



Insights and Events

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Forum Selection Clauses – Can we Agree to Litigate in our Backyard?

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Firm Alert

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One clause that typically does not receive the attention it deserves during contract negotiations is the forum selection clause. A forum selection clause specifies the location in which a dispute will be resolved. The advantages of selecting the location can be immense if a dispute arises. The location can strongly influence negotiating leverage, litigation costs, and may even be outcome determinative, particularly on procedural issues such as the statute of limitations (the length of time in which you can sue or be sued).

Because the location of the dispute can be so important during the litigation process, the question of whether, and to what extent, a forum selection clause is enforceable has been the focus of state legislatures across the country and the subject of recent court opinions, including the United States Supreme Court. At this point, almost half of the states have passed a statute expressly declaring a forum selection clause void and unenforceable if the location selected is not in the state where the project is being constructed. Courts have wrestled with balancing the location agreed between the parties and state policies set forth in those statutes.

That begs the question of whether it is worth spending time to analyze and negotiate forum selection clauses. The answer is an emphatic yes. Forum selection clauses will be enforced the majority of the time despite statutes to the contrary. However, the calculus to reaching that conclusion is complicated and depends on the facts associated with each project and whether the parties are in state court, federal court, or arbitration.

The simplest analysis is if the contract also includes an arbitration provision. If it does, a court will likely enforce the forum selection clause even if a state statute declares that such forum selection clause is void and unenforceable. This is true so long as the work involves any "interstate commerce", the movement of goods or services from one state to another. Under the current interpretation of that phrase, it is extremely hard to prove that a construction project does not involve some interstate commerce.

Absent an arbitration provision or agreement to arbitrate, a dispute is headed to litigation in court. One would hope that litigation would be filed in the location specified in the forum selection clause. However, life, business, and litigation are never that simple and despite a forum selection clause, many plaintiffs choose to file suit in another location. The critical question in that situation is whether the lawsuit was filed in state court or federal court, and if in state court, whether the lawsuit can be removed to federal court.

If the matter is in federal court, or has been removed to federal court, the United States Supreme Court determined late last year in *Atlantic Marine Constr. Co. v. U.S. District Court*, that forum selection clauses are valid and enforceable unless "extraordinary circumstances unrelated to the convenience of the parties" existed. The party trying to avoid the enforcement of the forum selection clause has the burden of proving the extraordinary public-interest. However, *Atlantic Marine* did not address whether a state statute prohibiting the enforcement of a forum selection clause would impact the result.

At least one federal district court in Pennsylvania has recently addressed that question. In *KNL Constr., Inc. v. Killian Constr. Co.*, the district court determined that a state statute does not “represent a compelling public policy interest” and therefore enforced the location set forth in the forum selection clause. That case involved a lawsuit by a subcontractor against a general contractor filed in state court in Pennsylvania concerning a project under construction in Pennsylvania. The subcontract included a forum selection clause mandating that any dispute be brought only in Western Missouri, advantageous to the general contractor for several reasons. However, a Pennsylvania statute declared that such a forum selection provision was unenforceable. Thus, the general contractor removed the action to a federal district court in Pennsylvania and requested that the federal court enforce the forum selection provision in the subcontract despite the Pennsylvania statute. The court did so, setting a precedent that absent extraordinary circumstances, forum selection clauses will be enforced as long as there is federal court jurisdiction, regardless of state statutes to the contrary. Thus, it appears that state statutes will only control over forum selection clauses when an action is asserted in state court and there is no basis to remove the action to federal court.

While the question of enforcement and legal arguments involving forum selection clauses are complicated and somewhat convoluted, the take away is that a forum selection clause is worth the time and energy to negotiate as it will be enforced in most instances and will often have a substantial impact on any dispute. In addition to the forum selection provision, related clauses covering the choice of law and arbitration are equally important and should be considered and negotiated in combination with the forum selection provision.

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