

## 10 Tips For Crafting A Forum Selection Clause

*Law360, New York (March 21, 2014, 3:16 PM ET)* -- Clients often ask whether all those “boilerplate” clauses at the end of a commercial contract are really necessary, and if so, why can’t they just be copied and pasted from earlier agreements. This article will focus on just one such clause, the “forum selection” clause, and hopefully persuade you that such clauses are critical and require careful consideration from lawyers and clients alike.

### The Benefits of Choosing Your Forum

Let’s use an example to set the stage: Imagine you are a business in New York and have just negotiated an important agreement with a key supplier in California. The economic terms of the contract are favorable to you, so in your desire to close the deal, you instructed your lawyer not to worry too much about those boilerplate clauses at the back of the contract, and you did not include any clause indicating the forum in which any later disputes would be decided.

After the post-closing honeymoon is over, a dispute emerges. While you are attempting to work it out with the supplier, it preemptively sues you in California, simply to gain home field advantage. You now face the prospect of having to obtain local counsel in California, deal with the unfamiliar rules there, and most importantly, your witnesses, and perhaps the better part of your management team, may well have to make multiple trips to California over the next couple of years to attend depositions and hearings and meet the other requirements of the case.

The absence of a forum selection clause in your contract has not only guaranteed that you will have to deal with legal proceedings 3,000 miles away, but also has induced your counterparty to start a lawsuit even as negotiations were pending, simply to gain a tactical advantage in the event that negotiations fail. The hypothetical can be made even starker: Imagine the supplier is not in California, but in a foreign country whose courts you do not trust to resolve your dispute fairly and efficiently and whose government may have close ties to your counterparty.

As these examples show, forum selection clauses provide several important benefits. First, they provide certainty. It can take untold expense and months of time to fight in two or more jurisdictions. A well-crafted forum selection clause will nip this in the bud and allow the parties to deal with the merits of their dispute without a prolonged and expensive procedural battle.

Second, forum selection clauses can make parties less trigger happy. If there is no forum selection clause in a contract, each side will have an incentive to race to the courthouse to lock in home field advantage as soon as a dispute arises. (Many courts apply the “first filed” rule under which the first-filed case will be permitted to take precedence.) The absence of a forum selection clause thus can impede the parties’

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In the euphoria of signing a business deal, no one likes to think of the possibility of later lawsuits. But a few minutes of thought about a well-crafted forum selection clause can save months or years of anguish and inconvenience. Although there is no single “right forum” for all disputes, in most cases, the clearly wrong answer is not to address forum selection at all.

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