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Location, Location, Location: Understanding How Contract Provisions Can Impact Where Litigation Takes Place and What Law Applies

I. Contractual Provisions that Dictate Forum and Applicable Law

Contracts often have pages of “boilerplate” language that can make the reader’s eyes glaze over. Yet, that language often contains three important and distinct provisions that may impact where and how disputes arising from the contract are litigated. Three provisions often found in contracts are: (1) a forum selection clause — where any litigation will occur; (2) a choice-of-law clause — what law governs that contract and will apply to any resulting dispute; and (3) a consent-to-jurisdiction clause — a party agrees that a selected jurisdiction can exercise jurisdiction over that party in litigation. Each of those provisions often contains a reference to a specific state, making it easy to believe that the mere mention of a state means that each provision is present.

Like Edwina, people commonly see a choice-of-law clause (e.g., “This contract shall be governed by the laws of the State of Tennessee.”) and incorrectly assume that such a clause requires any litigation arising from the contract to take place in a particular state. To confuse the issue further, a contract may include a consent-to-jurisdictional clause such as: “The parties consent to the jurisdiction of the State and Federal Courts located in Nashville, Tennessee.” Such provisions clearly reference Tennessee and how its laws will apply in any litigation that arises. But those provisions do not guarantee that the litigation will occur *in* Tennessee. Conversely, an agreement may select a particular state’s laws and the location of litigation that ensues, but typical due process considerations will determine whether that court can exercise jurisdiction over one of the parties to the agreement.

II. Permissive v. Mandatory Forum Selection Clause

The forum for a lawsuit may come down to a single word: “may” or “shall.” Courts will enforce contracting parties’ agreement about the forum provided that enforcement is fair and reasonable.^[1] However, courts generally do not read into contracts a provision not expressly contained in the agreement. A court would likely find that a provision stating that a lawsuit “may be brought in State or Federal Courts in Nashville, Tennessee,” does not require that litigation occur in Nashville.^[2] That language is viewed as a “permissive” forum selection clause. Putting aside the logical question of “why include a somewhat meaningless contractual provision,” such a clause does not mandate that the lawsuit be filed in a specific venue.

Conversely, courts will enforce a “mandatory” forum selection clause if the parties entered into the agreement and enforcement of the provision would be fair and reasonable.^[3] The fair and reasonable standard is difficult for the party challenging a provision in a contract it signed. For example, the mere fact that litigating in an inconvenient location generally will not defeat a mandatory forum selection clause.^[4] To be sure, use of “shall” in a forum-selection clause generally evidences the parties’ agreement to a specific forum.

III. Check the Fine Print

In sum, Edwina should have ensured that all three issues — venue, choice of law and jurisdiction over the parties — were addressed clearly and unequivocally in the agreement. Now she will have to litigate her dispute with Huffhines in Arizona, albeit while having that court apply Tennessee law. As she litigates in Arizona, Edwina may be comforted by the words of her husband, H.I., who said “There’s what’s right and there’s what’s right and never the twain shall meet.”

^[1] See, e.g., *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 374 (6th Cir. 1999).

^[2] See *Cornett v. Carrithers*, 465 Fed. Appx. 841, 843 (11th Cir. 2012).

^[3] See *General Elect. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095 (6th Cir. 1994).

[\[4\]](#) See *Wong v. PartyGaming, Ltd.*, 589 F.3d 821 (6th Cir. 2009) (finding that the inconvenience of litigating in a foreign country was not sufficient basis for defeating a mandatory forum selection clause).

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