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To: Our clients and friends

From: Stuart M. Riback

Re: Contracts – Choice-of-forum clauses

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There is no such thing as "boilerplate." The clauses at the back of the contract your business signs – clauses such as "entire agreement," "choice of forum," or "no third-party benefit" -- may not have been as actively negotiated as the business terms (if they were negotiated at all), but they can have a huge impact on later litigation. This can be true even if the later litigation is not an effort to enforce the contract, and perhaps even if the precise parties to the litigation are not the same parties that actually signed the contract. How the clauses are worded, and how they interact with other clauses, can be hugely consequential matters.

Consider, for example, choice-of-forum clauses. These clauses prescribe which courts will hear any eventual disputes. The United States Court of Appeals for the Third Circuit (federal appellate court covering New Jersey, Pennsylvania and Delaware) decided a case in February that enforced a contractual choice-of-forum against parties that didn't sign the contract in question. Not only that, it enforced the forum selection clause at the behest of parties that didn't sign the contract, either. The case is *Carlyle Investment Management LLC v. Moonmouth Co., SA,* decided February 25, 2015.

The case arose from a failed 2006 investment in a Carlyle-sponsored investment vehicle, CCC. The investor was an overseas company called Moonmouth. The Subscription Agreement for Moonmouth's investment provided that all disputes "with respect to" the Subscription Agreement must be heard exclusively in Delaware state courts.

CCC fell victim to the financial crisis and was placed in liquidation overseas. The financial crisis led as well to a fair number of other interactions, posturing and threats between the Carlyle parties and the parties affiliated with Moonmouth about, among other things, claimed breaches of fiduciary duty. Finally, in 2012, Carlyle and some of its affiliates sued Moonmouth and some related parties in Delaware state court. One of the defendants was Plaza Investment Management Overseas SA ("Plaza"), which had been the director of Moonmouth and had signed the Subscription Agreement for Moonmouth.

At this point the procedural maneuvering started. Plaza removed the case to federal court in Delaware. The plaintiffs made a motion to have the case sent back to state court. They relied on the forum selection clause, which specified that disputes should be heard in Delaware ***state*** court – not federal court. That motion was granted. Plaza and the other defendants appealed.

Remember that Plaza itself was not a party to the Subscription Agreement. It had signed the Subscription Agreement as a director of Moonmouth, not for itself. So it objected that it couldn't

be bound by the forum selection clause. It also objected that the plaintiffs hadn't signed the Subscription Agreement either – that agreement was with CCC, which was in liquidation. CCC was not a plaintiff. So Plaza argued that the plaintiffs couldn't rely on the Subscription Agreement to compel Plaza to litigate in Delaware state court.

The Third Circuit was unimpressed with these arguments. First, it held that Plaza was bound by the forum selection clause. The court's analysis involved a three-part test, but it boiled down to a fairly simple issue. Plaza was bound because Plaza and Moonmouth were so closely related in the context of the CCC investment that it was reasonably foreseeable Plaza would be sued in disputes about the CCC investment and Subscription Agreement. So because the relevant claims were "with respect to" the Subscription Agreement, the choice-of-forum clause applied.

Next, the Third Circuit held that the Carlyle parties --- the plaintiffs -- could rely on the forum selection clause even though they had not signed the Subscription Agreement, either (recall that the Subscription Agreement was with CCC, not with its Carlyle affiliates). The reasons the plaintiffs could rely on the forum selection clause were very similar to the reasons Plaza was bound by it. The plaintiffs were closely related to CCC, so it was foreseeable that disputes relating to CCC might pull them in as well. So because the Subscription Agreement required a Delaware state forum for all claims "with respect to" the Subscription Agreement, this case was covered.

Could this case have come out differently? Is there any wording in the contract that might have led to a different result? Maybe. Had the forum selection clause been limited to actions "to enforce" the Subscription Agreement, as opposed to any actions "with respect to" or "arising out of" the Subscription Agreement, it possibly might not have applied to case based on alleged breaches of fiduciary duty. If the Subscription Agreement had provided expressly that no nonsignatories could rely on or invoke its provisions, there is an argument that the choice-of-forum clause might not have applied in a case by nonsignatories.

But it's impossible to say for sure, and certainly not before the events. To a large degree, parties to a contract simply don't know in advance what precise sorts of disputes could arise from their relationship. Neither side can be sure whether it will one day be a plaintiff or defendant. And the parties rarely can forecast at the time they contract what permutations of parties might align in future litigation.

The bottom line is that choice-of-forum provisions really do add a large degree of certainty. Courts are inclined to enforce them, and enforce them broadly. So choose your forum carefully when you negotiate a contract. You may be stuck with it even if you don't want to be.

If you have any questions about this, or would like a copy of the *Carlyle* case, feel free to contact me by email at sriback@wilkauslander.com or by telephone at (212) 981-2326.