



Venue Menu: Venue, Forum, and Choice of Law April 11, 2019

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Set the Table

Basic Terminology

- Venue / Forum: Often interchangeable terms
 - Place (State, County)
 - Tribunal (Court (Fed / State), AAA)
- Law: Law AND RULES (State, Fed., AAA)



The Venue Menu

- Appetizer (Where disputes will be decided):
 - Too often not considered beyond ‘home court’
 - location
 - Convenience
 - Subpoena power
- First Course (Tribunal):
 - Courts:
 - Federal
 - State
 - Business Court (Many states have this)
 - Arbitration
 - AAA, JAMS
 - Back of the House (how to get into or out of a tribunal)
- Second Course: Choice of Law
- Dessert:
 - Drafting considerations



Appetizer

(Picking where to litigate - home or away?)

- Considerations:
 - Contract
 - Timing
 - Familiarity
 - Costs
 - Access
 - Peace of Mind
 - Challenges / Enforceability
- Strategy: Can vs. Should



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First Course

(Picking the Tribunal: Fed. vs. state vs. arb.)

- Considerations (similar to 'where'):
 - Contract
 - Electronic filing
 - Timing
 - Familiarity
 - Costs
 - Access
 - Peace of Mind
 - Challenges / Enforceability
 - Strategy: Can vs. Should



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Arbitration Pros and Cons

Pros of Arbitration

- Speed
- Limited discovery
- Confidentiality
- Option of multiple arbitrators, which can increase neutrality
- Control of selection of arbitrators
- Arbitrators unlikely to give excessive damages

Cons of Arbitration

- Speed
- Limited discovery
- Procedural quirks
- Loose rules on admissibility
- Arbitrator has no appellate check
- Arbitrators have to be paid



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Back of the House

Basics of Removal and Remand

- You've decided on federal or business court – now what?
- Five basic issues
 1. Jurisdiction
 2. Mechanics
 3. Costs
 4. Timing
 5. Opposition



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Back of the House

Basics of Removal and Remand

Issue 1: Jurisdiction

- Federal
 - Federal Question
 - Diversity + \$75,000 in dispute
- NC Business Court
 - Certain business disputes enumerated in statute
 - “Mandatory”: Corporate, securities, antitrust, IP, trade secrets, and big contract disputes (>\$1M, everyone consents)
 - “Mandatory mandatory”: Above and > \$5M, certain tax disputes



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Back of the House

Basics of Removal and Remand

Issue 2: Mechanics

- Federal
 - Notice of Removal
 - Notify state court of removal
- NC Business Court
 - Notice of Designation
 - Notice to Chief NCBC Judge and Chief Justice Sup. Ct.



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Back of the House

Basics of Removal and Remand

Issue 3: Cost

- Federal
 - \$400
- NC Business Court
 - \$1,100



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Back of the House

Basics of Removal and Remand

Issue 4: Timing

- Federal
 - 30 days from **receipt** of complaint
 - Or, first “paper” showing case is removable
 - 1 year hard deadline (diversity cases)
 - Multiple Defs. -- all must consent
- NC Business Court
 - 30 days from **service** of complaint



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Back of the House

Basics of Removal and Remand

Issue 5: Opposition

- Federal
 - Jurisdictional challenge (e.g., not a federal question)
 - Can be raised any time
 - Procedural challenge (e.g., removal was untimely)
 - 30 days from **service** of notice of removal
- NC Business Court
 - 30 days from **service** of notice of designation



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Second Course

Choice of Law

- Choice of law can make a HUGE difference.
 - Causes of action / Claims
 - Defenses
 - Fee shifting
 - Punitive damages / class action waivers;
 - Statutes of limitation and repose
 - Predictability



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Choice of Law Hypothetical

- Accident = injury at Defendant's bike store in NC.
- Plaintiff = SC Resident.
- Defendant = CA Corp with NC store.
- Suit filed in SC.

- Who's law applies?



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Choice of Law Hypo Analysis

- Who's law applies?
- Analysis:
 - Choice of Law Rules
 - Lex Fori (Law of the forum) = typical
- Various Choice of Law Tests:
 - Lex Loci contractus
 - Lex Loci delicti
 - Most significant relationship



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Choice of Law Hypo Analysis

- First Question:
- “Procedural” (law of forum);
 - Statute of Limitations = usually procedural – but check;
- “Substantive” (choice of law analysis)?
 - Contributory negligence = substantive;



Choice of Law

Strategy Considerations

- Law Impacts forum selection – where you sue?
- Whether and when to raise the issue?



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Choice of Law Matters (Cont'd)

- Examples when it mattered:
 - contributory vs. comparative negligence;
 - Statute of limitations NC / SC (1 yrs vs. 2 yrs) – but different states treat SOL differently;
 - Attorney fee shifting;
 - Class action waivers;
 - Statute of repose;
 - Strict product liability;



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Choice of Law

Lessons

- Every state has its quirks;
- Thorny analysis that is often overlooked;
- Research the basics – statute of limitations, etc.;
 - And/or consult with counsel in non-forum states;
- Early analysis can impact the result;



DESSERT

Drafting – Practical Considerations

- Important, but not a commercial term;
 - Typically (and unfortunately) an afterthought;
- Considerations:
 - Forum or Tribunal = Mandatory or Permissive?
 - Floating/Reciprocal – Why?
 - Convenience? Forum / Law should have relationship with the transaction and the parties;
 - Except specific state rules (ex. New York and Delaware)
 - Favorability / predictability / well-developed;
 - Limited choices - ex. corporate governance and UCC Article 9
 - International – consider CISG and New York Convention



DESSERT

Drafting – Pointers

- Forum: Exclusive or permissive or floating/reciprocal
- Scope: all disputes “related to” contract or “limited to” certain things;
- Choice of law: remember to waive local conflict of law rules (which could result in application of different law);
- Forum: consent to jurisdiction and waive objection for convenience
- Consider internal good-faith negotiations as a condition
- Consider CISG issues (differences from UCC and whether to disclaim?)
- Consider international arbitration and New York Convention



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CONCLUSION

TO-GO BOX

- BE THOUGHTFUL
- MIND YOUR DEADLINES
- KNOW THAT LAWS MAY DIFFER
- IT CAN MAKE A DIFFERENCE



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