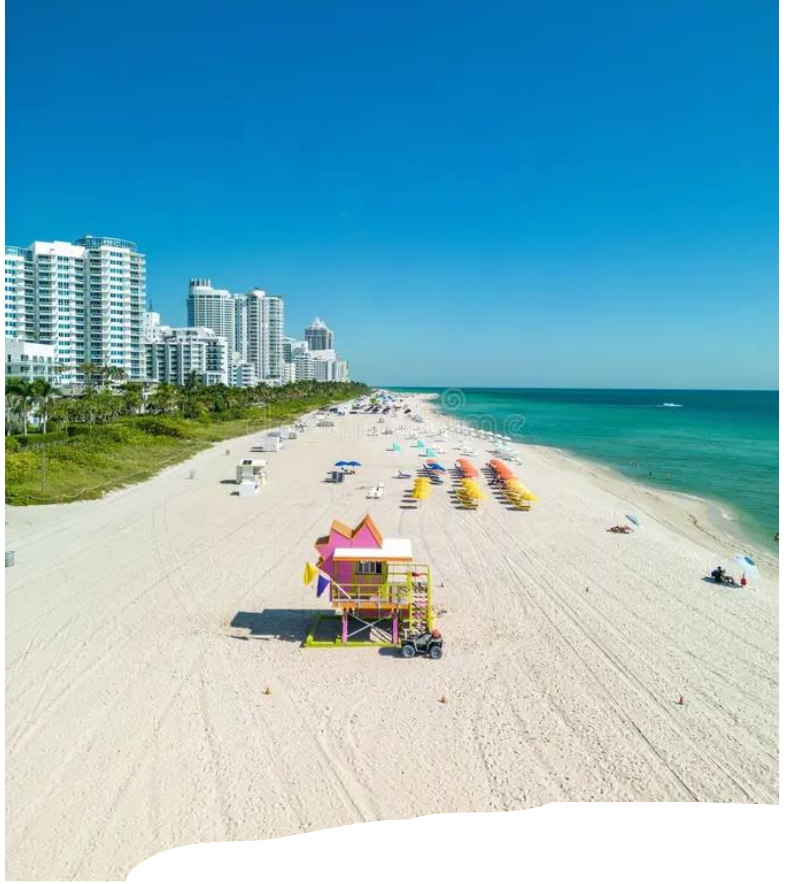

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Comparative Overview of Key Contract Law Issues: NY, DE, and FL

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Introduction

Purpose of this Presentation

- Highlight differences in how **NY, DE, and FL** treat key contract provisions.
- Highlight risks, advantages, and strategic considerations unique to each state.

Key Topics Compared

I. Arbitration Clauses
II. Fee Shifting (Unilateral v. Reciprocal)
III. Indemnity & Limitation of Liability
IV. Non-Compete Agreements
V. Settlement Agreements

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I. Arbitration
Enforcement of Clause

I. Arbitration – Enforcement of Clause

Federal Baseline (FAA, 9 U.S.C. §§ 1–16)	NEW YORK	DELAWARE	FLORIDA
Enforceability	• NY CPLR Art. 75 governs. • Strict procedural triggers (*e.g.*, timely demand to arbitrate under CPLR 7503). • Non-signatories may be bound under the direct benefits theory of estoppel *2004 Parker Fam. LP v. BDO USA LLP.*	• No separate arbitration statute. • DE contract law applies; Chancery strongly favors freedom of contract. • Non-signatories may be bound for "parties closely related to one of the signatories such that the non-party's enforcement of the clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound." *See Ashall Homed Ltd. v. ROK Ent. Grp.*	• Fla. Stat. §682 governs. • Florida Arbitration Code revised in 2013 to track the RUAA. • Non-signatories may be bound under equitable estoppel if they sue a signatory for breach of contract or have directly benefitted from the contract (*Paquin v. Campbell.*)
Court Intervention	• Courts intervene only for contract defenses (*e.g.*, unconscionability, waiver, scope). • Failure to comply with CPLR 7503 notice may waive arbitration entirely.	• Heavy deferral to arbitration. • Intervention limited to classic FAA grounds.	• Courts rarely invalidate/generally defer. • Special scrutiny on consumer/healthcare/ employment contracts with Florida Arbitration Act.

Standard for Vacancy	• Governed by CPLR Art. 75, § 7511
	  • Corruption, fraud, misconduct
	  • Partiality of an arbitrator
	  • Arbitrator exceeds power/fails to follow procedure
	• NY adds policy gloss: award may be vacated if it violates strong policy, is irrational, or exceeds enumerated limitation. *See Matter of New York City Transit Auth. v. Transp. Workers' Union.*
		• Governed by 10 Del. § 5714
		• Vacatur grounds track FAA almost word-for-word:
		  • Corruption, fraud, undue means
		  • Evident partiality or excess of power of arbitrator
		• Chancery/Superior Courts emphasize extreme deference: awards are vacated only in extraordinary circumstances. *See e.g., SPX Corp. v. Garda USA, Inc.*
			• Governed by Fla. Stat. § 682.13, as amended in 2013 to align with RUAA.
			• Grounds for vacatur include same FAA grounds, plus an **extra statutory ground:**
			  • Prejudicial misconduct by an arbitration (*e.g.*, refusing to postpone a hearing despite good cause). *See* Fla. Stat. § 682.13(1).
			  • Makes FL slightly broader than NY/DE
			• Courts also recognize statutory carve-outs for certain subject matters (*e.g.*, healthcare rights).

Threshold Arbitrability Question	• Typically decided by courts under CPLR 7503, unless the parties have provided clear and unmistakable evidence of their intent to delegate such issues to the arbitrator. *See Revis v. Schwartz.*	• Typically decided by courts, unless the parties have provided clear and unmistakable evidence of their intent to delegate such issues to the arbitrator. *See James & Jackson, LLC v. Willie Gray, LLC.*	• Typically decided by courts, unless the parties have provided clear and unmistakable evidence of their intent to delegate such issues to the arbitrator. • However, if the contract incorporates forum rules by reference (*e.g.*, AAA or JAMS), the arbitrator determines arbitrability. *See Airbnb, Inc. v. Doe*.

II. Fee-Shifting
Unilateral v. Bilateral

II. Fee-Shifting – Unilateral v. Bilateral

	NEW YORK	DELAWARE	FLORIDA
General Rule	• The American Rule stands: courts **reject fee-shifting**. • Attorney's fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule.	• American rule also followed but Chancery regularly enforces fee-shifting if contract drafted clearly and unequivocally. • DGCL silent, but corporate law context to consider (*e.g.*, 2025 amendments to Section 102(f) and 109(b) prohibit provisions in bylaws to impose fee-shifting).	• American Rule followed, but Fla. Stat. §57.105 also governs. • Attorney fees generally not recoverable unless specified by statute or agreement. • Can turn **one-way fee provisions into two-way obligations**.
Unilateral Provisions	• Generally enforceable if drafted unambiguously.	• Enforceable with clear language. • No statutory reciprocity.	• **NOT ALLOWED under Fla. Stat. § 57.105.** • Deemed **reciprocal by statute**.
Key Cases Notes	• *Alyeska Pipeline Services Co. v. Wilderness Society* (providing historical perspective on awarding of attorney's fees). • *Mighty Midgets, Inc. v. Centennial Ins. Co.* (reflecting on legislative policy of the American Rule). • *Sage Systems, Inc. v. Liss* (reaffirming strength of principles behind the American Rule).	• Contract controls. • More fee-shifting friendly, *see* *Schneider National Carriers, Inc. v. Kuntz* (court reading the contract as a "whole" should be read to require attorneys' fees even when contract did not contain precise language requirement).	• Statutory override; Florida courts will make a unilateral provision reciprocal (*e.g.*, *Ham v. Portfolio Recovery Assoc.*, LLC).

III. Indemnity & Limitation of Liability

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	NEW YORK	DELAWARE	FLORIDA
Indemnity	• Enforceable if explicit. • No indemnity for gross negligence or willful misconduct (*e.g.*, *Food Pageant v. Con Edison*).	• Very broad enforcement; contracts control. • No categorical bar on indemnity for gross negligence or willful misconduct—courts emphasize freedom of contract absent fraud. *See Abry Partners V, L.P. v. F&W Acquisition LLC.*	• Enforceable but Florida courts scrutinize scope; *e.g.*, exculpatory clauses must be clear and unambiguous (*see e.g.*, *Borden v. Phillips*). • No per se prohibition like New York, instead, Florida narrowly construes indemnity provisions against the indemnitee (e.g., construction contracts under Fla. Stat. 725.06).
Limitation of Liability	• Enforceable except for gross negligence, fraud, intentional misconduct	• Courts uphold enforceability of limitations on liability. • Chancery enforces contract freedom, even harsh results, absent narrow exceptions such as fraud or bad faith (*e.g.*, *Abry Partners V, L.P., v. F&W Acquisition LLC*).	• Generally looked upon with disfavor, and Florida law requires that such clauses be strictly construed against the party claiming to be relieved of liability. *Cooper v. Meridian Yachts, Ltd.).*
Special Notes	• New York courts have routinely enforced liability-limitation provisions when contracted by sophisticated parties. (*e.g.*, *Process Am., Inc. v. Cynergy Holdings, LLC*).	• DE law favors freedom of contract, particularly those governing LLCs. (*e.g.*, *In re Oxbow Carbon LLC Unitholder Litigation*). • Section 145 of DGCL (Indemnification Statute) to consider for corporate directors, officers, employees, and agents.	• Florida public policy sometimes narrows clauses (*e.g.*, indemnity in construction contracts, Fla. Stat. §725.06 which must include monetary limitation of liability tied to insurance coverage).

IV. Non-Compete Agreements

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	NEW YORK	DELAWARE	FLORIDA
Standard	• Generally disfavored. • NCAs must meet 3-part reasonableness test: **(1)** necessary to protect legitimate business interest; **(2)** reasonable in time and scope; **(3)** no undue hardship on employee or harm to public (*See BDO Seidman v. Hirshberg*). • Exception for sale of a business, where NCAs more likely to be enforced.	• Reasonableness standard: **(1)** legitimate business interest; **(2)** scope and time; **(3)** balance of the equities. • Enforced in M&A and employment contexts; usually "less-searching" and more deferential standard.	• Under Fla. Stat. § 542.335, NCAs must meet very specific legal criteria (similar to New York, *i.e.* **(1)** necessary to protect legitimate business interest; **(2)** reasonable in time and scope; **(3)** no undue hardship on employee or harm to public). • New **CHOICE Act**, codified as §§ 541.41 through 541.45, while leaving undisturbed the provisions of 542.335, impacts both **(a)** non-compete agreements and **(b)** covered garden leave agreements. For NCAs, the CHOICE act notably expands the scope of agreements to cover a period of up to **4 years**. • Very pro-enforcement; presumption of "irreparable harm" if covenant is not enforced (Fla. Stat. 542.335(1)(j)). • Attorney's Fees: prevailing party entitled to recover fees under Fla. Stat. § 542.335(1)(k).
Key Interests Protected	• Trade secrets/confidential information. • Client relationships and goodwill.	• Similar to New York.	• Similar, but also includes specialized employee training paid for by the employer.
Blue Pencil Doctrine	• New York courts can modify overbroad agreements in order to make them enforceable but are not required to do so. (BDO Seidman v. Hirshberg (1999)).	• Delaware courts do blue-pencil agreements to make them reasonable (United Healthcare Servs. v. Corzine (2019))	• Florida courts are required to "construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement." (§ 542.335(h)).

V. Settlement Agreements

V. Settlement Agreements

	New York	Delaware	Florida
Confidentiality	• Enforceable but whistleblower/public policy carve-outs apply; SAs cannot be too broad. • Subject to specific legal requirements in employment context (Section 5-336 of the New York General Obligations Law and Section 5003-B of the Civil Practice Law and Rules).	• Contract controls; policy to enforce confidentiality agreements and accept the parties' assertions of irreparable harm from breaches. • No special statutory carve-outs beyond federal law.	• Broad releases are also enforceable if clear and not procured by fraud or duress. *See Shepard v. Fla. Power Corp.*. • But confidentiality provisions must align with public policy, especially when information relates to public health or safety (known as *Sunshine* laws).
Release (All Known & Unknown)	• Broad releases enforced. • "Known or Unknown" sufficient to bar claims for recovery of money. • Unenforceable on certain non-disparagement grounds.	• Same as New York, courts will enforce broad releases, especially in sophisticated commercial or M&A contexts. • Treated as standard restricted covenants.	• Release clauses are critical. • Language must be precise (*see e.g.*, *Shepherd. v. Florida Power Corp.*).
Non-Disparagement	• Enforceable; often treated like confidentiality.	• Enforceable. • Chancery respects clear anti-disparagement provisions, especially in M&A/partnership exit agreements.	• Enforceable; viewed as "restrictive covenants." • Clause must be reasonably tailored and not overly broad.

Confession of Judgment v. Entry of Default	• **Confessions of judgment**
	  • Only allowed under CPLR 3218 if strict technical requirements are met.
	  • Creditors cannot file confessions of judgment against non-New York residents since the 2019 amendment to CPLR 3218.
	  • No pending litigation required.
	• **Entry of default** governed by CPRL 3215.
		• **Confession of Judgment**
		  • **Disfavored/Rarely Enforced** (due process concerns).
		  • No explicit statutory mechanisms, governed by common law with procedural rules embedded in Title 10 of Delaware Code (10 Del. C. § 2306).
		  • No residency requirement for confession of judgment.
		  • Pending litigation usually required.
		• **Entry of default** handled under Delaware Superior Court Rule 55, in many cases, the court grants the judgment without a hearing.
			• Confessions of judgment
			  • **Considered invalid**; creditors cannot rely on expedited process to secure judgment.
			  • No residency carve-out, because confessions of judgment are outright invalid under Florida law.
			  • Pending litigation required.
			• **Entry of default** permitted through procedural process; *see* Fla. R. Civ. P. 1.070; 1.140; 1.500.

Liquidated Damages Clauses	• Enforceable if **(1)** the amount liquidated bears a reasonable proportion to the probable loss and **(2)** the amount of actual loss is incapable or difficult of precise estimation. • No liquidated damages clauses in nondisclosure or non-disparagement agreements concerning discrimination, retaliation, or harassment claims N.Y. Gen. Obligations Law § 5-336.	• To be enforceable, courts assess **(1)** whether damages were uncertain or difficult to calculate at the time of contracting, and **(2)** whether the stipulated amount is reasonable and not unconscionable.	• Similar test to Delaware

Conclusion & Key Takeaways

NEW YORK	DELAWARE	FLORIDA
• Sophisticated commercial courts (esp. Commercial Division). • Strict construction of fee and indemnity clauses. • Conservative on non-competes.	• Extremely **contract-friendly**; strong deference to freedom of contract. • Courts (esp. Chancery) move quickly and have deep expertise. • Enforces broad indemnities, limits of liability, and non-competes in M&A.	• **Employer-friendly on non-competes**; presumption of irreparable harm. • Statutory reciprocity for attorney's fees (cannot have unilateral fee clauses). • Confessions of judgment prohibited; public policy carve-outs limit indemnity.

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