

## BUSINESS LITIGATION ALERT

NOVEMBER 2009

### Home-Field Advantage - Do Your Contracts Have Forum Selection Clauses?

**A home-field advantage is important in sports and in the courtroom.** Keeping litigation in the state of your preference provides immediate leverage in choice of law, familiarity with judges and opposing counsel, and limitation of expenses for travel to out-of-state jurisdictions. Lessons can be learned from e-Bay, as two federal courts have recently held that e-Bay's forum selection clause is valid and transferred lawsuits against e-Bay to California.

In *Tricome v. e-Bay, Inc.*, Plaintiff Domenic Tricome filed a lawsuit against e-Bay in the Eastern District of Pennsylvania alleging, among other things, fraud, negligence and breach of contract. Tricome was the owner/operator of an online store that allowed customers to purchase various types of vitamins and supplements. Tricome also listed items from his store with e-Bay. When Tricome registered with e-Bay, he explicitly clicked a box stating "I accept the User Agreement and Privacy Policy." The e-Bay User Agreement contained a forum selection clause that required disputes between e-Bay and its users to be resolved through a court action filed in Santa Clara County, California.

The Court upheld the validity of the forum selection clause and transferred the lawsuit to Santa Clara County, California. The Court held that forum selection clauses should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances. The Court found that the User Agreement was not unconscionable, that Plaintiff was an experienced businessman and had a meaningful choice not to accept the terms, and that e-Bay had a legitimate basis to avoid litigating claims all over the world. A similar result was also recently reached in *Universal Grading Service v. e-Bay* in the Eastern District of New York.

E-Bay was successful in forcing these Plaintiffs to litigate on its home turf in California, where they are more familiar with the law, judges and attorneys. Home-field advantage is important in litigation. We welcome the opportunity to speak with you regarding the application of forum selection clauses in your contracts with vendors, customers, and other business partners. ■

### Arbitration And Attorneys Fees: When Is The Last Time You Reviewed Your Contract's Arbitration Provision?

In *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, the United States Court of Appeals

for the Second Circuit analyzed an award of attorneys' fees at arbitration. ReliaStar became involved a dispute between two coinsurers regarding the scope of certain obligations under a coinsurance agreement. The agreement contained a common arbitration provision, which stated in part:

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In the event of any disputes or differences arising hereafter between the parties with reference to any transaction under or relating in any way to this Agreement as to which agreement between the parties hereto cannot be reached, the same shall be decided by arbitration. Three arbitrators shall decide any dispute or difference . . .

The arbitration provision also provided, as is very common, that each party was responsible for its own attorneys' fees. Specifically, the provision stated that "[e]ach party shall bear the expense of its own arbitrator . . . and related outside attorneys fees, and shall jointly and equally bear with the other party the expenses of the third arbitrator."

ReliaStar succeeded in obtaining a \$3,169,146 award at arbitration. In addition, the arbitrators awarded ReliaStar \$691,903 in attorneys fees and costs because EMC defended the case in bad faith. ReliaStar moved to have the award confirmed in the Southern District of New York. EMC objected to the award of attorneys' fees and costs. The District Court agreed with EMC and held that the arbitration provision clearly stated that each party was to pay its own fees and costs. ReliaStar appealed to the Second Circuit.

On appeal, the Second Circuit reversed and reinstated the award of attorneys' fees and costs. The Second Circuit found that the arbitration provision was broad and conveyed to the arbitrators the power to decide "any dispute or difference." The Second Circuit held that regardless of the attorneys' fees clause, this arbitration provision was broad enough to confer the inherent authority on the arbitrators to sanction a party that engaged in bad faith, including the award of attorneys fees and costs. The Second Circuit held that the attorneys' fees clause only applied to proceedings conducted in good faith and, therefore, was inapplicable to the present dispute.

The arbitration provision at issue in ReliaStar is very common. Every business relying on arbitration provisions in its contracts needs to reassess its agreements to ensure they will provide adequate protection against parties arbitrating in bad faith. We would welcome the opportunity to speak with you about your contracts, including the arbitration provisions. ■

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