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Arbitrate or Litigate? The Differences

By Zachary Tuck, Esquire

It has become increasingly common for commercial contracts to include mandatory arbitration clauses, which force any disputes arising out of the contract to be settled by an arbitrator, rather than through traditional litigation. Many of our clients are unclear as to the costs and benefits of such arbitration provisions. This article seeks to educate our clients about the crucial differences between arbitration and litigation.

For most people, the biggest advantage of the arbitration process is the reduced costs. Although paying for an arbitrator can be expensive, most arbitrations are concluded less expensively than traditional litigation. This is because arbitrations often take significantly less time to resolve than a lawsuit in district or superior court. Generally, a traditional lawsuit can take many months to get to the trial stage, and the costs of obtaining discovery and other attorney's fees can accumulate over this time. By contrast, an arbitration can take place in a matter of weeks, if not days. Although this "limited discovery" can keep costs down, it also makes it more difficult for your attorney to obtain all the relevant information about the case, which in turn makes it more difficult for the attorney to explain the evidence to an arbitrator.

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Contracts for Doing Business on the Web—Clickwrap Agreements

Every day, more and more business transactions are conducted over the Internet. Many of these transactions begin with a "clickwrap agreement." Clickwrap agreements are variations on "shrinkwrap" agreements, those printed terms and conditions usually found in the packaging for software. Clickwraps basically work the same way, but the user agrees to the terms by clicking a button on his computer, instead of by opening the package and using the product. While clickwrap agreements are still widely associated with software licensing, their use has spread to a wide range of business settings, such as advertising services, telecommunications, and banking, to name only a few.

Given that clickwraps have become ubiquitous, it is prudent for businesses to consider their advantages and to be informed as to the desirable characteristics that any clickwrap agreement should have. As compared with their paper predecessors, clickwraps are easier and quicker

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Establishing Patent Priority for Interfering Patent Applications

Under the United States patent system, patents are awarded to inventors who are the first to invent, as opposed to the first to file a patent application. Unless another inventor can show that he conceived of an invention first, and was reasonably diligent in later reducing the invention to practice, the inventor who first reduces the invention to practice is entitled to the patent. "Reduction to practice" can be either constructive, such as by filing a patent application, or actual, such as by constructing a working model or prototype of a product, carrying out the steps of the invented method, or producing the composition of an invented material.

In litigation over competing, sometimes called "interfering," patent applications for the same invention, evidence of actual reduction to practice is pivotal in establishing the priority of an invention. Such evidence is the "meat on the bones" of a legal case for establishing priority in an interference proceeding. The winning party will have to show that it constructed the claimed embodiment or performed the claimed process, that the embodiment or process functioned for the intended purpose, and that there is sufficient evidence to corroborate the inventor's testimony as to the first two requirements.

Carefully Document Evidence

There is no single, exclusive method for marshaling and authenticating evidence for use in a

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Arbitrate or Litigate?

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An arbitration can also be less expensive for a client because of the lack of an appeals process. In traditional litigation, a losing party always has an opportunity to appeal an unfavorable decision, and a case is not resolved until that appeals process has run its course. However, an arbitrator's decision generally cannot be appealed, except in very limited and rare circumstances. Generally, an arbitrator's award can be overturned in Court only if there has been fraud or an abuse of discretion, which is difficult to establish. Although this has the benefit for the client of finality, it also deprives the client of the opportunity to re-litigate a wrong decision.

Arbitrations also have the benefit of privacy, because unlike traditional litigation, an arbitration dispute and the terms of any decision can remain confidential. In addition, an arbitrator is also commonly selected because of his or her familiarity with a particular industry. Unlike a judge who may know very little about the context of the dispute, an arbitrator will likely have a specialized understanding of the nature of the conflict and the surrounding circumstances.

One distinct disadvantage of arbitration is that a successful party could receive a reduced amount of interest on an award. Under Massachusetts General Laws c. 231 § 6C, a successful party in traditional litigation can receive interest on an award at a rate of 12% per annum (or at contract rate) from the date of the breach or the date of demand. However, *Sansone v. Metropolitan Property & Liab. Ins. Co.* (1991) has made clear that the statute does not apply to an arbitrator's award, and a court cannot award pre-judgment interest if the arbitrator's award is silent on the issue.

Finally, clients should also be aware that an arbitrator will generally have the authority to decide a case under Massachusetts General Laws c. 93A, the state's consumer protection statute. In the *Drywall Systems Inc. v. ZVI Const. Co., Inc.* (2002), the Supreme Judicial Court held that not only was a claim under Chapter 93A subject to arbitration, but the arbitrator could award punitive damages and attorney's fees. The Court held that the statutory right in Chapter 93A to attorney's fees overrode the statutory prohibition against an arbitrator awarding them. Clients who wish to limit multiple damage claims under 93A should do so by the terms of their agreement to arbitrate.

Clickwrap Agreements

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for a customer to accept, and more difficult for the customer to attempt to change. They provide a measure of control that is to the business's advantage. Depending on the size of the business and its market, clickwraps can be the means by which countless relationships are formed and deals are struck, so it is vital for any business using them to get all of the details correct. To ensure enforceability and to head off later legal problems to the greatest extent possible, companies should seek and use the advice of legal counsel as they create clickwraps tailored to particular businesses.

Once a business decides to use a clickwrap agreement, there are certain traits that should be considered:

- Put the steps in the right order. Before a customer is expected to pay for the product or service, or is allowed to receive it, he should be given the chance to review the entire clickwrap agreement and the option to accept or reject all of its terms and conditions.

- Identify the user. If the party who comes to a company's clickwrap represents another company, it is especially important to get identifying information that will show that the user is authorized to bind his company to the agreement. To this end, the clickwrap should have places for the user's name, the company's name, the user's title, and both e-mail and physical addresses. Of course, aside from its value for such verification purposes, the identifying information can be useful in other ways.

- Do not make the user hunt. The clickwrap should be readily apparent to a user, and the "install" or "download" button should appear only after the clickwrap is set out in its entirety. In the same vein, a checkbox indicating that the user has agreed to the terms of the clickwrap makes good sense. The idea is to prevent anyone from claiming in a later dispute that there were parts of the agreement that he could not have easily seen, and to which he did not give his assent. As for any terms that are weighted in favor of the business, making them hard to find is an especially bad idea. On the contrary, these terms should stand out, maybe even with their own "I agree" checkbox.

- Drop the legalese. As is true for any contract, a clickwrap should use clear, plain English. It is well settled in law that a court will construe ambiguous terms against whoever wrote them, that is, the business whose clickwrap is being deciphered.

- Make the clickwrap control. If there are any other dealings with the user, whether oral or written, that conceivably could be said to constitute a separate agreement, they all should explicitly defer to the clickwrap agreement. Likewise, the clickwrap itself should have language indicating that its terms override any conflicting terms in other agreements relating to the transaction.

- Keep the final word for your business. What if a user navigates successfully and accepts the clickwrap agreement, but your business determines for some reason that it wants no business relationship with that user? The business should provide itself with an escape hatch, with language in the agreement to the effect that the business must confirm the agreement before it becomes enforceable, or that the business can cancel the agreement at will.

Clickwrap agreements have gained acceptance as valid, enforceable contracts, albeit in an unconventional format. This point is illustrated by a recent federal court decision. In a breach-of-contract dispute between two software companies concerning the use of licensed software, the court hardly paused at the question of whether a clickwrap agreement constituted a valid contract. In answering "yes," the court also relied on an extensive list of prior court decisions that had reached the same conclusion. The clickwrap agreement has become a permanent part of the legal landscape for businesses and individuals alike.

Firm News

Awards

John H. Rogers, a partner of the firm and current Massachusetts House Majority Leader, received two major honors in January 2007. John received the "Beacon of Justice" award in recognition of his long-standing leadership in support of civil legal aid for low-income people. The award, presented by the Equal Justice Coalition, the Massachusetts Legal Assistance Corporation and civil legal aid organizations across the state.

John Rogers

John was also appointed Chairman of the Massachusetts House Committee on Child Abuse and Neglect. The Committee will conduct a comprehensive investigation of the care and protection provided to children in the Commonwealth of Massachusetts.

At Rudolph Friedmann, John specializes in Business Transactions, Construction Law, and Civil Litigation

RF Attorney Involved in Malden Mills Case

Herbert Weinberg, our bankruptcy specialist, has been representing the Town of Methuen regarding its claim for $1.5 million for back property taxes, water and sewer fees and a bond. Malden Mills recently filed bankruptcy, alleging it was $130 million in debt. Methuen officials are hopeful of getting paid in the bankruptcy and retained Herb to protect the obligations to the Town. Two companies so far are interested in buying Malden Mills.

Herbert Weinberg

Jim Rudolph and Jim Singer will be giving a presentation to which members of the Associated Builders and Contractors and the Gould Institute will be invited on the subject of extreme importance to those in the construction industry "Getting Paid; Lien Claims, Bond Claims; Attachments and Other Ways to Expedite the Process". The date of the seminar will April 18, 2007. If this interests you, please call Karen at the RF office for further information.

New Employees of the Firm

Priscilla McMullen has joined the firm as our part-time Marketing Director in November 2006. Priscilla has extensive experience in law firm marketing and communications and, prior to joining Rudolph Friedmann, has worked with a number of Boston-based law firms in establishing their marketing departments and served on the board of the Legal Marketing Association of New England. Early in her career, Priscilla was director of development and chief administrator at international charities in which she remains actively involved in fundraising and serving a board member.

Anthony de Luca recently joined the firm as Runner/Clerk. Anthony was Lead Screening Officer at the TSA at Logan Airport in Boston prior to joining the firm. In conjunction with working at the firm, Tony is currently working towards an art degree, concentrating on photography. He is also experienced in yoga, a special way of propelling a gondola through the water, a skill mastered by only a few.

Tony de Luca

Patent Priority

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patent priority battle, but the case of the allergy medication ingredient suggests that a meticulous approach is prudent. Examples of practices that should be in place include bound notebooks for inventors, with each page signed and dated in permanent ink not only by the creator of the notebook, but also by a disinterested but informed noninventor; placement of entries in chronological order; and initialing and dating of any corrections. Inventors should record as much detail as possible about their activities and conclusions relating to the invention, and there should be a full explanation for any supplementary materials. Finally, all of this attention to detail and following of procedures could be for naught unless the information is kept in a secure place to which there is authorized access only.