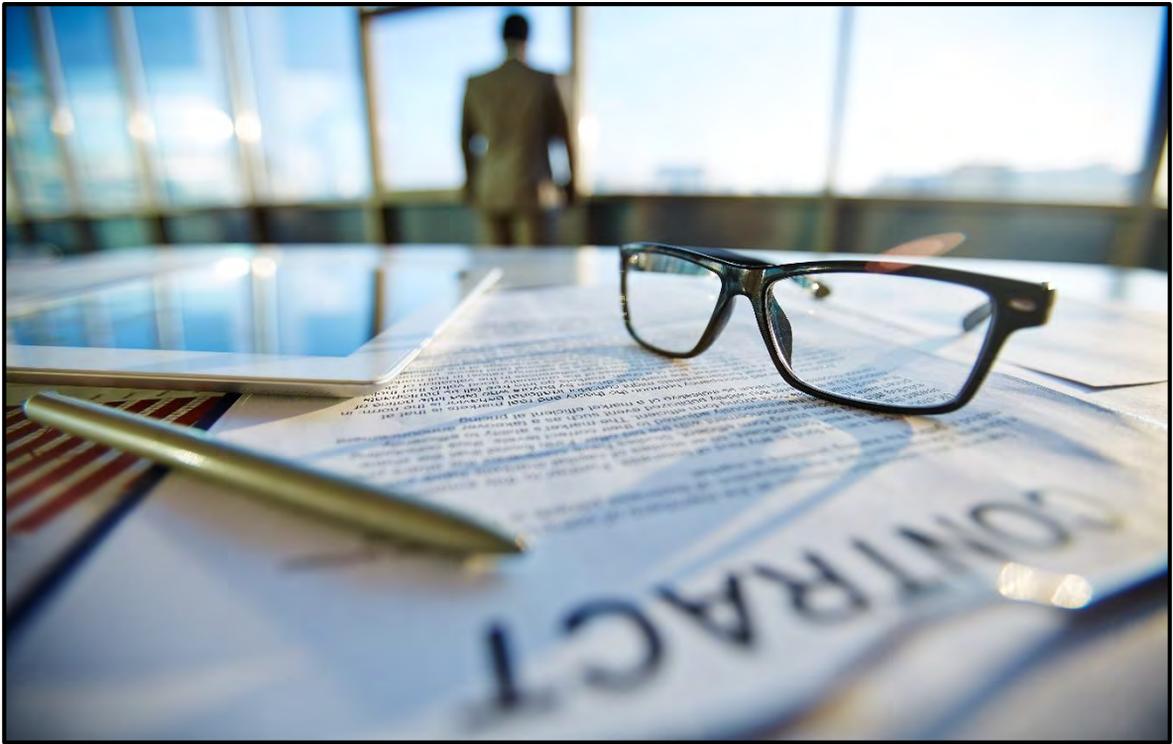


Contract Issues For Small Business Owners Choice of Law and Choice of Venue – Why These Provisions DO Matter

By Delia Bouwers Bianchin, The Lynch Law Group



Welcome to Part 3 of this multi-article series regarding contract interpretation for business owners. The first article in the series touched on important considerations when reviewing an indemnification clause and in the second article we focused on warranty language. If you missed them, you can read them here: [Reviewing the Indemnification Clause, Warranty Language - Does it Fit the Situation?](#)

Today's article addresses Choice of Law and Choice of Venue provisions. Without a doubt, you have seen both provisions before, as they are included in nearly every contract nowadays. But do they really matter? Are they really that important? The answer is a resounding "YES!"

Businesses Should Opt to Select Choice of Law

Choice of law provisions are exactly what they sound like: they allow the parties (businesses or individuals) to a contract to select in advance which jurisdiction's law will apply to any dispute that may arise between them out of the contract. For example, a contract may provide that, in the case of a dispute, Pennsylvania law will apply, even if one of the businesses is not from Pennsylvania. In fact, you may often agree to apply the law of a state that is not related to either business or business owner, and courts will generally enforce such an agreement, subject only to some relatively rare exceptions. As odd as it may sound, you could end up with a Pennsylvania court applying Texas law to a contract dispute between a Pennsylvania business and a New York business.

In the absence of a choice of law provision, courts will determine what law applies by undertaking what is referred to as a “conflicts of law” analysis, considering the interests of justice, where each of the businesses to the dispute are located, where critical events at issue took place, where potential witnesses may be located, and the interest of the respective jurisdictions in ensuring a fair resolution of the dispute. If you would rather not leave that selection to later (and perhaps unpredictable) determination by a court, selecting choice of law in advance is advisable.

What Difference Does it Really Make as to What Law Applies?

While many legal concepts are relatively consistent throughout the states, there are nonetheless critical differences – and agreeing in advance to a choice of law provision may lead to very different results than you intended. Let’s consider a specific example: If you hire a new employee and include a non-compete provision as one of the terms of employment, so that you can protect your business if the employee leaves and wants to work with a competitor, you provide that the non-compete term will last for three years and include a Pennsylvania choice of law provision.

Unbeknownst to you, three years may be considered an unreasonably long time-period by some courts throughout the United States, depending on the circumstances. In the event you ever have to go to court to enforce the non-compete provision, under Pennsylvania law, the court has the option to “blue pencil” an unreasonable non-compete provision by modifying or re-writing it to make it reasonable, such as lowering the non-compete term to two years instead of three. This is a much better result for you than having the entire provision tossed out.

On the other hand, under certain other state’s laws, such as South Carolina for example, no such modification option exists. The court would instead “red pencil” or delete the three-year period if it found it to be unreasonable. This could leave you without a non-compete provision at all, despite your advanced planning.

In another scenario, on the question of whether you adequately compensated your employee for a non-compete, whether Pennsylvania law or Massachusetts law applies to the contract may very well determine the outcome. Under Massachusetts law, in this example, continued employment is sufficient payment for a non-compete agreement, even for existing employees. On the other hand, under Pennsylvania law, separate compensation (a bonus or promotion or raise) is required in order for the agreement to be enforceable.

In an international context, the impact of a choice of law provision becomes even more pronounced when you compare the various state and federal laws of the United States to the laws of other countries or nations. Be very careful before you agree to the application of another jurisdiction’s laws. Doing so may change the terms of the deal without you realizing it.

An Unfavorable Choice of Venue Provision Could Cost You Time and Money

Choice of Venue is a similar but distinct concept that often appears along with choice of law. With Choice of Venue, you agree in advance to submit yourself or your business to the jurisdiction of a particular venue (state, county within a state, or country) in the event that a dispute arises from the underlying contract. This provision can be even more important than choice of law because, if a Choice of Venue provision is highly unfavorable to you, you could effectively lose your rights before you even make it to the courthouse.

An unfavorable Choice of Venue provision could mean that you must travel to another state or country to resolve a dispute, costing you dearly in time and money. Additionally, you could even lose your choice of legal counsel if your attorney is not licensed to practice in the state or country where you agreed to resolve the dispute. Needless to say, it is critical that you pay very close attention to your Choice of Venue provisions.

As an Alternative, Keep Your Provisions Neutral

Here's a helpful negotiating tip relating to Choice of Law or Choice of Venue provisions: if you are unable to get your preferred choice of law or venue, as an alternative, choose a neutral jurisdiction whenever possible, especially in the international context. It is quite common to agree to choose a neutral jurisdiction with well-established legal precedent for contract disputes, such as Delaware or New York. Of course, having a knowledgeable business attorney by your side during these negotiations never hurts!



[Delia Bouwers Bianchin](#) is Senior Counsel at The Lynch Law Group. She has nearly two decades of high level legal experience with exceptional skill in complex commercial litigation from a decade of practice with two prominent Pittsburgh firms. In addition she served for many years as in-house counsel for a diversified contract manufacturer and a dynamic start-up. For more information on contracts or other business matters, contact Delia at dbianchin@lynchlaw-group.com or (724)776-8000.