

More Than Just Boilerplate: Choice of Law, Venue and Forum Selection Clauses

The impact of a choice of law, venue or forum selection clause can significantly impact the outcome of a case. Therefore, careful attention must be given when drafting or seeking to enforce these clauses.

Choice of law clauses determine, regardless of the venue, what law applies to this dispute. A choice of law clause provides certainty as to the applicable governing law in the case of a subsequent dispute. The way the clause is drafted can affect whether the substantive law, procedural law, or both apply to the dispute and the scope of the claims subject to the choice of law clause, for example, statutes of limitations. These are creatures of contract and are generally given effect as they are considered a clear manifestation of the parties' intentions. *Mountain States Adjustment v. Cooke*, 412 P.3d 819, 822 (Colo. App. 2016). A court may not uphold a choice of law provision however if there is no reasonable basis for the choice or if applying the chosen state's law would be contrary to the fundamental policy of the state whose law would otherwise govern. *Id.*

A forum selection clause allows the parties to agree that any disputes relating to that contract will be resolved in a specific forum. Forum selection clauses are generally enforceable, unless application of the selected forum is unfair or unreasonable or was induced by fraud. *ABC Mobile Systems, Inc. v. Harvey*, 701 P.2d 137, 139 (Colo. App. 1985); *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972). The burden of proving a forum selection clause is unfair or unreasonable is on the party seeking to avoid its effect. *Adams Reload Co., Inc. v. International Profit Associates, Inc.*, 143 P.3d 1056, 1060 (Colo. App. 2005). Mere inconvenience or additional expense is not enough to declare a forum selection clause unreasonable. *Id.*

An often-fought issue is whether a forum selection clause is mandatory or merely permissive. The difference between these is that a mandatory forum selection clause will contain clear language that jurisdiction is appropriate only in the designated forum. Permissive forum selection clauses authorize jurisdiction in a designated forum but do not prohibit litigation elsewhere. *American Soda, LLP v. U.S. Filer Wastewater Group, Inc.*, 428 F.3d 921, 926-27 (10th Cir. 2005). These battles generally appear when arguing over venue in different courts, where the court will be stricter in interpreting a mandatory clause than when evaluating an arbitration clause.

Arbitration is a form of forum selection; however, unlike a court forum selection clause, the use of "may" submit to arbitration is generally enough to compel the parties to arbitration. Arbitration clauses are typically upheld because of the strong public policy in favor of arbitration. However, the presumption in favor of arbitration is not without limits. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute beyond that which he agreed to submit.

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