



A Contract's "Miscellaneous" Section

Governing Law and Forum Selection Provisions: Part 2

By Gail S. Kelley, P.E., Esq.

Design agreements often contain a *governing law provision* which specifies that the laws of a designated jurisdiction will govern any disputes arising from the agreement. Likewise, design agreements often contain forum or venue selection provisions that specify where the adjudication of any disputes will take place. Part 1 of this series (STRUCTURE, February 2018) provided an overview of governing law provisions and the state statutes that apply to these provisions in design agreements. This second part will look at forum and venue selection clauses.

Venue Versus Forum

Although the words "venue" and "forum" are often used interchangeably when establishing where an adjudication will take place, there is a difference. Forum refers to the state; venue refers to the actual location of the court. For litigation arising from a design agreement taking place in state court, the venue would be the specific county; for a federal court, the venue would be the specific district.

An example of a forum selection provision would be: *Any litigation of disputes arising under this Agreement shall take place in a court of competent jurisdiction in New York.* A venue selection clause necessarily also specifies the forum. An example of a venue selection provision for state court would be: *Any litigation of disputes arising under this Agreement shall take place in the County of Kings, New York.* An example of a venue selection provision for federal court would be: *Any litigation of disputes arising under this Agreement brought in Federal Court shall take place in the Southern District of New York.*

Forum Selection

Selection of the forum state (the state in which the adjudication of disputes will take place) can have a significant effect on the cost of a litigation. Much of the administrative work required for dispute resolution can be done remotely via electronic filing and conference calls. Nevertheless, a certain amount of travel to the forum state will be required; dispute resolution that takes place in a distant state can result in considerable travel expenses and time for both witnesses and legal personnel. An agreement to submit any disputes to resolution

in a state other than the state where the engineer has its office, or the project is located, should be considered carefully.

Jurisdiction Requirement

Forum selection clauses are sometimes worded as jurisdiction selection clauses. Jurisdiction refers to the court's power to rule on a dispute, or more precisely, the court's power over the defendant (the party being sued). In general, the courts of a particular state will not have power over a defendant unless it is domiciled in that state, or it has consented to jurisdiction. Thus, a design agreement might contain the provision: *The parties agree to submit to the jurisdiction of the courts of New York.* The parties are agreeing that the courts of New York have the power to rule on disputes arising from the Agreement and are waiving their right to claim that New York does not have jurisdiction. As worded, however, the provision does not require that disputes be adjudicated in New York, it merely says they can be. If the parties want to specify that New York will be the forum state, they would need to state that New York had exclusive jurisdiction, i.e., *The parties agree to submit to the exclusive jurisdiction of the courts of New York* or *The parties agree to submit all disputes arising under this Agreement to the jurisdiction of the courts of New York.*

Forum Selection Statutes

As discussed in Part 1 of this series, 22 states have passed laws which require the state's laws to govern contracts for design and construction projects in the state, regardless of the parties' wishes. This is essentially an exercise of the state's "police" power; under the U.S. Constitution, states are granted the power to establish and

enforce laws protecting the welfare, safety, and health of their inhabitants.

Most of the states which require that their law apply to design and construction projects also require that the arbitration or litigation concerning the project take place in the state. There are a few exceptions, however. While Colorado requires that every construction agreement affecting improvements to real property within the state of Colorado be governed by Colorado law, it does not require that disputes arising from these agreements be adjudicated in Colorado. In contrast, California, Florida, and Virginia require that adjudication take place within the state but do not require that the state's law governs the dispute. Theoretically, however, if adjudication is taking place in the state's court,

Table of states with statutes governing forum for resolution of disputes arising from design agreements.

State	Statute
Arizona	Ariz. Rev. Stat. § 32-1129.05
California	Cal. Civ. Proc. Code § 410.42(a)
Connecticut	Conn. Gen. Stat. Ann. § 42-158m
Florida	Fla. Stat. Ann. Ch. 47.025
Illinois	815 Ill. Comp. Stat. Ann. 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 – only applies to claims for payment
Rhode Island	R.I. Gen. Laws § 6-34.1-1(a)
South Carolina	S.C Code Ann. § 15-7-120.A – not law
Tennessee	Tenn. Code § 66-11-208(a)
Texas	Tex. Bus. & Com. Code Ann. § 272.001
Virginia	Va. Code Ann. § 8.01-262.1
Wisconsin	Wis. Stat. § 779.135 (2)

the court would be more likely to override a provision requiring the use of another state's laws, on the grounds that the result would be contrary to the public policy of the forum state.

The *Table* (page 47) provides a listing of the states that have forum selection statutes and a citation to the code section. Many of these statutes use language similar to that found in the Ohio Code:

Ohio Rev. Code Ann. § 4113.62(D) (2) Any provision of a construction contract, agreement, understanding, 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 requires any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding to occur in another state is void and unenforceable as against public policy.

Void Versus Voidable

The majority of the governing law and forum selection statutes state that a provision which

specifies that another state's law will govern the design agreement or requires adjudication of disputes to take place in another state is "void." This means that if either party to the agreement challenges the provision and the dispute falls within the provisions of the statute, the court will not enforce the provision.

However, the Rhode Island and Texas statutes state that if a provision specifies that another state's law will govern the design agreement or adjudication of disputes will take place in another state, the provision is *voidable by the party that is obligated by the contract to perform the construction or repair*. This means that only the design professional would be entitled to challenge the provision.

Whether a provision is void or voidable, if neither party to the agreement challenges the provision, a court is unlikely to decide it is unenforceable on its own initiative (*sua sponte*), provided it has jurisdiction over the dispute. For example, if the design agreement for a bottling plant in Cincinnati specified that litigation of any disputes would take place in New Jersey using New Jersey law (because the bottler's headquarters are in New Jersey), and neither party challenged the provisions, the New Jersey court would probably not *sua sponte* bring up the fact that the provisions violated Ohio Rev. Code Ann. §4113.62(D).

Conclusion

Part 3 of this series will look at some of the issues that might come into play when the parties are negotiating which state's law will govern a design agreement and will take another look at some of the state statutes for forum selection. ■

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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