

## 10 Tips For Crafting A Forum Selection Clause

*Law360, New York (March 21, 2014, 3:16 PM ET)* -- Clients often ask whether all those “boilerplate” clauses at the end of a commercial contract are really necessary, and if so, why can’t they just be copied and pasted from earlier agreements. This article will focus on just one such clause, the “forum selection” clause, and hopefully persuade you that such clauses are critical and require careful consideration from lawyers and clients alike.

### The Benefits of Choosing Your Forum

Let’s use an example to set the stage: Imagine you are a business in New York and have just negotiated an important agreement with a key supplier in California. The economic terms of the contract are favorable to you, so in your desire to close the deal, you instructed your lawyer not to worry too much about those boilerplate clauses at the back of the contract, and you did not include any clause indicating the forum in which any later disputes would be decided.

After the post-closing honeymoon is over, a dispute emerges. While you are attempting to work it out with the supplier, it preemptively sues you in California, simply to gain home field advantage. You now face the prospect of having to obtain local counsel in California, deal with the unfamiliar rules there, and most importantly, your witnesses, and perhaps the better part of your management team, may well have to make multiple trips to California over the next couple of years to attend depositions and hearings and meet the other requirements of the case.

The absence of a forum selection clause in your contract has not only guaranteed that you will have to deal with legal proceedings 3,000 miles away, but also has induced your counterparty to start a lawsuit even as negotiations were pending, simply to gain a tactical advantage in the event that negotiations fail. The hypothetical can be made even starker: Imagine the supplier is not in California, but in a foreign country whose courts you do not trust to resolve your dispute fairly and efficiently and whose government may have close ties to your counterparty.

As these examples show, forum selection clauses provide several important benefits. First, they provide certainty. It can take untold expense and months of time to fight in two or more jurisdictions. A well-crafted forum selection clause will nip this in the bud and allow the parties to deal with the merits of their dispute without a prolonged and expensive procedural battle.

Second, forum selection clauses can make parties less trigger happy. If there is no forum selection clause in a contract, each side will have an incentive to race to the courthouse to lock in home field advantage as soon as a dispute arises. (Many courts apply the “first filed” rule under which the first-filed case will be permitted to take precedence.) The absence of a forum selection clause thus can impede the parties’

ability to negotiate their differences prior to the expense of filing a lawsuit.

Third, although all lawsuits are potentially costly, cases in inconvenient forums can impose costs and other problems that are particularly burdensome and unwelcome. If a case will involve multiple depositions, for example, the travel time and distraction of those depositions and the sheer distraction on management's time could be a substantial deterrent to continuing the fight.

Fourth, not all courts are equal when it comes to expertise, experience, fairness and predictability. Many parties select forums such as Delaware or New York because the courts there have well understood rules and frequently deal with complex commercial disputes. More remote forums, and courts in other countries, may not be as familiar with standard commercial dealings or the customs and usages of the parties. Even when choosing among relatively sophisticated forums, local rules and procedures may vary in ways that matter a great deal to the outcome. Jury pools differ from place to place. And not every forum moves cases equally quickly. Some courts, particularly in foreign jurisdictions, can take many years to resolve even a basic commercial dispute. Failing to choose a forum that can resolve your dispute in an acceptable time frame can effectively deny you a forum altogether.

### **Things to Think About When Crafting Forum Selection Clauses**

So a forum selection clause is an important part of any business contract. But what are the issues you need to keep in mind in crafting a forum selection clause? The following is a non-exhaustive list.

**1. *Mandatory vs. Non-Mandatory.*** A forum selection clause is mandatory if it requires the parties to litigate a dispute in a particular forum. Many forum selection clauses, however, are not mandatory, and simply say that the parties "may" or "can" bring a lawsuit in a particular place, meaning that the forum is simply one of various acceptable options. If you want certainty, make sure your forum selection clause uses forceful, mandatory language, such as "shall" or "will," and specify that the designated forum is "exclusive."

**2. *Scope.*** Having a forum selection clause in your contract does not necessarily guarantee that every dispute you have with your counterparty will be decided in that forum. Imagine your clause says that disputes "concerning this contract" will be decided in forum X. What if your counterparty accuses you of fraud or a business tort? Would that be decided in forum X? Perhaps not. For greater certainty, use a broad clause, such as that applies to "any and all disputes arising out of, in connection with, or relating to this agreement and/or the transactions and relationships among the parties contemplated by this agreement."

**3. *Enforceability and Nexus.*** Can you and your counterparty force the courts of your selected forum to decide your dispute? Sometimes not. Although forum selection clauses are generally enforced, some courts will decline to enforce such a clause if the contract or parties have no connection to the forum. Courts also may decline to enforce forum selection clauses where the parties' negotiating power was unequal, or the application of the clause may result in unfairness (such as in consumer transactions), or the forum selection clause might violate public policy. Make sure you understand the rules of your chosen forum in this respect, or choose a forum whose rules allow it to be selected even absent any connection. New York's General Obligations Law § 5-1402(1), for example, provides that if an agreement creates an obligation of at least \$1 million and the parties have stipulated to the exclusive jurisdiction of the New York courts, the New York courts will decide the case even if other forums might have a stronger connection to the parties or the subject matter of their dispute.

**4. Personal Jurisdiction.** Courts will decide a dispute only if they also have personal jurisdiction over the parties. To avoid a problem where a party agrees to a forum but then argues it cannot be sued there due to a lack of personal contacts with the forum, make sure your contract has the parties agree to personal jurisdiction in the forum. For maximum efficiency, the parties might also waive personal service or other service requirements.

**5. Forum Selection Clauses and Arbitration.** Some believe that simply because they have an arbitration clause, they need not worry about forum selection. Not necessarily so. Once the arbitration is won, there must be access to a court to enforce the award. And in the absence of a forum selection clause, the parties might dispute which forum is appropriate for that proceeding. Avoid this problem by adding a sentence to your arbitration clause specifying the court in which any arbitration award may be enforced.

**6. Federal vs. State Courts.** Some forum selection clauses say that any disputes will be resolved “in the federal courts” or “in the business litigation session” of a particular state or city. But federal courts are courts of limited jurisdiction, as are most business or complex litigation sessions, and simply stating your preference to litigate there is not enough to ensure that the dispute can be dealt with there. And if it cannot be dealt with there, your forum selection clause is then unenforceable. To avoid this problem, many clauses choose the “federal or state courts” of a particular location, or simply do not specify which courts within a particular geography. If your preference is to be in federal court, the clause can specify “the federal courts of X, or, in the event the federal courts of X do not have jurisdiction, the state courts of X.”

**7. Non-Signatories.** Can forum selection clauses bind entities that are not parties to the contract? In some circumstances, where the non-parties are related to one of the contracting parties and the dispute involves the same subject matter as one that is subject to a forum selection clause, the courts may conclude that the disputes can or should be addressed in the chosen forum, even when they involve a non-party. But the general rule is that a party is not bound by a contract he or she did not agree to. If there are people or entities involved in the transaction who would likely be involved in any later dispute, the safest solution is to have them agree to the forum in advance.

**8. Multiple Agreements.** Many business transactions involve several related agreements. What happens if only one of the agreements has a forum selection clause? In some courts, an analysis is performed to determine whether the agreements should be viewed as part of a unitary transaction, in which case the forum selection clause in the main agreement might apply to disputes arising under a related agreement. But for greater certainty, it is always best to have all of the related agreements include or at least incorporate the same forum selection clause.

**9. Choice of Law vs. Choice of Forum.** It is important to remember that choosing where the dispute will be decided is not the same as choosing what jurisdiction’s law will govern the dispute. It is possible for those choices to be different ones: for example, the parties may agree to a New York court applying Delaware law. Keep in mind that the forum selection clause locks in the geographic location, and the procedural rules that will apply to your dispute, but not necessarily the governing principles of law or how your contract will be interpreted.

**10. Breaches of Forum Selection Clauses.** What are the consequences of a party suing somewhere other than the specified forum? In general, the recourse is simply to have the improperly initiated lawsuit dismissed. In some jurisdictions, however, making the forum selection clause a “covenant” might entitle the aggrieved party also to sue for damages resulting from the breach.

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In the euphoria of signing a business deal, no one likes to think of the possibility of later lawsuits. But a few minutes of thought about a well-crafted forum selection clause can save months or years of anguish and inconvenience. Although there is no single “right forum” for all disputes, in most cases, the clearly wrong answer is not to address forum selection at all.

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