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Determining the forum and venue (location) for litigating and arbitrating construction disputes

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When a dispute arises on a construction project, an initial question is where must the dispute be litigated or arbitrated? The answer: It depends. Contract clauses may govern the issue. Other times, state-specific statutes might govern. The venue (location) and forum for adjudicating a construction dispute is an important consideration when entering a contract. Generally, it is a disadvantage to litigate/arbitrate a dispute in a distant location or across state lines. Not only is there the potential for bias, but additional costs, time, and inconvenience will occur.

Contract clauses may govern the location

First, one should check the contract. “Forum selection clauses” are contract clauses that mandate the litigation/arbitration to be held in a specific forum. These clauses can be surprisingly complicated. Technically, jurisdiction, venue, and forum are all separate things. Jurisdiction is the authority of a specific state’s courts to rule on the matter. Venue is the specific location within the state. Forum could mean a few different things, including whether the selected court is a federal or state court, or whether arbitration controls.

In construction contracts, not all forum selection clauses precisely address the nuances of jurisdiction, venue, and forum. Nevertheless, as a starting point, any clause in the contract that indicates a specific state, court, or forum may be the controlling authority on the matter.

Generally, forum selection clauses are enforceable. Thus, if a material supplier is located out-of-state, and its boilerplate purchase order requires litigation to be held in its out-of-state location, then, there is a decent chance that the clause is enforceable and the litigation must be held there. But, as set forth below, that may not always be the case.

State-specific home court statutes

Some states have statutes that require all disputes, litigation and arbitration arising from a construction project to be litigated/arbitrated in the location (state) of the project. While each state’s statute may be worded differently, the most common statutory approach is to void any contract that selects an out-of-state forum.

In the Mid-Atlantic, Pennsylvania and Virginia have statutes that void forum selection clauses. Thus, litigation/arbitration must be conducted in the state where the project is located. Maryland and New Jersey, on the other hand, do not have a controlling statute on point and, thus, litigation/arbitration is not conclusively prohibited in an out-of-state location.

State statutes may also dictate that the dispute be heard through an agency adjudication, such as the Pennsylvania Board of Claims or the Maryland State Board of Contract Appeals. These forums are often controlling on public project disputes that arise on a prime contract.

Additional doctrines: choice of law, personal jurisdiction, and forum non conveniens

If a contract clause is precise, comprehensive, and well-written, then it will likely be controlling. Similarly, if a state statute governs the issue, then it, too, is likely controlling.

For any other circumstance — either there is no state statute controlling, or the contract language is imprecise — it can be unpredictable whether the court will require the litigation/arbitration to be held in one location or another. Litigation often ensues when confusion and ambiguity exist as to the choice of law, personal jurisdiction of the

parties and whether the forum is legally too inconvenient to allow for a reasonable proceeding on the matter.

When to contact an attorney

When a dispute arises on a project, it is best to seek legal advice on the options and the proper forum for proceeding with the dispute. Legal counsel can clarify and opine on whether a specific contract clause or statute is controlling and if any pre-conditions must be met to pursue the claim. If there is no controlling authority, then, legal counsel can also assist by developing the strongest arguments to pursue the case in the preferred location.

Saxton & Stump attorney [Ron Pollock](#) is available to discuss how our [Construction Law Group](#) can help you navigate contract language and state-specific laws when determining where construction disputes must be litigated or arbitrated.

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