

Choice of Law and Forum Selection in Business Contracts – New Law in North Carolina

Contracts often include agreements stating how litigation will be handled in the event the parties have a dispute. These agreements sometimes include “choice of law” and “forum selection” provisions. In a choice of law provision, the parties specify that the contract will be interpreted according to the law of a particular state. In a forum selection clause, the parties specify the State—and sometimes the specific county—in which disputes will be filed.

These provisions generally are valid in North Carolina, but our courts have declined to enforce them in some specific circumstances. This summer the General Assembly created a new [Chapter 1G](#) that attempts to remove these limits when parties choose North Carolina as the forum state and North Carolina law as the applicable law. The new legislation *only* affects provisions included in *business contracts*. It defines a “business contract” as “a contract or undertaking, contingent or otherwise, entered into primarily for business or commercial purposes,” and it explicitly excludes “employment contracts” and “consumer contracts.” See 1G-2(1), -5(1). Chapter 1G became effective June 26, 2017 and it applies to business contracts entered into before, on, or after that date. These are the main effects of Chapter 1G:

Choice of law provisions

Our courts have long declined to enforce a choice of law provision if (1) the agreement and parties had no substantial relationship with the chosen state and there was no other reasonable basis for choosing it; or (2) the law of the chosen state was contrary to a policy of the state having a materially greater interest in the dispute. See *Schwarz v. St. Jude Medical, Inc.*, 802 S.E.2d 783, 789 (N.C. App. 2017); *Cable Tel Svcs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 642–443 (2002) (applying Restatement (Second) of Torts, Conflict of Laws, §187); *Torres v. McClain*, 140 N.C. App. 238, 241 (2000).

The new Chapter 1G aims to erase these restrictions when parties choose to be governed by North Carolina law:

The parties to a business contract may agree in the business contract that North Carolina law shall govern their rights and duties in whole or in part, whether or not any of the following statements are true:

(1) The parties, the business contract, or the transaction that is the subject of the business contract bear a reasonable relation to this State.

(2) A provision of the business contract is contrary to the fundamental policy of the jurisdiction whose law would apply in the absence of the parties' choice of North Carolina

law.

1G-3(a).

For example, assume ABC Manufacturing and ZED Construction have a contract. Neither ABC nor ZED is a North Carolina company, and the contract work will take place in Virginia. For various reasons not discussed in the contract, however, they specify that North Carolina law will apply to contract disputes and that lawsuits must be filed in North Carolina. After some time the agreement falls apart, ZED sues ABC in North Carolina, and ZED argues that North Carolina law contract law applies. ABC counters that, despite the clear choice of law provision, Virginia law should apply. Before Chapter 1G, the North Carolina court could conclude that North Carolina has nothing to do with the contract and that the choice of law provision is not enforceable in a suit maintained in North Carolina. Chapter 1G seeks to make the relationship between the contract and North Carolina immaterial.

For contracts governed by the UCC, [G.S. 25-1-301\(a\)](#) has also been [amended](#) to recognize the effect of Chapter 1G. But if one of the UCC provisions listed in [25-1-301\(c\)](#) specifies a different applicable law, that UCC provision controls. 1G-3(b).

Forum selection clauses

Prior to Chapter 1G, selection of a particular venue within North Carolina—that is, a specific *county*—was not enforceable unless that county was already a “proper” venue as set forth in the applicable venue statute. In a recent case the Court of Appeals held that a clause requiring suit to be filed in Mecklenburg County was not enforceable. The venue statute, G.S. 1-82, required that litigation occur in a county in which one of the parties resided. Neither resided in Mecklenburg. The court stated that “parties may not strip our Legislature of its power to determine in which county or counties that actions maintained *in this State* must be prosecuted.” *A&D Environmental Servs., Inc. v. Miller*, 240 N.C. App. 296, 298 (2015) (citing *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 143 (1992)).

With Chapter 1G, parties to business contracts who select North Carolina law as the applicable law may also agree to file suit in North Carolina *and* choose a venue from among the State’s 100 counties. Moreover, if they choose not to specify a county, they may bring the action in *any* county:

Notwithstanding any other provision of law, a party to a business contract may bring an action in the courts of this State for a dispute arising from the business contract if the business contract contains both of the following provisions:

- (1) A provision where the parties agree that North Carolina law shall govern their rights and duties in whole or in part, pursuant to G.S. 1G-3.**

(2) A provision where the parties agree to litigate a dispute arising from the business contract in the courts of this State.

1G-4(a). And...

Notwithstanding any other provision of law, the parties...may designate in the business contract one or more counties in this State as the proper venue for a dispute arising from the business contract. If the parties do not designate a county in the business contract, a party may bring an action for a dispute arising from the business contract in any county in this State.

1G-4(c).

In addition, 1G-4(b) states that a parties selecting North Carolina as the forum state consent to the personal jurisdiction of the State and a court “may not stay or dismiss the action pursuant to G.S. 1-75.12 or the doctrine of forum non conveniens.” The statute goes on to provide that transfers of venue are only allowed under G.S. 1-83(2) (convenience of parties or ends of justice), 1-83(3) (judge has conflict), or 1-84-4 (when required for a fair trial). In other words, the case may not be transferred pursuant to G.S. 1-83(1) on grounds that it would be an improper venue under a different venue statute.

[It should be noted that North Carolina courts will not enforce a forum selection clause as mandatory unless the contract indicates that the selected forum is exclusive. See *Southeast Caissons, LLC v. Choate Constr. Co.*, 784 S.E.2d 650, 654 (N.C. App. 2016) (a venue clause specifying “the City of Contractor’s office” was not mandatory); *Overland Contracting*, 154 N.C. App. at 644 (noting the requirement of language such as “exclusive,” “sole,” or “only”). It does not appear that Chapter 1G alters this specificity requirement.]

Chapter 1G was enacted at the urging of the Business Law Section of the North Carolina Bar Association. That Section’s Legal Opinion Committee argued that these changes would, among other things, bring North Carolina’s law in line with that of other states and promote North Carolina as a more business-friendly environment. You can find the Section’s draft report and draft bill [here](#).