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Today's Business: Sometimes, more than facts are needed to win

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Sometimes you need more than the facts on your side to win a lawsuit.

In any business dispute there are procedural elements, in addition to the facts, that may determine the outcome. The difference between winning or losing a claim often depends on those additional elements, including the specific law that applies as well as the forum where the action takes place — and the particular judge, jury or arbitrator ultimately deciding the matter.

The focus of any business, naturally, is on what it knows best: delivery of a service, development and marketing of products and brands, financial aspects affecting pricing, revenue and expenses, and management of employees.

This focus typically is reflected in the detailed terms of a business agreement. Unfortunately, that focus is too often to the neglect of the “procedural” aspects of the business relationship that can come to mean everything.

Most contracts contain terms that articulate the agreement of the parties as to how disputes will be resolved in the event of default by either party. These provisions include agreements on the applicable law, the place where any dispute will be resolved, and whether a case will proceed in court or to private arbitration.

The general rule is that a court applies the law of the state in which it is located unless the parties expressly agree to apply the law of another state. It is not surprising that businesses generally prefer a local court, because of convenience, presumed familiarity and the ability to plan business practices around known law.

Nevertheless, there are some instances where a business is formed under the laws of a state other than where it is headquartered. Sometimes that is because the alternate state’s laws are preferable for the particular industry or business. In those circumstances, when creating a business agreement it is incumbent on the business to expressly name the state whose law will apply.

Businesses sometimes believe that articulating a choice of law also solves the issue of where a potential dispute will be resolved. A contract, however, must do more to spell out the parties’ choice of forum to ensure that a court can exercise jurisdiction over an out-of-state party and to provide certainty about location. This is very important to ensure that a business has an actual, practical remedy in the event of a dispute.

For example, a contract between Connecticut and California companies that names California as the choice of forum would require the Connecticut business to commence or defend any action across the country with the obvious costs and practical difficulties of doing so that are often prohibitive. The goal for any business should be to litigate close to home.

As part of the choice of forum, businesses have an opportunity to elect whether to proceed in court or by private arbitration. There are many factors to consider in that decision. In court, the parties likely have broader abilities to discover

documents and take deposition testimony. Unless waived in the contract, there also is a right to jury trial. Such court proceedings may favor cases in which the story of the case would be understandable and appealing to a jury. By contrast, arbitration may provide a faster, more cost-effective resolution and an opportunity to select arbitrators with experience in the specific subject matter.

A business owner may fervently believe that he or she is on the side the angels — namely, that the facts compel a decision in his or her favor. Unfortunately, that may be rendered academic unless attention is paid to more than the facts, including applicable law, location and procedures for resolving the claim.

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