PUBLICATION

Forum Selection Clauses in Construction Contracts: Part Two [Ober|Kaler]

Authors: Joseph C. Kovars
January 2014

The U.S. Supreme Court recently made our work as drafters of construction contracts a little easier. In the case of *In re Atlantic Marine Construction Co.*, the U.S. Court of Appeals for the Fifth Circuit had refused to enforce a forum selection clause in a construction contract. By a unanimous decision issued in December 2013, however, the U.S. Supreme Court reversed the court of appeals. It held that, in all but "the most exceptional circumstances," federal courts must dismiss or transfer the case to the federal court that the parties agreed to in their contract.[1]

In the April 2013 *Construction OberView*, I discussed the *Atlantic Marine* case and said that more careful drafting could have avoided the situation. I recommended that a well drafted contract include a choice of law clause coordinated with the forum selection clause to make sure the parties' intent was carried out. I still believe that a more tightly written contract can help avoid a fight over where the dispute should be resolved. The Supreme Court decision notwithstanding, good drafting is a much less expensive way to deal with procedural issues than in a court room in front of an unfriendly judge.

Let's review how the case came to the Supreme Court. The case arose out of a construction project to build a day care center for the U.S. Army Corp of Engineers in Texas. The prime contractor was based in Norfolk, Virginia. The prime subcontracted a portion of the job to a Texas company. The subcontract had a forum selection clause that required all disputes to be resolved in either state or federal court in Norfolk, Virginia. When disputes arose, however, the subcontractor sued in federal court in its hometown, Austin, Texas. Atlantic Marine filed a motion to dismiss or transfer the case to federal court in Norfolk, Virginia. The district denied the motion and the Fifth Circuit affirmed. The unhappy prime contractor had to take the case all the way to the U.S Supreme Court.

At the Supreme Court Justice Alito, writing on behalf of a unanimous court, sided with the prime contractor. Under 28 U.S.C. § 1404, the court needs to consider private interests – convenience of the parties and witnesses – and public interests, in deciding a motion to transfer. The parties' agreement on choice of forum, the court held, would be upheld as a reflection of their agreement on the private interests. As for the public interests, the court held that these would rarely defeat a transfer motion. The party who files suit in a forum different that the one agreed to in the contract bears the burden of showing that the transfer is not warranted. Applying these rules, the Supreme Court reversed the decisions below, because the trial court had improperly considered the forum selection clause as just one factor among the private interests and put the burden on the wrong party concerning the issue.

The *Atlantic Marine* opinion should discourage the party who tries to ignore the deal that was made and sue in a place he thinks will provide a friendlier forum. The time to address that concern, frankly, is during contract negotiation. As I wrote in the first article, "Otherwise, more money will be spent fighting over where to hold the dispute than resolving the dispute itself."

There are certain forum selection issues not addressed, however, by *Atlantic Marine*. First, the forum selection clause has to list a forum that has *some* connection to the parties or the deal in question. The parties, for example, can't select the U.S. District Court of Northern Virginia (a/k/a the "Rocket Docket"), merely because

they would like a quick decision, if neither party is located there and the project is also somewhere else. In other words, the parties can't create their own federal jurisdiction where none otherwise exists.

Second, *Atlantic Marine* involved only a prime-sub dispute and did not involve a bond claim against the surety under the U.S. Miller Act. The Miller Act provides for venue where the project is located. But in *F.D. Rich Co. v. United States, ex rel Indus. Lumber Co.*, 417 U.S. 116 (1974), the Supreme Court held that the statute was "merely a venue requirement." Lower courts have since held that parties could change the venue via a forum selection clause. Note, however, that a clause that sends a Miller Act case to the state court is generally not enforceable.

Third, the *Atlantic Marine* case does not address arbitration agreements. Under the Federal Arbitration Act, arbitration clauses are frequently enforced. A clause that requires arbitration in a particular state or selects the laws to be applied in an arbitration usually should be respected. The American Arbitration Association now has a rule that states that, when the agreement selects a locale for the arbitration, "the locale shall be that specified in the agreement." R-12, AAA Constr. Indus. Rules.

All of these issues should be discussed by the parties and their attorneys during the contract drafting phase. The construction attorney should explain the benefits of a well drafted clause that reflects the parties' agreement.

---

[1] *Atlantic Marine Constr. Co. v. U.S.* D.Ct. for W.D. of TX, ___ U.S. ___, 2013 WL 6231157 (U.S. 2013).