

**CHOICE OF LAW AND FORUM SELECTION
CLAUSES** | John F. Coyle
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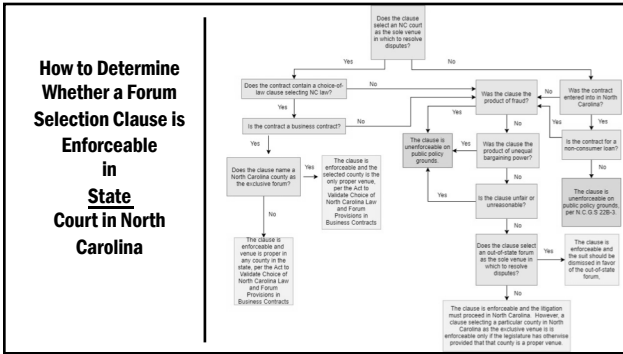
The Forum Selection Clause

- A forum selection clause is a contractual provision in which the parties establish the place—such as the country, state, or type of court—for specified litigation between them.

- BLACK'S LAW DICTIONARY

Issues Relating to Forum Selection Clauses

1. Is the clause **enforceable**?
2. How should the courts **interpret** the language in the clause?



How to Determine Whether a Forum Selection Clause is Enforceable in Federal Court in North Carolina

The federal courts in North Carolina apply a four-factor test to determine whether a forum selection clause is enforceable.

- (1) Was the clause induced by fraud or overreaching?
- (2) Will the complaining party for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum?
- (3) Will the fundamental unfairness of the chosen law deprive the plaintiff of a remedy?
- (4) Will the enforcement of the clause contravene a strong public policy of the forum state?

If the answer to two or more of these questions is "yes" then the court will probably not enforce the clause.

In practice, the federal district courts in North Carolina enforce forum selection clauses in almost all instances. It is the rare case where two or more of the above factors are present.

INTERPRETIVE QUESTIONS

1. Is the Forum Selection Clause **Exclusive** or **Non-Exclusive**?
2. What is the **Scope** of the Clause?
3. Does the Clause Apply to **Non-Signatories**?
4. Does the Clause Permit Litigation in **Federal Court**?

EXCLUSIVITY

Exclusive Forum Selection Clause

• We agree to litigate our disputes in the named forum and nowhere else.

} **Exclusive**

Consent to Jurisdiction Clause

• We agree not to contest jurisdiction if you sue us in the named forum... but you can sue us somewhere else if you can find another court that has jurisdiction.

} **Non-Exclusive**

Consent to Venue Clause

• We agree not to contest venue if you sue us in the named forum... but you can sue us somewhere else if you can find another court where venue is proper.

MAGIC WORDS — EXCLUSIVITY

Exclusive Clauses (Sole, Exclusive, Only, Must)

- The **sole and exclusive** jurisdiction and venue for any action, suit or litigation arising from or related to this agreement shall be in the state or federal courts located in the State of New Hampshire.
- In the event that either party brings suit to enforce the terms of this Agreement both parties consent and agree that jurisdiction for such action will lie **only** in the state and federal courts sitting in Mecklenburg County, North Carolina.
- Charterer further specifically agrees and consents that any causes of action or suits related to this Agreement **must** be filed in the Second Judicial District Court, Albuquerque, New Mexico, USA.

Non-Exclusive Clauses (May, Submit, Consent, Waive)

- The parties hereto **submit and consent** to the jurisdiction of the courts present in the state of Texas in any action brought to enforce (or otherwise relating to) this agreement.
- Any suit, action or proceeding arising out of or relating to this Agreement **may** be commenced and maintained in any court of competent subject matter jurisdiction in Miami-Dade County, Florida and each party waives objection to such jurisdiction and venue.

SCOPE

Contract Claims } **Always Covered by Forum Selection Clause**

Tort Claims } **Always Covered by Clauses With the Magic Words**

- "Relating to"
- "In connection with"

Sometimes Covered by Other Forum Selection Clauses

- "Arising out of"
- "Arising hereunder"

NON-SIGNATORIES ARE FREQUENTLY COVERED

The courts have held that a non-signatory to a contract is covered by a forum selection clause where (1) that person is "closely related" to a contract signatory and (2) it is "foreseeable" that the non-signatory would be bound.

In practice, the following parties are frequently covered by forum selection clauses in contracts that they did not sign:

1. Parent corporations to the contracting party
2. Corporations affiliated with the contracting party
3. Corporations controlled by the contracting party
4. Successor corporations to the contracting party
5. Directors of the contracting party
6. Agents of the contracting party
7. Guarantors of the contracting party

AVAILABILITY OF FEDERAL COURT

"Of" Means State Court → No Federal Court

"The Courts of Texas . . . shall have jurisdiction over all controversies with respect to the execution, interpretation or performance of this Agreement."

"In" Can Mean Federal Court... Depending on Courthouse Location

"Venue shall lie in the County of El Paso, Colorado."

Is there a federal courthouse in El Paso County?

It's Better Just to Say "Federal" if That's What you Want

"The parties agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy."

A GUIDE TO DRAFTING FORUM SELECTION CLAUSES			
EXCLUSIVITY	SCOPE	NON-SIGNATORIES	FEDERAL COURTS
If the goal is exclusivity, use words like "sole," "only," "exclusive," and "must" to convey an intent to litigate exclusively in the chosen forum and no other.	If the goal is to give the clause a broad scope, state that the clause shall apply to all claims "relating to" the contract or the parties' relationship.	If the goal is for the clause to apply to non-signatories, specifically identify the relevant non-signatories as third-party beneficiaries to the forum selection clause.	If the goal is to preserve the option of going to federal court, state that claims shall be resolved by the "state and federal courts" in the chosen forum.
If the goal is non-exclusivity, omit all the words listed above and use the word "non-exclusive" or state that the parties "submit to jurisdiction" or "consent to venue" in the chosen forum.	If the goal is to give the clause a narrow scope, state that the clause shall only apply to "contract claims" or to claims "arising out of the alleged breach of this agreement."	If the goal is for the clause to apply exclusively to contract signatories, state that there are no third-party beneficiaries.	If the goal is to eliminate the option of going to federal court, state that claims shall be resolved by the "state courts" in the chosen forum and that "no actions commenced" in those courts "shall be removed to federal court."

The Choice-of-Law Clause

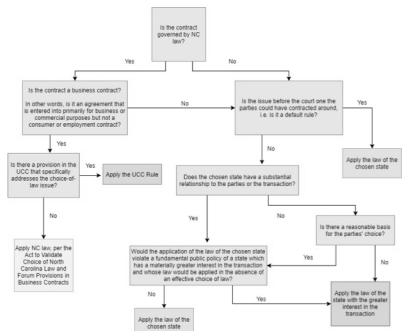
• A choice-of-law clause is a contractual provision by which the parties designate the jurisdiction whose law will govern any disputes that may arise between the parties.

- BLACK'S LAW DICTIONARY

Issues Relating to Choice-of-Law Clauses

1. Is the clause **enforceable**?
2. How should the courts **interpret** the language in the clause?

How to Determine Whether a Choice-of-Law Clause is Enforceable in State or Federal Court in North Carolina



INTERPRETIVE QUESTIONS

1. Interpreted = Construed = Governed?
2. Internal Law
3. Substantive Law
4. Federal Law
5. Non-Contractual Claims

INTERPRETED = CONSTRUED = GOVERNED?

The Interpretive Rule

Regardless of whether the parties choose to have their contract "governed by" or "interpreted in accordance with" or "construed in accordance with" the law of a particular jurisdiction, the result will generally be the same.

The Rule In Action

This agreement shall be interpreted in accordance with the laws of the State of North Carolina.



This agreement shall be **governed by, and shall be interpreted and construed** in accordance with, the laws of the State of North Carolina.

Illustrative Cases

Boatland, Inc. v. Brunswick Corporation, 558 F.2d 818, 821-822 (6th Cir. 1977)
Hammel v. Ziegler Financing Corp., 113 Wis. 2d 73, 75-78 (Wis. Ct. App. 1983)

INTERNAL LAW

The Interpretive Rule

When the parties choose to have their contract governed by the "law" or "laws" of a particular jurisdiction, they intend for courts to apply that jurisdiction's **internal law** (excluding its conflict-of-laws rules) rather than its **whole law** (including its conflict-of-laws rules).

The Rule In Action

This agreement shall be governed by the laws of the State of Georgia, **without giving effect to any conflict-of-laws rule that would result in the application of the laws of a different jurisdiction.**

Illustrative Cases

Ministers & Missionaries Benefit Bd. v Snow, 26 N.Y.3d 466, 470 (N.Y. 2015)
IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A., 20 N.Y.3d 310, 315 (N.Y. 2012)

SUBSTANTIVE LAW

The Interpretive Rule

When the parties choose to have their contract governed by the "law" or "laws" of a particular jurisdiction, they intend for courts to apply that jurisdiction's **substantive** law rather than its **procedural** law.

States have different views as to whether statutes of limitations should be deemed "procedural" or "substantive."

Statute of Limitations is Procedural

This agreement shall be governed by the laws of the State of New Hampshire, **excluding its** statutes of limitation. **The statutes of limitations of the forum (NC) shall apply.**

E.g. *Martin Marietta Materials, Inc. v. Bondhu, LLC*, 772 S.E.2d 143, 146 (N.C. Ct. App. 2015)

Statute of Limitations is Substantive

This agreement shall be governed by the laws of the State of New Hampshire, **including its** statutes of limitation. **The statutes of limitations of the chosen state (NH) shall apply.**

E.g. *Gaiser v. Parifolio Recovery Assocs., LLC*, 571 F. Supp. 2d 1273, 1276 (S.D. Fla. 2008)

FEDERAL LAW

The Interpretive Rule

When the parties choose to have their contract governed by the "law" or "laws" of a particular state, they intend for (1) courts to apply any relevant provisions of federal law and (2) that federal law to preempt state law if the two come into conflict.

The Rule in Action

This agreement shall be governed by the laws of the State of Alabama, which shall be deemed to include the **United Nations Convention on Contracts for the International Sale of Goods (CISG)**, a federal treaty. **The CISG shall preempt Article 2 of the Alabama UCC if the contract involves the international sale of goods.**

Illustrative Cases

VLM Food Trading Int'l, Inc. v. Illinois Trading Co., 748 F.3d 780, 787 (7th Cir. 2014)

NON-CONTRACTUAL CLAIMS – MAJORITY

The Interpretive Rule

A generic choice-of-law clause governs only causes of action sounding in contract. It does not govern tort and statutory claims. If the parties want the choice-of-law clause to apply to tort and statutory claims, they must draft the clause more broadly.

The Rule in Action

This agreement shall be governed by the laws of the State of New Jersey.



Any and all contractual claims arising out of this agreement shall be governed by the laws of the State of New Jersey. Tort and statutory claims are not covered by this clause.

Illustrative Cases

Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1162 (11th Cir. 2009)

Ster v. Reading & Bates Corp., 992 S.W.2d 423, 433-434 (Tex. 1999)

NON-CONTRACTUAL CLAIMS – MINORITY

The Interpretive Rule

A generic choice-of-law clause also governs tort and statutory claims when they are related to the contract. If the parties want the choice-of-law clause to apply exclusively to contract claims, they must draft the clause more narrowly.

The Rule in Action

This agreement shall be governed by the laws of the State of California.



Any and all claims arising out of or relating to this agreement, whether sounding in contract, tort or statute, shall be governed by the laws of the State of California.

Illustrative Cases

Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 468-470 (Cal. 1992).

Plytt-Boone Eless, Inc. v. IRR Trust for Donald L. Fetterolf Dated December 9, 1997, 918 F. Supp. 2d 532, 542-548 (W.D. Va. 2013).

THE CUMULATIVE EFFECT OF THE CANONS

"This agreement shall be governed by the laws of the State of Wyoming."

BECOMES...

"This agreement shall be interpreted and construed in accordance with the laws of the State of Wyoming. Any contractual claims (but not tort or statutory claims) arising out of this agreement shall be governed by the laws of the State of Wyoming, excluding its statutes of limitation, without giving effect to any conflict-of-laws rule that would result in the application of the laws of a different jurisdiction. Where applicable by its terms, the UN Convention on Contracts for the International Sale of Goods shall preempt Article 2 of the Uniform Commercial Code."

MORE RESOURCES

John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 Washington Law Review 631 (2017)

John F. Coyle, *Interpreting Forum Selection Clauses*, 104 Iowa Law Review (forthcoming 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3047989

Or call me! My office number is 919-843-9634.
