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Commercial Contracts Decoded: Strategic Insights into Choice of Law and Forum Selection

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INTRODUCTION

- Considerations in Contract Drafting in five Key States: California, Delaware, Florida, New York and Texas
- This discussion will help with:
 - Deciding whether to choose or avoid any Key State's law in a choice of law clause,
 - Assessing forums for disputes – arbitration vs. courts in the Key States; and
 - Adopting business and litigation strategies should a contractual dispute arise or be anticipated.

CHOICE OF LAW CONSIDERATIONS



CHOICE OF LAW CONSIDERATIONS



- Choice of law provisions select the substantive law to govern the relevant contract.
- Under each of the Key States' laws, choice of law provisions are generally upheld.
- Contract law in each of the Key States is similar in many respects, but there are key differences that may impact the outcome of a future dispute.

BREACH OF CONTRACT ELEMENTS

CHOICE OF LAW CONSIDERATIONS

- Under all of the Key States' laws except **Delaware** and **Florida** law, the requisite elements of a breach of contract claim are the same:
 - The existence of a valid and binding contract,
 - Plaintiff's performance under the contract,
 - The defendant's breach of its contractual obligations, and
 - Damages.
- **Delaware** law does not require plaintiff's performance under the contract as a requisite element to plead a breach of contract claim.
- **Florida** law requires a material breach.

LIMITATION OF LIABILITY

CHOICE OF LAW CONSIDERATIONS

- Limitation of liability clauses and damages caps are generally enforceable in the Key States.
- Key differences:
 - **California** does not permit parties to exclude liability for conduct that rises to the level of gross negligence, willful misconduct, or fraud. In **New York**, such practice is generally disfavored.
 - **Texas** generally follows the same rule but allows parties to preclude punitive damages for fraud.
 - **Florida and Delaware** uphold limitation of liability clauses excluding gross negligence (though disfavored) but prohibits limitation of liability for willful misconduct or fraud.

FORCE MAJEURE

CHOICE OF LAW CONSIDERATIONS

- *Force majeure* clauses are interpreted narrowly in the Key States.
- Courts require the event to be (1) expressly listed in the clause, (2) unforeseeable at the time of contracting, and (3) prevent performance, not just cause impracticality.
- In **California**, force majeure can be implied if the event was entirely unforeseeable.
- The Key States, except **Delaware**, follow *ejusdem generis* – catch-all provisions apply only if the event is similar to the listed ones.
 - In **Delaware**, the intent of the parties guides interpretation of catch-all clauses.
- **California** codifies acts of God and terrorism as enforceable force majeure events.

MOST FAVORED NATION

CHOICE OF LAW CONSIDERATIONS

- Most-favored nation or customer (“MFN”) clauses are generally enforceable across the Key States, allowing parties to ensure specific treatment going forward.
- The interpretation and enforceability follow general contract law principles.
- Breaches of MFN clauses are usually remedied by monetary damages rather than specific performance.

DISPUTE RESOLUTION

CHOICE OF LAW CONSIDERATIONS

- Mandatory dispute resolution clauses are generally enforceable and prevent immediate litigation.
- Permissive clauses allow the option to go directly to court unless otherwise specified.
- Dispute resolution provisions can include details like:
 - Good faith negotiation requirements,
 - Specific mediation/arbitration forums (e.g., JAMS, AAA),
 - Procedural rules, timing, and arbitrator/mediator selection,
 - Time limits for mediation/arbitration completion, and
 - Steps if ADR is unsuccessful.

FORUM SELECTION CONSIDERATIONS



FORUM SELECTION CONSIDERATIONS



- Contracts often include forum selection clauses specifying where disputes will be resolved.
- This section covers:
 - Enforceability of forum selection clauses,
 - Potential loopholes to enforcement,
 - Pros and cons of arbitration versus litigation.

EXPLICIT PROVISIONS

FORUM SELECTION CONSIDERATIONS

- All Key States, except **New York**, consider forum selection clauses *prima facie* valid unless enforcing them would violate public policy, create inequities, or cause serious inconvenience.
 - **New York** generally upholds mandatory forum selection clauses as valid unless deemed unreasonable, except in consumer goods contracts.
- **New York** and **Florida** have statutes allowing parties to access courts even if neither the parties nor the transaction are connected to the state.
 - **New York** → if New York law is selected and the contract is worth over \$1 million.
 - **Florida** → if Florida law is selected and parties expressly submit to its jurisdiction.

FORUM NON CONVENIENS

FORUM SELECTION CONSIDERATIONS

- A party may seek to stay or dismiss a breach of contract case under *forum non conveniens* if there is no substantial connection to the chosen forum.
- In **New York**, a court cannot stay or dismiss for *forum non conveniens* if:
 - The case is related to a contract,
 - The action involves a foreign corporation, nonresident, or foreign state,
 - The contract selects New York law and forum, and
 - The transaction is worth \$1 million or more.
- In **California**, *forum non conveniens* applies only to permissive forum selection clauses, not mandatory ones.

REFERRAL TO ARBITRATION

FORUM SELECTION CONSIDERATIONS

- **Delaware, Florida, and Texas** courts typically uphold forum selection clauses specifying court litigation.
- **New York** have mechanisms to refer disputes to arbitration, despite agreements to litigate.
 - Supreme, county, district, and city courts may refer cases to mandatory arbitration if claims are under \$6,000.
 - New York City Civil Court can refer cases with claims under \$10,000.
 - Judges may order arbitration if an arbitration program is in place at the court.

ARBITRATING DISPUTES

FORUM SELECTION CONSIDERATIONS

✓ Pros

- Confidential Proceedings
- Speedy Resolution
- Cost Efficient
- Finality
- Choice of Arbitrators
- Procedural Flexibility
- Evidentiary Flexibility

✗ Cons

- Difficulty Reaching Third Parties
- Potential for Serial Disputes
- Summary Determinations Unavailable
- Increased Exposure to Delay Tactics
- Optional Enforcement of the Rules of Evidence
- Less Leverage Over Counterparty
- High Bar to Overturn Arbitration Award

LITIGATING IN COURT

FORUM SELECTION CONSIDERATIONS



Pros

- Parties Are Compelled to Comply with Judgments
- Right to Appeal
- Precedent Setting
- Discovery
- Application of Rules of Evidence
- Ability to Reach Third Parties



Cons

- Public Proceedings
- Lengthy Proceedings
- Judgment Subject to Appeal
- More Expensive



Q & A





Thank You!

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