



A Contract's "Miscellaneous" Section

Part 1: Governing Law and Forum Selection Provisions

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In the best of all possible worlds, engineers and their clients will negotiate their contract, the engineer will provide the agreed-upon services, and the client will pay the agreed-upon amount. In the real world, there is always the chance that something will go wrong, there will be a dispute, and the dispute will result in arbitration or litigation. In such cases, some of the seemingly innocuous provisions in the "Miscellaneous" section of the design agreement can take on alarming significance. Two such provisions are the Governing Law and Forum Selection provisions.

A *governing law* provision, also referred to as a *choice of law* provision, specifies that the law of a designated jurisdiction will govern disputes arising out of the agreement, regardless of where the dispute is adjudicated. A *forum selection* provision specifies the location of the adjudication. Since these concepts are often contained in the same section of the agreement, they are sometimes blurred together. However, it is important to understand the difference between the two. This article looks at governing law provisions; a second article will look at forum selection provisions and the closely related venue selection provisions.

Governing Law

The law of contracts (the law that courts use to interpret contracts) is primarily state, as opposed to federal, law. In the U.S., all states except Louisiana are common law states, which means that when there is no statute addressing an issue, the issue will be decided under the law that has developed through previous case decisions. This is referred to as a common law system and was inherited from the English court system. (Louisiana inherited its legal system from France and thus has a civil law system. Under a civil law system, there is less emphasis on previous case decisions and more emphasis on the laws passed by the legislature, as codified into the governing code.)

Common law legal systems follow the principle of *stare decisis*, which holds that a dispute involving the same issues as a previously decided case must be decided in the same way. However, when the court in a particular state decides a dispute, only the cases

from that state are binding on the court. The court might look to cases in other states for guidance, particularly if it is a "matter of first impression" (there is no relevant case law in that state), but the cases of other states do not create binding precedent. The courts of one state can interpret the wording of a contract completely differently from the courts of another state.

Also, there are a number of statutes (laws passed by the state legislature, like mechanic's lien laws and anti-indemnity statutes) that apply to design agreements, and the laws of different states can be very different. As a result, which state's law governs a dispute can have a significant effect on the outcome.

A governing law provision attempts to ensure that the law of a designated jurisdiction will govern the dispute. For a project in the U.S., the specified jurisdiction would be a state. For an international project, the specified jurisdiction could be a country, if the country only had one legal system, i.e. "the laws of Sweden." In countries such as the U.S., Canada, and Mexico, which have a federal system of government with both federal and state or provincial courts, the appropriate state or province must be specified.

Choice of Law – Enforceability

Historically, courts would not enforce governing law provisions, as they were viewed as an attempt by private parties to usurp the legislative function by selecting which law would apply to their transaction. However, courts now give greater emphasis to the parties' right to contract on whatever terms they choose unless there is an overriding public policy concern. Courts generally hold that governing law provisions

are presumptively enforceable as long as there is some relationship between the transaction and the jurisdiction whose law would govern.

Conflicts of Law Principles and Governing Law Statutes

In addition to its *substantive laws* (also referred to as its *internal laws*), each state will have procedural choice of law principles that govern when its laws will apply. It is common in choice of law provisions to say that the laws of a particular jurisdiction apply "without giving effect to its conflict of law principles." This carve-out is used to make sure that the conflicts of law principles of the chosen state's laws do not result in the application of another state's law, thereby circumventing the intention of the parties. Sometimes the choice

Table of statutory governing law provisions.

State	Statute
Arizona	Ariz. Rev. Stat. § 32-1129.05
Colorado	Colo. Rev. Stat. § 13-21-111.5(6)(g)
Connecticut	Conn. Gen. Stat. Ann. § 42-158m
Illinois	815 ILCS 665/10
Indiana	Ind. Code § 32-28-3-17
Kansas	Kan. Stat. Ann. § 16-121(e)
Louisiana	La. Rev. Stat. § 9:2779
Minnesota	Minn. Stat. § 337.10
Montana	Mont. Code § 28-2-2116 (1)
Nebraska	Neb. Rev. Stat. § 45-1209
Nevada	Nev. Rev. Stat. Ann. 108.2453(2)
New Mexico	N. M. Stat. Ann. § 57-28A-1
New York	N.Y. Gen. Bus. Law, Chapter 35-E, § 757
North Carolina	N.C. Gen. Stat. § 22B-2
Ohio	Ohio Rev. Code § 4113.62 (D)
Oklahoma	Ok. Stat. Ann. tit. 15, § 15-821
Oregon	Or. Rev. Stat. § 701.640
Pennsylvania	73 Pa. Stat Ann. §514
Rhode Island	R.I. Gen. Laws § 6-34.1-1(a)
Tennessee	Tenn. Code § 66-11-208(a)
Texas	Tex. Bus. & Com. Code Ann. § 272.001
Wisconsin	Wis. Stat. § 779.135 (2)

of law provision will specify that only the “substantive laws” or “internal laws” of a particular state apply so that the conflict of laws principles do not come into play.

While the “without giving effect to its conflicts of law principles” language is often included as a matter of course in governing law provisions, it is not really necessary. Conflicts of law principles are only relevant to contracts that do not contain a valid governing law provision. If the contract unambiguously states that the laws of a particular jurisdiction apply, a court is unlikely to invalidate the parties’ agreement based on conflicts of law principles, as long as there is a reasonable basis for choosing the law of that jurisdiction. However, there are specific statutory governing law rules that cannot be modified by contract. In particular, 22 states have passed laws that require the state’s laws to govern contracts for design and construction projects in the state, regardless of the parties’ wishes. The *Table* provides a listing of these states and a citation to the relevant section of the code. In general, the language of these laws is similar to that of the Ohio code: *Ohio Rev. Code § 4113.62 (D)(1) Any provision of a construction contract, agreement,*

understanding, or specification or other document or documentation that is made a part of a construction contract, subcontract, agreement, or understanding for an improvement, or portion thereof, to real estate in this state that makes the construction contract or subcontract, agreement, or other understanding subject to the laws of another state is void and unenforceable as against public policy.

The only one that is significantly different is the Pennsylvania law, which only applies to claims for payment. (The governing law statute is a provision of the Pennsylvania Contractor and Subcontractor Payment Act.)

Conclusion

A client that has properties or projects in several states will typically want all of its design agreements to be governed by the law of the state in which it has its headquarters. This simplifies matters for its legal team, as the lawyers do not have to research the case law and statutes of different states. For the same reason, a design professional will likely want all of its design agreements to be governed by the law of the state in which it has its principal office. If the project is in

a state such as Massachusetts, which does not have a governing law provision, the parties are free to negotiate which state’s law will be used to settle disputes. Part 2 of this series will look at forum and venue selection provisions; Part 3 will look more closely at some of the state laws applicable to design agreements as well as some of the factors to consider when negotiating which state law will govern an agreement.▪

Disclaimer: The information in this article is for educational purposes only and is not legal advice. Readers should not act or refrain from acting based on this article without seeking appropriate legal or other professional advice as to their particular circumstances.

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