

LITIGATION MINUTE: CHOICE OF LAW AND FORUM CLAUSES IN DEAL WORK

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Choice of Law (COL) and Choice of Forum (COF) clauses are not like cheap baseball caps—one size does not fit all. While these provisions may not be scintillating, they are important if a deal goes south.

Deal attorneys should consider five main questions while drafting COL and COF provisions in deal papers:

Where Are the Assets Located?

Consider assets as broadly as possible (state of incorporation, location of headquarters, physical assets, human capital, etc.). In many—if not most—instances, COF and COL will be tied to a state of incorporation or headquarter location. But not always.

If a prominent local company is acquired, a seller may want to avoid that jurisdiction, whether litigation or arbitration. If certain assets are located in a particular state—and a dispute would require quick action to secure or protect them—consider courts or arbitration in that location.

Are the Contract Provisions in Your Client's Favor?

While courts generally enforce terms as written, this is not always the case. Likewise, in certain states (and under their laws), courts are much less likely to summarily dismiss a party's contractual claims prior to trial. For enforced contracts as written, New York or Delaware COL and COF may be among the best options. If, however, the terms are drafted favorably to the counterparty, flexibility might be advantageous.

What Type of Disputes?

This may be the most important inquiry, as well as the hardest answer to predict. While a future conflict may not be apparent when negotiating, it may also be staring you in the face—indicated by questions and comments such as:

- Seller side
 - Can they deliver payment?
 - Will they [voluntarily] pay the full earn out?
- Buyer side
 - How clean are their books?
 - What concerns do we have with the [fill in the blank] warranty?

The most likely—or most critical—disputes will determine the jurisdictions, parties, and laws governing the dispute resolution.

Do You Need a Particular Type of Fact Finder or Experience?

This relates, in many ways, to anticipated disputes. Courts, as a general rule, are effective at resolving disputes over legal issues. They are not, however, industry specialists (e.g., transportation, health care), nor do they typically have experience in non-legal areas (e.g., accounting). If there is potential for a working capital or earn-out dispute, you may want to (carefully) carve out resolution of that one issue alongside accounting experts.

Have I Checked With the Litigators?

We are a different kettle of fish, but we have our uses—experienced litigators may see the non-obvious. If, for example, the counterparty changes location from New York to California, it could change the finder of fact; California public policy bars jury waivers, so this switch in jurisdiction moves disputes from an experienced judge to a lay jury. A small change could have large consequences.

There are no ironclad rules for COL and COF clauses. However, these questions are important to consider while drafting. This way, if a dispute arises, the client may not be happy, but will be prepared.

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