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Construction Law

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A Modern Approach to Choice of Law Provisions in Contracts for Illinois Construction

All construction projects performed within the boundaries of Illinois are subject to Illinois law pursuant to the Illinois Building and Construction Contract Act (the Act), regardless of any contrary contractual provision. 815 ILCS 665/10. In short, "if you build in Illinois, you litigate in Illinois." *Dancor Constr., Inc. v. FXR Constr., Inc.,* 2016 IL App (2d) 150839, ¶ 81. This prohibition on any choice of law or forum selection provision purporting to relegate construction related disputes to foreign jurisdictions has been in effect since July 16, 2002. 815 ILCS 665/10 (eff. July 16, 2002 by passage of P.A. 92-657). Nonetheless, numerous agreements pertaining to work completed on Illinois soil are crafted each year to include provisions that run afoul of state law. Careful consideration of the Act's application and exclusions should be paid when assessing the potential value and utility of such provisions.

The Building and Construction Contract Act

Section 10 of the Building and Construction Contract Act provides, in pertinent part:

> A provision contained in or executed in connection with a building and construction contract to be performed in Illinois that makes the contract subject to the laws of another state or that requires any litigation, arbitration, or dispute resolution to take place in another state is against public policy.

815 ILCS 665/10. Any such provision is automatically considered void and unenforceable. *Id.* Pursuant to the clear language of section 10, it applies only to work performed within the state of Illinois. *Id.* Courts have explicitly declined to extend the application of the Act to reach contracts executed in Illinois that pertain to work performed by Illinois workers outside the state. *See, i.e., J.F. Elec., Inc. v. HD Supply, Inc.,* 2013 IL App (5th) 120279-U.

In the context of the Act, a "building and construction contract" is defined as "a contract for the design, construction, alteration, improvement, repair, or maintenance of real property, highways, roads, or bridges." 815 ILCS 665/5. The precise breadth of projects and work that the foregoing definition may encompass has yet to be litigated. There is, of course, a wealth of legal interpretation available as to what may be construed as a construction contract in the context of the Illinois Construction Contract Indemnification for Negligence Act, which is also often referenced as the "Anti-Indemnity Act." However, while the Anti-Indemnity Act similarly serves to render specific contractual language unenforceable, the definition language provided within that particular statute pertaining to the breadth of its application differs significantly from that used in the Act. 740 ILCS 35/1. As such, decisions interpreting the Anti-Indemnity Act are not instructive on the issue of how the Building and Construction Contract Act is, will or should be applied.

Most notably, construction contracts subject to the Act include those involving construction, alteration and maintenance of "real property" whereas that term is not utilized anywhere within the Anti-Indemnity Act. *Compare* 815

ILCS 665/5 *with* 740 ILCS 35/1. Through the inclusion of that particular term in the Act, the legislature opened the door for the Building and Construction Contract Act to cover a broader range of projects and work than may be addressed by the Anti-Indemnity Act. The term "real property" is also not defined anywhere within the Act. 815 ILCS 665. However, the term is defined in Black's Law Dictionary as "land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." BLACK'S LAW DICTIONARY 1337 (9th ed. 2009). Under that definition, the Act has been found to extend to a contract for wind turbine maintenance and repair services. *McCoy v. Gamesa Tech. Corp.,* No. 11 C 592, 2012 U.S. Dist. LEXIS 9278, at *15 (N.D. Ill. Jan. 26, 2012). Like buildings, wind turbines are permanently affixed to the ground. *Id.* However, the wind turbines at issue in the contract were not constructed in Illinois; instead, they were manufactured in Spain. *McCoy v. Iberdrola Renewables, Inc.,* 760 F.3d 674, 678 (7th Cir. 2014). The provisions of the Act were found applicable despite the apparent lack of in-state construction work. *McCoy,* 2012 U.S. Dist. LEXIS 9278, at *15.

Exclusions to the Application of the Act

Despite the potential for wide application of the Act that is implied by its broad definition of what may constitute a construction contract, its reach is severely curtailed in a number of ways. First, the Act only applies to contracts entered on or after July 16, 2002. 815 ILCS 665/10; *Foster Wheeler Energy Corp. v. LSP Equip., LLC*, 346 Ill. App. 3d 753 (2d Dist. 2004). Second, the Act cannot be applied against a party found to be "primarily engaged in the business of selling tangible personal property." 815 ILCS 665/10.

Moreoever, the Act cannot be used to avoid enforcement of an arbitration provision in the context of a project implicating interstate commerce. *R.A. Bright Const., Inc. v. Weis Builders, Inc.,* 402 Ill. App. 3d 248, 251-55 (3d Dist. 2010). Agreements to submit to arbitration, as an alternative method of dispute resolution, are favored at both the state and federal level. *Bd. of Managers of Courtyards at Woodlands Condo. Ass'n v. IKO Chi., Inc*., 183 Ill. 2d 66, 71 (1998). Where a particular agreement implicates interstate commerce, the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1 through 307) applies. *Drobny v. Am. Nat'l Ins. Co.,* No. 01-12-01034-CV, 2013 Tex. App. LEXIS 11055 (Tex. App. Houston 1st Dist. Aug. 29, 2013). The FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Id.* Pursuant to the FAA, arbitration agreements will be enforced and arbitration compelled wherever parties have contracted for that mode of dispute resolution. *Melena v. Anheuser-Busch, Inc.,* 219 Ill. 2d 135, 142 (2006). That holds true even where the arbitration agreement to be enforced flies in the face of the prohibitions contained within the Illinois Building and Construction Act; that is, where the agreement to be enforced mandates adjudication in a foreign state despite its inclusion within a contract pertaining to Illinois construction. *R.A. Bright,* 402 Ill. App. 3d at 255. In other words, the Federal Arbitration Act preempts the Illinois Building and Construction Act and further limits the application of the Act. *Id*.

Next, the Act is not applicable to projects or work performed pursuant to any contract awarded by the federal government or any foreign state government. 815 ILCS 665/10. Further, the Act will likely be found inapplicable to any construction projects located on federal property within Illinois as the state generally lacks authority over such property. *See, e.g., U.S. ex rel. J-Crew Mgmt., Inc. v. Atlantic Marine Const. Co. Inc.*, No. A–12–CV–228–LY, 2012 U.S. Dist. LEXIS 182375, at *8 (W.D. Tex. Aug. 6, 2012).

The Impact of Atlantic Marine

Despite the clear prohibitions within the Illinois Building and Construction Contract Act, an argument may be made that new life was breathed into choice of law and forum selection clauses by the United States Supreme Court decision of *Atlantic Marine Construction Co., Inc. v. United States District Court for Western District of Texas*, 134 S.Ct. 568 (2013). In *Atlantic Marine*, a contract pertaining to construction work performed in Texas was executed. *Atlantic Marine*, 134 S.Ct. at 575. The agreement included a forum selection clause providing that all disputes "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division." *Id.* A lawsuit arising out of the work was subsequently filed in the Western District of Texas. *Id.* at 576. A motion to dismiss or transfer the case to the District Court for the Eastern District of Virginia pursuant to the aforementioned forum selection clause was denied by the Texas District Court. *Id.* In reaching its ruling, the district court considered the application of a Texas statute that—similar to the Illinois Building and Construction Act—precludes enforcement of language within in-state construction contracts that mandates litigation in some other state. *U.S. ex rel. J-Crew Mgmt.,* 2012 U.S. Dist. LEXIS 182375, at *4-9. The statutory provision was, however, found inapplicable in the context of the work at issue because the project was located on a federal enclave, over which the state of Texas lacked authority. *Id.* at *8.

A petition for a writ of mandamus directing the district court to dismiss or transfer the case pursuant to the forum-selection clause was denied by the Fifth District. *Atlantic Marine,* 134 S.Ct. 568 at 576. However, an appeal was subsequently heard by the United States Supreme Court and the decision was reversed. *Id.* at 584. On remand, the lower courts were instructed to assess whether any public-interest factors existed to support denial of the motion to transfer. *Id.* Absent the discovery of any such motivating factors, the suit was to be transferred from Texas to the agreed upon forum, Virginia. *Id.* In support of this decision, the Court announced, "[w]hen parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations . . . . In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain." *Id.* at 583.

The *Atlantic Marine* decision indicates valid forum selection clauses will be enforced absent exceptional circumstances. Of importance, the application of the Texas statute precluding enforcement of the forum selection clause in the context of a dispute arising out of construction work performed in Texas was not addressed or at issue before the Supreme Court in *Atlantic Marine*. It is clear that choice of law and forum selection clauses contained within Illinois construction contracts will be enforced as to projects completed on federal property or in federal enclaves. So far, the decision has not successfully been cited as a basis to side-step the prohibitions contained within the Illinois Building and Construction Act. In other words, it has not been utilized in any foreign jurisdiction to enforce forum selection and choice of law provisions pertaining to construction work completed on private property in Illinois. As such, practitioners are forewarned that choice of law and forum selection provisions that run afoul of the Act likely remain unenforceable.

Practical Implications

Agreements pertaining to construction work are regularly drafted to include a choice of law or forum selection provision specifying the location, jurisdiction and law applicable to any future disputes that may arise. Where a construction contract designates a foreign forum or foreign source of law to resolve a conflict arising out of a project

completed on Illinois soil, there may be circumstances where the provision may be followed despite the fact that it violates the Illinois Building and Construction Act. For example, if no party to the dispute objects to litigating in the pre-determined forum. In any event, practitioners are forewarned of the conflicts surrounding the application of the Illinois Building and Construction Act and should be prepared to disregard contract language pertaining to choice of law or forum selection, where warranted.

About the Author

Lindsay Drecoll Brown is a senior associate in the Chicago office of *Cassiday Schade LLP*. She concentrates her practice in civil litigation defense, with an emphasis on construction law, professional liability and product liability. Ms. Brown received her J.D., *cum laude*, from Loyola University Chicago School of Law, and her undergraduate degree from Michigan State University, with high honors. She is a member of the Illinois Association of Defense Trial Counsel's Construction Law Committee.

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