

# BUILDING BLOCKS

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## CHOICE-OF-LAW FOR DESIGN & CONSTRUCTION PROJECTS

By: *Eric O. Pempus, FAIA, Esq., NCARB*  
*DesignPro Insurance Group*

In a general sense, you cannot choose which laws apply to you. You cannot unilaterally decide which laws apply and disregard (opt out) others. Laws are established by governing bodies (federal, state, local) and apply to everyone within their jurisdiction. However, in certain situations, particularly in contracts, parties can agree to have specific laws governing their agreements, which is known as a “choice-of-law” clause. In the United States, contracts are governed by state law: with rare exceptions (such as certain contracts to which the federal government is a party), but there is no such thing as U.S. contract law.

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In many situations, such as criminal law, tort law (when someone is injured by another's actions), and family law, there is no option to choose the applicable law. The laws of the place where the crime occurred, where the injury happened, or where the family is located will generally apply. Courts will for the most part uphold these clauses as long as the chosen law has a reasonable relationship with the parties or the transaction, and it's not against public policy.



A public policy example in the design professions requires that architects and engineers hold paramount the health, safety, and welfare of the public, above all other interests (even their clients).

## IN THE DESIGN PROFESSIONS & CONSTRUCTION INDUSTRY

The choice-of-law for architectural and engineering projects come into play, for example, when the design professional is providing services in a state different from their client's place of business.

The American Institute of Architects' Standard Form of Agreement Between Owner & Architect, AIA B101, simply states:

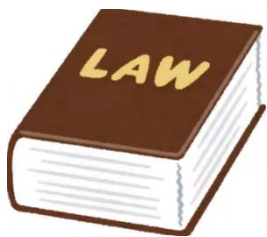
**§ 10.1** This Agreement shall be governed by the law of the place where the Project is located, excluding that jurisdiction's choice of law rules.

Likewise, the Engineers Joint Contract Documents Committee, EJCDC E-50, simply states:

### 6.07 Controlling Law

A. This Agreement is to be governed by the Laws and Regulations of the state in which the Project is located.

***[Note to the Parties of this Agreement: If necessary, modify this provision to identify a specific controlling jurisdiction if other than the state where the Project is located; if multiple states are involved; or to identify controlling jurisdictions other than a state, such as a U.S. territory, commonwealth, or tribal jurisdiction/domestic dependent nation.]***



Prior standard AIA and EJCDC agreements used to establish the state law of the design professional's main place business (the home office and an architectural or engineering firm). However, in response to design professional standard agreements to be more friendly to their clients, the documents changed the choice-of-law clause to the project location.

And that makes sense. If the project is in Texas, the greatest number of project's participants will likely be in that state - the client's business and their project, other design consultants, construction manager, construction contractors and subcontractors, material suppliers, code officials, etc.

The AIA and EJCDC standard agreements' choice-of-law clauses are simple and straight forward. However, the parties to an A/E – Owner agreement may desire a more detailed clause. Thus, the following could be used.

This Agreement, and all claims or defenses based on, arising out of, or related to this Agreement of the relationship of the Parties created hereby, including without limitation those arising from or related to the negotiation, execution, performance, or breach of this Agreement, whether sounding in contract, tort, law, equity, or otherwise, shall be governed by, and enforced in accordance with, the internal laws of the State of \_\_\_\_\_ including its statute of limitations and repose, without reference to its choice of law rules or any principle calling for application of the law of any other jurisdiction.

## WHERE THE AGREEMENT IS INTERPRETED & ENFORCED IS A DIFFERENT MATTER

A close cousin to choice-of-law clause is the selection where the agreement is interpreted and enforced, which does not necessarily control the choice of forum (location). Even though the

provisions “choice-of-law” and “choice-of-forum” are usually in the same section of an agreement, and are sometimes included in a single sentence, they are legally distinct.

Thus, while choice-of-law provision can be established, the parties to an agreement may agree to hear their dispute in a separate state. That can create practical difficulties, because the location of a dispute resolution can require the parties extraordinary travel time and expense issues.

## IN CONCLUSION

Generally, in the United States, in commercial agreements between sophisticated parties a consistent approach is to apply a “freedom-of-contract” view. Accordingly, choice-of-law provisions in commercial agreements, including those for design and construction projects, are interpreted and enforced in accordance with the contract language. Including such a provision “demonstrates the parties’ intent that courts not conduct a conflict-of-laws analysis.”

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### **About the Author of this Risk Management Building Block Article**

*As a risk manager for the last 20 years for the design profession, Eric O. Pempus, FAIA, Esq., NCARB has experience in professional liability insurance and claims, architecture, engineering, land use, law, and a unique background in the construction industry. Prior to risk management, he has 25 years of experience in the practice of architecture/engineering, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 37 years at Kent State University’s College of Architecture & Environmental Design.*

*As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals since 2000 on topics of ethics, contracts, and professional practice in various venues across the United States and Canada. He is a former member and chair of his city’s Board of Zoning & Building Appeals for 24 years, and is a licensed architect, attorney, and property & casualty insurance professional.*

*His educational background includes a JD from Southwestern University School of Law, Los Angeles; Master of Science in Architecture from University of Cincinnati; and BA in psychology/architecture from Miami University, Oxford, Ohio.*

*The above comments are based upon DesignPro Insurance Group’s experience with Risk Management Loss Prevention activities and should not be construed to represent a determination of legal issues but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.*

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Brad Bush, CPCU, AU  
Principal  
[brad.designproins@wichert.com](mailto:brad.designproins@wichert.com)



Eric Pempus  
FAIA, Esq., NCARB  
Risk Manager  
[eric.designproins@wichert.com](mailto:eric.designproins@wichert.com)



Connor Bush  
Account Executive  
[connor.bush@wichert.com](mailto:connor.bush@wichert.com)



Mike Pettit  
Risk Manager  
[mike.designproins@wichert.com](mailto:mike.designproins@wichert.com)



Roger Perry  
Account Executive  
[roger.designproins@wichert.com](mailto:roger.designproins@wichert.com)



Tracey Heise  
Account Manager  
[tracey.designproins@wichert.com](mailto:tracey.designproins@wichert.com)



Tracy Combs  
Risk Manager & Loss Control Specialist  
[tracy@wichert.com](mailto:tracy@wichert.com)

## DesignPro Insurance

5991 Chandler Court, Suite A  
Westerville, OH 43082  
614-794-4820  
[www.designproins.com](http://www.designproins.com)