

It's Not Always Just "Boilerplate": Know Your Choice of Forum Provisions

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Clients often ask if the terms of an existing contract can be amended if all the parties agree to the revision. Contracts are amended all the time. Circumstances change. Business parties evolve and priorities shift. As long as all the parties agree to the change, you can "chart a new course" so to speak. When you do that, however, it is best to remember that the law of unintended consequences applies even in the world of the business deal. For that reason, all parties should pay particular attention to how the terms of an amendment or a new agreement between the parties may impact an existing term or agreement.

The Wisconsin Supreme Court was recently tasked with sorting out just such a situation. In *Midwest Neurosciences Associates, LLC and Neurosurgery and Endovascular Associates, SC v. Great Lakes Neurosurgical Associates, LLC and Yashdip Pannu, M.D.* (Wis. 2018), the Wisconsin Supreme Court was called upon to decide whether an agreement which contained a "merger clause" (effectively superseding all prior agreements), but did not contain a mandatory arbitration clause, would alter the forum of dispute resolution when a prior agreement between the same parties did contain such an arbitration clause. The Court dealt with several other complex legal issues in the *Midwest Neurosciences* case, but the survival of the arbitration clause in the Operating Agreement provides a lesson for anyone who desires consistency in their choice of dispute forum.

In *Midwest Neurosciences*, the parties to a neurosurgery clinic executed an Operating Agreement which contained restrictive covenants, as well as a mandatory arbitration clause. Almost a decade later, the three members of Midwest Neurosciences decided to go their separate ways. As part of that process, one of the members of Midwest Neurosciences offered to remain in the company and redeem the other two members' interests. To that end, a Redemption Agreement was drafted and signed by the departing members. The Redemption Agreement contained a release of the restrictive covenants (*i.e.*, noncompetition) of the two departing members, but it did not contain an arbitration clause as had the Operating Agreement. As a result, one of the redeemed members opened up a competing practice near Midwest Neurosciences.

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Shortly afterwards, the remaining member of Midwest Neurosciences claimed that since he had not signed the Redemption Agreement he had not agreed to its terms (even though his attorney had proposed a “final” version for the departing members’ signature). As a result, Midwest Neurosciences pursued claims against the former member for breaching the restrictive covenant contained in the Operating Agreement. Even though it had initially filed the claim in Circuit Court, Midwest Neurosciences sought to invoke arbitration under the terms of the Operating Agreement, while the former member fought to defend the claim in court, making the argument that the Redemption Agreement was an executed and enforceable agreement and that arbitration was not required under the terms of the Redemption Agreement. The Circuit Court sided with the defendant, holding that the arbitration clause has been extinguished by the later Redemption Agreement. The Court of Appeals reversed, but the Supreme Court sided with the Circuit Court on the lack of enforceability of the arbitration clause, in effect ruling that the lack of an arbitration clause in the Redemption Agreement had nullified the ability of a party under the Operating Agreement to resort to arbitration.

The lesson in all this for both business owners and legal practitioners is multi-fold:

- First, ensure your business contracts are consistent in their choice of forum, as well as choice of law provisions. Many businesses have signed agreements with dispute resolution agreements that are either inconsistent or subject the company to defense in multiple fora.
- Second, make sure that any amendments or new agreements with an existing contract party don’t inadvertently take away rights that you would like to carry over from existing contracts.
- Finally, a mandatory arbitration clause can be a good way to avoid extensive and costly legal battles, but understand how choice of law or choice of forum provisions can vary the outcome substantially from your expectations.

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