

TEXAS LAWYER

“Forum” and “Venue”: A Distinction With a Difference in Texas

By Jim Zucker and Wyatt Dowling | April 05, 2018

Courts and lawyers often use the words “forum” and “venue” interchangeably. However, the terms have different meanings and have significantly different practical impacts in Texas state court concerning one of the most fundamental issues in litigation: where a case will be tried.

As noted in *Great Lakes Dredge & Dock Co.*, 251 S.W.3d 68 (Tex. App.—Corpus Christi 2008, no pet.), “forum” refers to a sovereign or a state. A provision in a contract stating that disputes must be brought “in the courts of the State of Texas” is therefore a forum-selection clause. “Venue,” by contrast, is the place within a forum where the case will be tried. A provision specifying that the parties agree that disputes shall be brought “in the courts of Harris County, Texas” is a venue-selection clause.

Why does this matter? Until relatively recently, it did not. Regardless of whether a contract contained a forum- or venue-selection clause, federal and state courts generally refused to enforce them on the grounds of public policy. In *Home Insurance Co. v. Morse*, 87 U.S. 445 (1874), the U.S. Supreme Court held that a forum-selection clause requiring suit in Wisconsin state court was unenforceable because “agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.” Texas courts likewise disfavored forum-selection clauses as “ousting” courts of jurisdiction.

Venue-selection clauses were also disfavored in Texas. In *International Travelers Association v. Branum*, 212 S.W. 630 (Tex. 1919), the Texas Supreme Court held unenforceable a contract provision requiring suit in Dallas County that effectively overrode a statutory venue scheme allowing suit in several counties. Quoting the Massachusetts Supreme Court, the Texas Supreme Court wrote that “the rules to determine in what courts and counties actions may be brought are fixed . . . by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law.”

But in 1972, things began to change, at least for forum-selection agreements. That year, the United States Supreme Court held that forum-selection clauses should be given full effect, absent fraud or undue influence. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972). Years later, the Texas Supreme Court followed the United States Supreme Court’s lead and held in *In re AIU Insurance Co.*, 148 S.W.3d 109, 114 (Tex. 2004) that a forum-selection clause in an insurance policy was valid and enforceable. Since that time, forum-selection clauses have been presumptively enforceable in Texas, absent a strong showing that they should be set aside.

No such change occurred for Texas law concerning the invalidity of venue-selection clauses. Unlike forum-selection clauses, venue-selection clauses can conflict with the Legislature’s venue scheme, as set forth in general in Chapter 15 of the Civil Practices and

Remedies Code and numerous Texas statutes, mandating or permitting suit in specific counties regardless of the dispute's or the parties' connection to a particular county. Enforcement of venue-selection agreements therefore would permit parties to override the convenience determinations of the Legislature, contrary to public policy.

What are the practical consequences of Texas's differing treatment of forum- and venue-selection clauses?

First, although contractual counterparties can take some comfort that their forum-selection clause will be enforced, the same should not be assumed for venue-selection clauses. A party assuming that the dispute will occur in the neutral or even favorable venue specified in the agreement may find itself litigating elsewhere and at a disadvantage, with limited options for transferring the case to the county specified in the agreement, absent unusual inconvenience to the parties and witnesses. "Inconvenience" is given much less if any credit now, with the horse and buggy days long gone. The result may be an unfavorable transfer and a significant and adverse impact on the party's interests.

Second, parties should be aware that for certain agreements, the Legislature has made venue-selection clauses enforceable. Many Texas litigators are familiar with Section 15.020 of the Texas Civil Practice and Remedies Code, which has a special rule for "Major Transactions." For written contracts involving \$1 million or more, the Legislature has made venue mandatory in the county specified in the contract. That is, for high-value agreements the Legislature has created a narrow exception to the general rule that venue-selection clauses are not enforceable and made them enforceable.

So contractual counterparties to high-value agreements can take comfort that their venue-selection clause will be enforced, right? Wrong. When the Legislature created Section 15.020's exception for "Major Transactions," it also created an exception to the exception. Section 15.020 also says that it "does not apply" if "venue is established under a statute of this state other than this title." That is, if venue is established by any statute other than Title 2 of the Civil Practices and Remedies Code, the venue-selection clause is not enforceable, even if the contract at issue involves \$1 million or more. And there are dozens of Texas statutes outside Title 2 of the Civil Practices and Remedies Code that have special venue schemes. Yet another wrinkle is that Texas state courts will enforce a clause requiring a non-Texas forum or venue, regardless of whether the transaction involves \$1 million or more.

The interplay between Texas's common law on venue-selection clauses, the Legislature's special venue schemes, and the "Major Transaction" exception in the Civil Practices and Remedies Code can inject significant uncertainty into the fundamental issue of where a case will be tried. A party anticipating filing or defending a lawsuit in Texas involving a contract must ask: Does the contract contain a venue-selection clause (as opposed to a forum-selection clause)? If so, does it involve a "Major Transaction," so that the clause is enforceable? And even if it does involve a "Major Transaction," is there some other Texas statute that establishes venue, invalidating the contractual venue provision? Resolving this complexity may be critical to securing a favorable venue (or avoiding an unfavorable one) and significantly advancing the interests of the client.

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