and-a-disputes
25. https://www.deallawyers.com/blog/2023/08/purchase-price-adjustment-disputes-accountants-as-experts-or-arbitrators.html

26. https://www.law.cornell.edu/uscode/text/9/10
27. https://corpgov.law.harvard.edu/2012/08/26/dispute-resolution-for-earnouts-and-purchase-price-adjustments
28. https://clsbluesky.law.columbia.edu/2026/08/10/wachtell-lipton-discusses-delaware-decision-drawing-line-between-expert-and-arbitrator-in-earnout-disputes
29. https://delcode.delaware.gov/title10/c081/index.html
30. https://jonesday.com/en/insights/2017/01/accounting-trueup-vs-valuation-dispute
31. https://gouldratner.treepl.co/assets/publications/BBG_Dispute-Resolution-Issues-in-Connection-With-Price-Adjustments.pdf
32. https://www.law.cornell.edu/uscode/text/9/11
33. https://www.law.cornell.edu/uscode/text/9/9
34. https://delcode.delaware.gov/title10/c057/index.html
35. https://daypitney.com/the-role-of-the-independent-accountant-in-post-acquisition-disputes
36. https://gesmer.com/publications/seller-notes-vs-earn-outs-managing-deferred-purchase-price-ma
37. https://www.mintz.com/sites/default/files/media/documents/2020-05-27/Insights%20Article.pdf
38. https://www.hklaw.com/en/insights/publications/2026/10/drafting-earnout-provisions-that-actually-work
39. https://www.freshfields.com/en/our-thinking/blogs/risk-and-compliance/ma-earnout-provisions-recent-trends-in-us-law-and-how-to-draft-your-clause-to-a-102is8s
40. https://www.irs.gov/publications/p537
41. https://www.srsacquiom.com/our-insights/deal-terms-study
42. https://www.srsacquiom.com/our-insights/deal-terms-study-2024
43. https://learn.srsacquiom.com/rs/664-KLJ-520/images/2026-ma-earnout-and-milestone-trends.pdf?version=1
44. https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-december/announcing-aba-2023-private-target-ma-deal-points-study
45. https://www.mondaq.com/unitedstates/corporate-and-company-law/1724296/2025-aba-private-target-mergers-acquisitions-deal-points-study
46. https://www.deallawyers.com/blog?p=21960
47. https://www.srsacquiom.com/our-insights/ma-deals

THE PUBLISHER

About Laurent Capital

Laurent Capital advises the owners of lower middle market B2B companies, generally between $5 million and $150 million in revenue, across North America.

What it does

Sell-side advisory, buy-side advisory and acquisition search, majority and minority recapitalizations, exit planning and sale readiness, indicative valuation advisory for planning purposes, and management buyouts and succession.

How it works

Fees are agreed in writing before work begins and weighted to the result, and each engagement is led by a partner from the first meeting to closing.

What it is not

Laurent Capital is not a lender, a fund or a business broker for small main-street sales, and its valuation work is not a fairness opinion or a tax appraisal. Where a transaction requires a registered broker-dealer, it works with appropriately licensed parties.

Visit

See Laurent Capital and its services.

Articles published here are general information. They are not investment, legal, tax or accounting advice, nor an offer or solicitation regarding any security or transaction; consult your own qualified advisors. Tax rules, market conditions and valuations change.

Website: https://laurent.capital

This article is educational. Verify consequential medical, legal, financial, regulatory and technical decisions with appropriate professionals and the cited primary sources. Company services are described separately from the article's research findings.