

# Litigation-Related Contractual Clauses


## How Contract Drafting Plays Out In Litigation

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### Today's Panel\*




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\*The views expressed in this panel presentation are not necessarily those of any particular panel member or his or her employer or clients.



## Overview

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For transactional attorneys, how do your choices play out in litigation?

For litigators, what contractual terms are most important when you find yourself in litigation?



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## Litigation-Related Contractual Clauses

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### Roadmap

Forum Selection

Choice of Law

Non-Reliance

Time and Damage Limitations

Fee Shifting

Arbitration



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## Forum Selection Clauses

### Advantages (in order)

- Avoiding challenging jurisdictions and races to the courthouse
- Cost of local versus distant forum
- Ability to bring witnesses to trial, particularly third-party witnesses
- Hometown advantage

### Disadvantages

- Use of contractual negotiating leverage to obtain a forum
- Difficulty of choosing a forum in the abstract
- Some concerns about enforceability



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## Practical Factors In Choosing Jurisdiction And Court

Quality of judiciary

Jury pools

Time to judgment

Impact of forum on choice of law

Other party's willingness to agree

- Dual forum?



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## Your Local Courts (N.D. Ill.)

- Quality of judiciary
- Jury Pool
  - Draws from a larger, more suburban area
- Time to trial
  - Third busiest Federal Court in country (after S.D.N.Y. and S.D. W.Va.)
  - 34 months
  - In contrast, “rocket dockets” in E.D. Va. and E.D. La.
- Unusual procedures
  - Patent pilot project judges
  - Mandatory Initial Discovery Pilot Program



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## Your Local Courts (Cook County)

- Organization
  - Law, Commercial Calendar, Chancery
- Quality of judiciary
- Jury pool



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## Drafting Forum Selection Clauses

### Typical Clause (with Potential Flaws)

“The parties agree that all disputes arising from this contract will be litigated in the United States District Court for the Northern District of Illinois or the Circuit Court of Cook County. The parties expressly consent to the jurisdiction and venue of such courts.”

## Will the state where you are sued enforce forum selection clause?

State	Enforce?	Comments
Federal Court	Yes	<i>Atlantic Marine</i> – U.S. Supreme Court: Federal court will enforce forum clause except in exceptional circumstances involving public interest.
Illinois	Yes	Six factors that determine the validity of a forum-selection clause are: “(1) which law governs the formation and construction of the contract; (2) the residency of the parties involved; (3) the place of execution and or performance of contract; (4) the location of the parties and witnesses participating in the litigation; (5) the inconvenience to the parties of any particular location and (6) whether the clause was equally bargained for.” <i>GPS USA, Inc. v. Performance Powdercoating</i> , 2015 IL App (2d) 131190, ¶ 8, 26 N.E.3d 574, 578.
Texas	Yes	Enforcement is mandatory unless forum selection clause is unreasonable and unjust or is invalid for fraud or overreaching, <i>Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.</i> , 177 S.W.3d 605, 614 (Tex. App. 2005), or if forum selection clause is permissive. <i>Mabon Ltd. v. Afri-Carib Enters, Inc.</i> , 29 S.W.3d 291, 297 (Tex. App. 2000) (“shall have venue” is still permissive).
California	Yes	Forum selection clauses are invalid unless enforcement would be unreasonable. <i>Intershop Commc'ns v. Superior Court</i> , 104 Cal. App. 4th 191, 201 (2002). If it is permissive, however, a traditional <i>forum non conveniens</i> analysis applies. Actions can be brought in other states if forum selection clause is raised too late. <i>Trident Labs, Inc. v. Merrill Lynch Commercial Fin. Corp.</i> , 200 Cal. App. 4th 147, 155 (Cal. 2011) (19 months too late).

## Drafting Forum Selection Clauses

### Solving The Flaws

Choose a federal court first if it has jurisdiction

Language that helps avoid litigation over forum,  
in order of ease of use:

- “exclusively”
- covenant not to sue elsewhere
- waiver of right to raise *forum non conveniens*
- attorney’s fee shifting to prevailing party in forum disputes

Take care with inconsistent clauses in related contracts



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## Drafting Forum Selection Clauses (cont.)

### Better Clause

“The parties agree that all disputes arising from this contract will be litigated *exclusively* in the United States District Court for the Northern District of Illinois *if it has jurisdiction over the matter or* the Illinois Circuit Court of Cook County if there is no federal jurisdiction. The parties expressly consent to the jurisdiction and venue of such courts, *and covenant not to sue in any other court. The parties waive their right to argue that either of those courts is an inconvenient forum.*”



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## Choice of Law What Law Should You Choose?

Generally better off with clarity

Choose state with a wide body of law, middle of the road

- Illinois, New York, most Midwestern states
- Sparse law? Indiana, Delaware for some purposes
- Avoid California and Louisiana

Have a relationship to parties or transaction



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## Will your forum enforce a choice of law clause?

State	Enforce?	Comments
Illinois	Yes, generally	Under Illinois choice of law rules, litigants can agree on the substantive law to be applied to their case so long as the stipulation does not contravene Illinois public policy and the state chosen bears a reasonable relationship to the parties or the transaction. <i>Sabo v. Dennis</i> , 408 Ill. App. 3d 619, 628 (1st Dist. 2011); <i>Freeman v. Williamson</i> , 383 Ill. App. 3d 933, 938 (1st Dist. 2008).
Delaware	Yes, generally	The law must bear some material relationship to the forum and Delaware will not enforce clauses that are clearly repugnant to public policy of Delaware. See <i>J.S. Alberici Const. Co. v. Mid-W. Conveyor Co.</i> , 750 A.2d 518, 521 (Del. 2000).
Texas	Yes, generally	Will enforce unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the choice, or (b) enforcement would contravene a fundamental policy of a state with a greater interest than the chosen state. <i>Parker v. Schlumberger Tech. Corp.</i> , 475 S.W.3d 914, 927 (Tex. App. 2015).
California	Yes, generally	Will enforce unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the choice, or (b) enforcement would contravene a fundamental policy of a state with a greater interest than the chosen state. <i>Hambrech &amp; Quist Venture Partners</i> , 38 Cal. App. 4th 1532, 1544 (1995).



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## Other Litigation-Related Contractual Clauses

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Non-reliance

Time and damage limitations

Fee-shifting



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## Non-Reliance Clauses

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### Integration Clauses Don't Bar Fraud

Standard integration clause –

“This Agreement constitutes the entire agreement of the Parties regarding the transaction. All prior negotiations and discussions have been merged into this Agreement.”

Standard integration clauses typically do **not** preclude fraudulent inducement claims.



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## Non-Reliance Clauses

### Examples

Settlement Agreement: “The parties are *each relying upon* their own judgment, belief, and knowledge, *and not upon* any representation or statements made by any person hereby released.”

Purchase Agreement: “Buyer acknowledges that, other than those representations contained in this Agreement, *it has not relied on* any representations made by the Sellers in entering into this Agreement . . . .”

Employment Agreement: “Employee acknowledges that she *is not relying on* any other representations made by Employer or its representatives about her employment.”



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## Non-Reliance Clauses

### Illinois Law

- Under Illinois law, non-reliance clauses preclude extra-contractual fraud claims. *Narayan Rao v. Abbott Labs.*, 2013 WL 1768697, at \*7 (N.D. Ill. Apr. 24, 2013).
- Fraud within contract?
- Fraudulent concealment?



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## Non-Reliance Enforcement

State	Enforce	Comments
Delaware	Yes	Non-reliance clauses are enforceable so long as they are explicit and unambiguous. <i>Abry Partners V, L.P. v. F &amp; W Acquisition LLC</i> , 891 A.2d 1032, 1058 (Del. Ch. 2006) (non-reliance clauses do not protect against lying, they merely state that the party hasn't relied on statements, whether truthful or not).
Texas	Yes	Waiver of right to bring fraud claims based on clear non-reliance clause. <i>Leibovitz v. Sequoia Real Estate Holdings, L.P.</i> , 465 S.W.3d 331, 342-47(Tex. App. 2015) (but analyzing factors such as sophistication of parties).
California	Sometimes	California courts "are divided as to the enforceability of non-reliance clauses." <i>Signal Hill Serv., Inc. v. Macquarie Bank Ltd.</i> , 2013 WL 12244056, at *6 n.52 (C.D. Cal. June 12, 2013); see, e.g., <i>Hinesley v. Oakshade Town Center</i> , 135 Cal. App. 4th 289 (2005) (yes); <i>Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp.</i> , 32 Cal. App. 4th 985, 995 (1995) (no).

## Hypothetical

Your contractor is suing you for \$50 million because it alleges it will be forced out of business by your breach, an outrageous and totally unjustified sum, in your view.

Are there contractual clauses that would have helped?



## Damage and Time Limitations

### Possible Damage Limitations

No punitive damages

No consequential damages

Limited to fees paid under the contract

Limited to amount of insurance coverage

(For IP), limited to reasonable royalty, no lost profits and no willful infringement



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## Can parties disclaim consequential damages?

State	Enforce	Comments
Illinois	Yes	Can disclaim them unless it is unconscionable or an exclusive or limited remedy would fail of its essential purpose. <i>Razor v. Hyundai Motor Am.</i> , 222 Ill. 2d 75, 86 (2006).
Delaware	Yes	Can disclaim them unless it is unconscionable or an exclusive or limited remedy would fail of its essential purpose. <i>Norman Gershman's Things To Wear, Inc. v. Mercedes-Benz of N. Am., Inc.</i> , 558 A.2d 1066, 1070 (Del. Super. Ct. 1989).
Texas	Yes	Can disclaim them unless it is unconscionable or an exclusive or limited remedy would fail of its essential purpose. <i>Rosa v. Am. Water Heater Co.</i> , 177 F. Supp. 3d 1025, 1040 (S.D. Tex. 2016).
California	Yes	Can disclaim them unless it is unconscionable or an exclusive or limited remedy would fail of its essential purpose. <i>A &amp; M Produce Co. v. FMC Corp.</i> , 135 Cal. App. 3d 473, 484 (Ct. App. 1982).



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## Hypothetical

The contractor is suing for wrongful termination and also is alleging that you underpaid for the last four years.

The statute of limitations is four years.

Were there any options for avoiding these types of claims?

## Damage and Time Limitations

### Shortened Statute of Limitations

State	Enforce?	Comments
Illinois	Yes, depending	Contract may shorten the limitations period to replace a SOL "as long as it is reasonable." <i>Zerjal v. Daech &amp; Bauer Const., Inc.</i> , 939 N.E.2d 1067, 1075 (Ill. App. Ct. 2010). But be careful about preserving counterclaims.
Delaware	Yes	No Delaware policy against shortened SOL. <i>GRT, Inc. v. Marathon GTF Technology, Ltd.</i> , 2011 WL 2682898, at *3 (Del. Ch. July 11, 2011) .
Texas	Yes, depending	Statute can be shortened, but there are limits. <i>Malone v. Prudential Ins. Co. of America</i> , 2013 WL 12140397, at *2-3 (S.D. Tx. July 30, 2013) (contractual cause of action cannot be shortened to less than two years).
California	Yes, depending	Courts generally enforce agreements to shorten limitations if reasonable. <i>Parra v. ADT Sec. Services, Inc.</i> , 2014 WL 4926277, at *4 (E.D. Cal. Sept. 30, 2014).

## Shifting Attorneys' Fees

- Advantages
  - Deter frivolous suits and encourage settlement
  - No out-of-pocket costs for asserting meritorious positions
- Disadvantages
  - Spawn side litigation over “prevailing party” definition and reasonableness of fees.
- Consider
  - Reasonable cap on attorneys’ fees
  - Carefully defining prevailing party standards



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## Arbitration

- Pros and cons of arbitration
- Assuming you arbitrate, what terms are worth fighting for?



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## Advantages of Arbitration

- For consumer contracts, avoids class actions
- Theoretically
  - better decision makers
  - quicker
  - less costly
- Greater control over format of proceedings
- Typically confidential
- Typically final
- As a defendant, lower risk of huge damages
- Avoids problematic jurisdictions



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## Disadvantages of Arbitration

- Without careful drafting, all “theoretical” benefits can be illusory
  - Decision makers not always better
  - Arbitration is not always quicker or less costly
  - May limit your ability to develop and prove your case
  - Battles over enforceability can make you regret adding the clause
- If you are a plaintiff, more moderate damages
- Potential for client remorse – awards most often unappealable



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## Best Practices For Arbitration Clauses

Are all the claims covered?

- “Breach of contract” or “arising out” of specific contract or “related to” it?
  - defamation?
  - fraud?
- Carve-outs for certain types of claims?
  - intellectual property?

Is it enforceable?

- FAA – procedural v. substantive law



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## A “Good” Commercial Arbitration

Repetitive patent disputes resolved by agreement to arbitrate in the future, including:

- Mandatory licensing period
- Single arbitrator with IP background
- Limited discovery, deposition and hearing time
- 30 days to decision
- Attorney fee shifting, up to a cap of \$200k



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## A “Bad” Commercial Arbitration

### Two-sentence standard arbitration clause

- Selection of single arbitrator who “retired” from active practice, leaving plenty of time to arbitrate
- No limits on discovery
- Repeated extensions and reopening of hearings, leading to hearings over the course of several years



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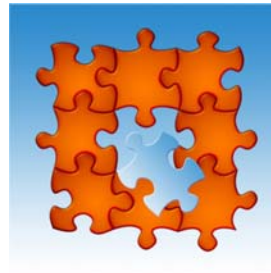
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## Ensuring A “Good Arbitration”

### Picking the framework

- Rules?
- Administrative body?

### Filling in the gaps



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## Best Rules?

	AAA Commercial Rules	JAMS Comprehensive Rules
Arbitrator Selection	One, unless otherwise agreed by the parties or the AAA decides otherwise. Requires neutrality after appointment.	One, unless otherwise agreed by the parties. Requires neutrality after appointment.
Discovery Limits	<ul style="list-style-type: none"> <li>Limited discovery allowed on application of any party or by arbitrator's own initiative</li> <li>Depositions allowed with arbitrator approval in complex cases</li> </ul>	<ul style="list-style-type: none"> <li>Limited according to JAMS protocol, unless parties agree otherwise</li> <li>One deposition allowed for each side, with more at arbitrator discretion (particularly in complex cases)</li> </ul>
Dispositive Motions	Yes, if arbitrator determines the motion is likely to succeed and dispose of or narrow issues	Yes, upon agreement by parties or request of one party
Time to Opinion	30 days from close of hearing, or from date set for receipt of parties' final statements	30 days from close of hearing, or from date set for receipt of parties' final statements

## Best Rules? (cont.)

	AAA	JAMS
Appealability	Optional; parties may consent to AAA Optional Appellate Rules	Optional; parties may consent to JAMS Optional Arbitration Appeal Procedures
Fees and Costs	Arbitrator costs and expenses can be reallocated; attorney's fees only if agreed or allowed by law	Arbitrator costs and expenses can be reallocated; attorney's fees only if agreed or allowed by law
Reasoned Opinion	Only upon written request prior to appointment or if arbitrator deems appropriate	Concise written statement of reasons unless otherwise agreed
Injunctive Relief	Yes	Yes

## Gaps in Rules

	AAA	JAMS
Hearing time	?	?
Choice of law	?	?
Requiring mediation	?	?
Further discovery restrictions	?	?
Interest on award	?	?
Place of enforcement	?	?
Decision-maker for enforceability	?	?

## Delegation Clause Example

“The Arbitrator, and not any federal, state or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable.”

## Recent Supreme Court Development

### ■ *Henry Schein Inc. v. Archer and White Sales Inc. (2019)*

- Ruled that there is no “wholly groundless” exception to the FAA. A contract that delegates the question of arbitrability to an arbitrator should be enforced as written.
- Open question: Does reference to the AAA rules give enforcement authority to the arbitrator?
- Bottom line: Specific delegation clause is a best practice.



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## Sample Arbitration Clause (Simple)

“Unresolved disputes and controversies concerning any of the terms and provisions of this Agreement or the application of charges hereunder shall be submitted for binding arbitration under Commercial Arbitration Rules of the American Arbitration Association which will be the exclusive remedy of the parties. Compound interest . . . shall be calculated from the date of the arbitrator’s decisions.”



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## Sample Arbitration Clause (Simple) (cont.)

All the benefits of the AAA rules

No gap fillers

Hearing time
Choice of law
Requiring mediation
Further discovery restrictions
Place of enforcement
Decision-maker for enforceability



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## Sample Arbitration Clause (Complex)

Scope	Disputes "in connection with the Agreement" shall be resolved by arbitration.
Arbitrator Selection	One if agreed. Otherwise two party arbitrators who select a chair.
Arbitrator Experience	Limited to arbitrators with railroad experience.
Discovery	As per Federal Rules 26-37.
Hearing and Evidence	Arbitrator to set a hearing and take "reasonable evidence" pursuant to Federal Rules of Evidence.



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## Sample Clause (Complex) (cont.)

Time to Award and Form	Arbitrator(s) "promptly" issue(s) a reasoned award.
Appeal	Final, binding and conclusive.
Enforceable	In any court having jurisdiction.
Costs and Fees	One arbitrator – split.  Three arbitrators – each pays one and splits the third.  No attorney's fees.
Interest	Yes

## Potential Gaps/Challenges

- Who decides enforceability?
- Full federal discovery?
- Procedural and evidentiary rules?
- Dispositive motions allowed?
- Time to opinion?
- Injunctive relief?
- Hearing time?
- Choice of law?
- Appellate rights?

## Class Action Waivers in Arbitration Clauses

- Before *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011)
  - Jurisdiction-specific rulings.
  - 7th Circuit vs. 9th Circuit and California state courts.
- *Concepcion*
  - State law conditioning enforcement of arbitration clauses based on availability of class arbitration is preempted by the FAA.
- *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013)
  - Cost concerns in vindicating federal statutory rights do not invalidate non-class arbitration clauses.
- *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018)
  - FAA saving clause does not provide basis for refusing to enforce arbitration agreements waiving FLSA collective action procedures and state-law class action procedures.



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## Drafting Class Action Waivers

- Key is to include provisions overcoming “unconscionability” arguments and allowing reasonable access to the arbitral forum: costs, attorneys’ fees, and award amounts.
- Consider explicitly specifying in arbitration agreements that court or arbitrator will make threshold determination of arbitrability.



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## Questions and Comments



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