

Schoenberg Finkel Newman & Rosenberg, LLC (312) 648-2300

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TO ARBITRATE OR TO LITIGATE: OVERLOOKED PART OF MANY CONTRACTS

Special Interest Articles

TO ARBITRATE OR TO LITIGATE: OVERLOOKED PART OF MANY CONTRACTS

By: Norman T. Finkel

RECENT UPDATES REGARDING THE BIOMETRIC INFORMATION PRIVACY ACT

By: Andrew S. Johnson

About Our Law Firm

We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

LEGAL PRACTICE AREAS:

- *Corporate and Other Business Transactions*
- *Employee Benefits*
- *Employment Law*
- *Estate Planning, Probate and Trust Administration*
- *Health and Fitness Industry*
- *Independent Sales Representatives*
- *Intellectual Property Law*
- *Litigation and Alternative Dispute Resolution*
- *Mergers, Acquisitions and Business Sales*
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- *Real Estate Tax Reduction*
- *Securities, Futures and Derivatives*
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Many companies devote hours negotiating the "substantive" terms of a contract, but pay little attention to the dispute resolution clause often included among boilerplate terms at the end of the contract. This is a risky practice, since rights that were carefully bargained for may effectively be lost if the "right" dispute resolution procedure is not negotiated at the outset.

When it comes to dispute resolution clauses, there is no one-size-fits-all solution. Those negotiating the agreement must fully understand the dispute resolution options available and their implications in different contexts. Because arbitration is a creature of contract, the ability to negotiate those procedures upfront can be a gold mine for the astute or a minefield for the uninformed. The following are some of the threshold issues that may be explored when negotiating a dispute resolution clause.

Specialized Knowledge of the Arbitrator(s)

Perhaps the greatest potential benefit of arbitration is the ability to select the person(s) who will resolve the dispute. Judges and jurors are not likely to have expertise on the subject matter of the dispute and they may have no experience in operating a business. Arbitrating before one or more experts in the relevant industry may provide a more efficient and satisfying result, especially in complex cases.

Publicity/Confidentiality

A compelling advantage of arbitration is the option to keep the proceedings confidential. This can provide great value to a company that prefers to avoid publicity or fears developing a reputation as a litigious actor or an easy target. The ability to keep dispute resolution proceedings confidential can also be critical when a dispute involves commercially sensitive matters such as trade secrets and business strategies. Of course, confidentiality is not always desirable, and some view the lack of transparency as making the process more likely to be tainted or biased. This issue should be considered at the outset and not postponed until after a dispute arises.

Fees and Costs

Minimizing costs and legal expenses is always important, but the issue merits focused attention when selecting a dispute resolution procedure. Although arbitration will often be less expensive than litigation, that will not always be the case. Arbitration costs that would not arise in a courtroom include hourly fees for the arbitrators, as well as the arbitral forum's own case administration fees. These fees can be substantial. A well-known arbitrator may charge \$3,000 - \$4,000 per day, while the arbitration filing fee itself could be upwards of

\$10,000. In contrast, judges are not paid by the parties, and the courthouse filing fees generally pale in comparison to those assessed in arbitration. The difference is certainly worth considering.

Of greater significance is the common misperception that arbitration will always minimize attorneys' fees. Often, the discovery process is narrow and motion practice is more limited in arbitration. On the other hand, some arbitrators allow for broad discovery since limiting discovery can make it more difficult to try a case effectively. Conversely, some courts place the same type of limits on discovery and motion practice that are often employed in arbitration. In these courtrooms, litigation may be as cost efficient as arbitration. In negotiating arbitration provisions, the parties can agree on what the process will look like, including discovery rights and motion practice. In sum, arbitration *may* be less expensive than litigation, but that will depend on the arbitration procedures to which the parties agree.

Speed of the Case

The ability to obtain a more speedy resolution can be a significant advantage of arbitration. In fact, some arbitration agreements require the arbitrators to resolve matters within short deadlines. Yet, arbitrations can proceed just as slowly as litigation when the issues are complex, when the parties are numerous and/or dispersed and when the parties have agreed to court-like pretrial procedures. When expediency is an issue, careful attention must be paid to the forum selection.

How the Dispute Will be Resolved

An often overlooked distinction between arbitration and litigation is the basis for the outcome. In litigation, the judge is constrained to rule based on the law. Arbitrators have greater flexibility in considering the same body of law, and they also have discretion to consider evidence that may otherwise be excluded in a courtroom. In addition, the decision of judges and juries are subject to appeal. In contrast, an arbitrator's decision generally cannot be appealed unless it can be established that the arbitrator exceeded his or her authority or that the decision was obtained through illegal means. The inability to appeal an arbitrator's decision requires careful consideration in deciding whether to litigate or arbitrate.

The above considerations in deciding whether to litigate or arbitrate are not exhaustive, but they demonstrate the complexity of an issue that is often overlooked in contract negotiations and the importance of addressing the issue head-on and early-on.

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Recent Recognitions

We are proud to announce that LeadingLawyers.com added partners **Bruce E. Bell** and **Michael S. Friman** to our current list of *Leading Lawyers**. Also newly recognized is associate **Andrew W. Bell** as an *Emerging Lawyer** for 2019.

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Firm Accolades

After a two-day arbitration in Los Angeles, partner **Richard M. Goldwasser** prevailed in an unpaid commissions dispute for an independent sales representative in the medical supplies field. On April 6, 2019, finding the manufacturer's failure to pay the outstanding commissions was willful, the arbitrator entered a six-figure award for the sales rep, including three times the unpaid commissions, plus interest, attorney's fees and costs.

Partners **Norman T. Finkel** and **Richard M. Goldwasser** achieved a significant victory for two owners of commercial properties in Lake County following an evidentiary hearing conducted over three months in the Nineteenth Judicial Circuit Court of Illinois. Defending against allegations of multi-million-dollar fraud, mismanagement and waste, Norm and Rich defeated the plaintiff's petition seeking a preliminary injunction and the appointment of a receiver.

Welcome Aboard....

Schoenberg Finkel Newman & Rosenberg, LLC welcomes its newest attorneys to our team: **Alena Jotkus**, **Andrew S. Johnson** and **Maggie M. Dugan**.

Notable Publications

On April 19th, *Forbes* contributor Larry Light featured an interview with **Bruce E. Bell** entitled "Remarried? Here's How to Take Care of Your Kids from Before." In this interview, Bruce provides advice on how to structure your 401(k) or other qualified plan benefits so that upon death, they can be paid to someone other than your second spouse.

LinkedIn

If you have a LinkedIn account, please take a moment to follow our Firm page. We post new articles (not always included in our Firm newsletters), as well as Firm news and accolades.

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The Illinois Biometric Information Privacy Act (the "Act")¹ is a privacy rights law that applies both inside and outside the workplace. Employers and business owners in Illinois should be aware of the law, its requirements and the consequences of a violation. The Act is particularly relevant due to a recent Illinois Supreme Court decision which held that any person aggrieved by a violation of the Act may recover damages from the offending party without having to prove damages. Simply by violating the Act, a private entity may be subject to a costly lawsuit and damages.

What Does the Act Regulate?

The Act imposes restrictions on how private entities collect, retain, disclose and destroy biometric identifiers. As defined in the Act, a "Biometric identifier" is "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." The Act defines "Biometric information" as "any information, regardless how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual."

Significantly, the Act requires that private entities must develop written policies, made available to the public, that establish a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for the collecting or obtaining of such identifiers or information has been satisfied, or within three years of the individual's last interaction with the private entity, whichever occurs first.

In addition, the Act prohibits a private entity from collecting, capturing, purchasing, receiving through trade, or otherwise obtaining, a person's or a customer's biometric identifier or biometric information, unless it first:

- informs the person or the person's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;
- informs the person or the person's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
- receives a written release executed by the person or the person's legally authorized representative of the biometric identifier or biometric information.

What Happens if the Act is Violated?

The Act provides a cause of action to any person aggrieved by a violation. Recently, in the 2019 case of *Rosenbach v. Six Flags Entm't Corp.*, the Illinois Supreme Court ruled that "an

individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an "aggrieved" person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act."² Thus, if a person proves a violation of the Act, he or she is entitled to relief without having to prove actual damages beyond a violation of the Act. This is especially significant, as the Act allows recovery for each violation. The Act provides that a prevailing party may recover for each violation:

- against a private entity that negligently violates a provision of this Act, liquidated damages of \$1,000 or actual damages, whichever is greater;
- against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of \$5,000 or actual damages, whichever is greater;
- reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and
- other relief, including an injunction, as the state or federal court may deem appropriate.

Cases Involving the Act

In December 2016, the first reported class action settlement under the Act occurred between L.A. Tan Enterprises, Inc. and a class of the franchise's customers who claimed that L.A. Tan had failed to properly handle their biometric information.³ In the settlement, L.A. Tan reportedly agreed to pay \$1.5 million to the class members and also agreed to establish procedures to comply with the Act.

In April 2019, the First District Appellate Court considered the Act in connection with a class action by employees against their employer and held that claims under the Act were not subject to arbitration under the employment agreements at issue.⁴

Given the language of the Act and the Illinois courts' interpretation of claims brought pursuant to the Act, employers and business owners need to be aware of the Act's requirements and the consequences of a violation. Otherwise, the Act can easily be an expensive trap for the unwary.

¹ The Act is contained in the Illinois Code at 740 ILCS 14/1 *et seq.*

² See *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186 ¶ 40.

³ See *Sekura Klaudia v. L.A. Tan Enterprises, Inc.*, Cook County Case No. 2015-CH-16694.

⁴ *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645.