

Choice of Law and Forum Selection Clauses: Home Field Advantage in Construction Contracts

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Beginning with the Little Leagues, everyone knows about “home field advantage”, where friendly fans abound, the field is familiar, and grueling travel is absent. While certainly no guarantee of victory, these are intangible factors leading to the best opportunity to win.

Likewise, in the realm of construction contracts, the opportunity often exists to claim “home field advantage” through utilizing choice-of-law and exclusive jurisdiction clauses.

A choice of law clause is one that specifies which law will govern the application, interpretation, and enforcement of the contract. This can be the law of the state where a party resides or is located, or where the project is located, or of a state having another sufficient “nexus” or connection to the parties or project. [Normally, in the absence of specifying the governing law in the contract, and on the matter of disputes under the contract will involve a default process applying a “conflicts of law” analysis, which varies from state to state and can be uncertain, in determining the applicable law.]

Selecting a favorable law to claim via the choice-of-law clause means understanding the substantive law of each possible choice well enough to determine which is most favorable under the broadest of circumstances- and that you have enough leverage in the contract process to get the provision included! The chosen state’s substantive law will include both applicable statutes and common law principles (as determined by past court cases).

Alternatively, a forum selection clause is one that stipulates which jurisdiction and court can be utilized in filing a lawsuit to enforce the contract. The goal, of course, is to have any litigation be in a location that is convenient to you and/or where the courts are perceived as likely to be favorable with respect to the most important issues in the contract.

For example, the Missouri case of Hope's Windows, Inc. v. McClain, 394 S.W.3rd 478 (Mo. App. W.D. 2013) involved a contract signed by McClain (a resident of Missouri, who also signed in Missouri) for windows to be provided (as part of a larger project) by a window supplier located in New York. The contract stipulated that New York law governed, and that venue for any litigation would be in a court of competent jurisdiction in Chautauqua County, New York. Even though McClain never was in New York, and all the work was performed in Missouri, a default judgment from the New York court was ordered registered and enforced in Missouri, based upon the application of New York law and confirmation of jurisdiction in the New York court based upon that law.

Both the choice-of-law and forum selection clauses can be critical in the enforcement of the construction contract, and whether the parties expectations are met. If you treat these clauses simply as "boilerplate" provisions, and are not intentional in addressing them, you may end up losing any possibility of "home field advantage." Let the construction attorneys at Sandberg, Phoenix & von Gontard, P.C., help you understand and craft these provisions in your next contract, so that you will have your best opportunity for a "winning" experience.

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