

8 April 2019

Choose Wisely — Drafting Governing Law and Forum Selection Clauses

A number of recent cases highlight the importance of properly drafting governing law and forum selection clauses to give maximum effect to the parties' preferences.

An earlier [M&A Update](#) covered some practical differences resulting from choosing New York or Delaware governing law for a contract, including situations where the choice can be outcome determinative in subsequent litigation.

A number of recent cases highlight the importance of not just selecting the preferred governing law (and its close cousin, the forum selection clause, which identifies the courts where disputes will be resolved), but also of properly drafting the contract provisions to give maximum effect to those choices.

A recent Delaware [decision](#) addressed the question of whether a forum selection clause applied to all claims relating to a deal or was limited to breach of contract claims. The Delaware court cited to a related Texas court decision which underscored the clause in question referencing “any dispute arising out of” the agreement which the court viewed as “necessarily broader than claims based solely on rights originating exclusively from the contract.” By encompassing disputes rather than just claims, the court determined that tort and fiduciary claims arising out of a transaction, and not just contract claims, were subject to the chosen jurisdiction.

Similar issues apply to governing law clauses. New York cases suggest that a typical “short-form” provision that states, “This agreement shall be governed by the law of the State of New York”, is not “sufficiently broad” to mandatorily apply New York to a tort claim arising out of the transaction. A number

of Delaware cases have reached different outcomes on the question of whether a similar short-form clause means that extra-contractual fraud claims are governed by the named state’s laws. A more broadly drafted governing law clause that also references disputes relating to the agreement increases the likelihood that the provision will be read to cover a wider range of claims.

Another related issue arising from “short-form” governing law clauses was addressed in a recent New York [decision](#). The court held that such a provision only ensured application of the substantive laws of the chosen state and not procedural laws (including statutes of limitation). Delaware decisions are consistent with this New York outcome which suggests the benefit of including phrases like “*internal laws*” and express exclusion of the application of laws, including statutes of limitation, of other jurisdictions.

A further drafting issue was featured in another recent Delaware [decision](#) which addressed whether the forum selection clause was mandatory, and therefore exclusive, or merely permissive. The agreement in question stated: “Each of the parties hereby consents to the jurisdiction of the courts of the Commonwealth of Kentucky.” The court viewed the “consent” formulation as permissive and therefore it did not prohibit a party from bringing litigation in a different state. By contrast, a mandatory clause, which the court expected to include language like “shall be,” would preclude a party from initiating litigation in another jurisdiction. The

courts will look for “clear language” evincing intent of exclusivity which can be supported by one or more phrases like “shall,” “exclusive” or “any [dispute].”

Yet another issue addressed in a recent Delaware [decision](#) is whether a forum selection clause covers non-parties. Often, as in this case, the clause will refer to “each of the Parties submit[ting] to the jurisdiction of the State of Delaware” without addressing whether related non-parties, including third party beneficiaries, are also bound by the exclusive jurisdiction provision. The court held that the plain language of the clause was unambiguous, and therefore entities which were integral parties to other components of an integrated transaction, but not a formal

named party to the contract with the forum selection clause, were not bound by its terms.

Given the often important differences between the laws of different states, as well as the perceived benefits of litigating disputes in a particular court, parties should be aware that the specific drafting of governing law and forum selection clauses may dictate their scope and efficacy. While “short-form” clauses are appealing and non-legal considerations may dictate limitations on the length of these provisions in any given agreement, recent cases have shown that courts will closely examine the specific wording of the relevant clause in determining whether or not it applies to the particular claim or party before it.

If you have any questions about the matters addressed in this *Kirkland M&A Update*, please contact the following Kirkland attorneys or your regular Kirkland contact.

Daniel E. Wolf, P.C.

daniel.wolf@kirkland.com
+1 212 446 4884

Stefan Atkinson, P.C.

stefan.atkinson@kirkland.com
+1 212 446 4803

This communication is distributed with the understanding that the author, publisher and distributor of this communication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this communication may constitute Attorney Advertising.