Selected Construction Contract Clauses: From the Routine to the Cutting Edge

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This article discusses nine topics that present special challenges for attorneys negotiating and drafting construction contracts. [1] Most of these involve standard issues that come up in practically every construction project. A few involve developments that are just beginning to attract the special attention of the construction bar.

1. Differing site conditions clauses

Who should bear the risk that the conditions under which the project is being built will be substantially different from what the parties contemplate? The common law places this risk squarely on the contractor on the basis that when a contracting party agrees to perform a specified act for a definite price, changed circumstances will not relieve the obligation to perform as promised.[2] Contractors, however, know that conditions at the project site often differ significantly from what both the owner and the contractor expect based on the information available at the time a bid is submitted or a stipulated price or guaranteed maximum price is established. This is especially true with respect to the risk that underground or other concealed conditions will not conform to soils reports and other preliminary information about the site. While courts applying common law reasoning to differing site conditions claims have sometimes shown varying degrees of sympathy for surprised contractors, judicial solutions to the dilemma have been neither consistent nor reliable.[3]

Not surprisingly, the combination of the governing principles of contract law and the common experience in practice leads the economically rational general contractor routinely to include a substantial contingency in its price proposal to account for the possibility of unanticipated site conditions. The true financial risk of differing site conditions, however, is hard to predict and quantify accurately in any given situation. As a result, in a series of projects, the contingency amount that a contractor operating under this system adds to each project tends to increase substantially the price of any one project beyond what the cost would be if the contractor did not bear the risk. Simply put, experience suggests that it is often more efficient to allocate much of this risk to the owner.

Over time, this logically risk-averse bidding strategy became so well-established in government contracting that the Federal Acquisition Regulations eventually introduced a standard differing site conditions clause for federal projects.[4] As owners in other segments of the industry began to appreciate the economic rationale for retaining the differing site conditions risk, some version of the federal government differing site conditions clause became a common feature in most stipulated sum contracts.

The usual formulation of the differing site conditions clause deals with two distinct underground or concealed conditions, commonly distinguished as either type I or type II conditions.[5] Type I conditions are those that differ materially from what the contract documents indicate, as in the case of materials existing in a rehab project that are different from the materials shown in as-built plans provided to the contractor. Type II conditions are unknown conditions that differ from what would ordinarily be encountered in similar projects, such as the existence of an abandoned underground utility installation that an experienced contractor would not expect given the circumstances at the site.

Despite the clear history supporting the economic rationale for placing the differing site conditions risk on the project owner, it has sometimes been difficult for courts to decide whether specific language in a differing site condition clause should be construed to re-assign some of the risk back to the contractor. This is particularly so where the contract documents impose a duty on the contractor to inspect the site or where they include broad disclaimers concerning information provided to the contractor.[6] One study implies that at least some recent cases may indicate a developing inclination not to apply differing site conditions clauses quite as generously as contractors might expect.[7] It has also been argued that, at least in federal projects, the standard differing site conditions clause may be applied less favorably to design-build contractors than to contractors operating under a traditional design-bid-build delivery system.[8]

2. Pay When Paid and Pay If Paid Clauses

Pay-when-paid and pay-if-paid clauses are forms of conditional payment terms that general contractors frequently use to shift to subcontractors some of the risk of owner payment default.[9] As the terminology implies, a pay-when-paid clause expressly defers the contractor’s obligation to pay the subcontractor until the owner makes the corresponding payment to the contractor. A pay-if-paid clause takes the concept to the next level by conditioning the subcontractor’s right to be paid at all on the contractor’s receipt of the corresponding payment from the owner. The essential distinction between the two clauses is that a pay-when-paid clause may implicitly
give the subcontractor a right to be paid within a reasonable time, while a pay-if-paid clause may transfer the full risk of owner payment default onto the subcontractor.

Across the country, courts have struggled both with questions of how to interpret versions of these clauses and with whether or to what extent to enforce them. Some courts have simply enforced these conditional payment provisions according to their terms, while others have shown remarkably hostility to them, finding ways to construe them against the contractor or holding that public policy considerations limit their enforceability. Arkansas case law supports the enforceability of clearly written conditional payment clauses.[10] The authority is, however, sufficiently limited in scope to leave at least some possibility that a properly constructed policy argument might lead to the judicial adoption of some limits on enforceability should the right circumstance arise.[11]

3. Indemnities

While indemnities come into play in the construction industry in a wide array of circumstances, the discussion of indemnities here primarily concerns agreements that, to some extent, indemnify a contracting party against that party’s own negligence or fault. Courts have long imposed limits on such contractual indemnities in certain circumstances.[12] Moreover, as is now the case in many jurisdictions, for several years we have had a statute in Arkansas that limits the enforceability of such clauses in private construction contracts and a similar statute that applies to public contracts.[13]

Arkansas lawyers should note that these statutes were amended in some curious ways by 2015 legislation. To begin with, two separate 2015 acts purport to amend the anti-indemnity statutes, and both apply to private and public construction contracts. [14] Perhaps evidencing a legislative effort to keep us on our toes, these two acts are not entirely consistent with each other. It will be interesting to see whether the courts will be called upon to resolve distinctions between the two sets of amendments.[15] Even assuming that the inconsistencies between the two acts can be satisfactorily reconciled, the net effect is anti-indemnity legislation that presents at least as many questions as it answers. The discussion that follows specifically addresses indemnities under the amended statute applicable to private construction contracts rather than public ones.

As amended, the Arkansas statutory limitation on indemnities in private construction contracts essentially invalidates a provision by which one contracting party, Party A, agrees to indemnify another contracting party, Party B, against liability for death, bodily injury, or property damage attributable to Party B’s own negligence or fault. The restriction does not, however, entirely invalidate an indemnity “against liability for damage arising out of the death or of bodily injury to persons, or damage to property, but the indemnification shall not exceed any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitors, its agents, representatives, subcontractors, or suppliers.”[16]

Thus, the net result of the legislation seems to be to restrict indemnities in construction contracts that would make the indemnitor liable for damage arising out of death, bodily injury, or property damage to the extent that the damage is attributable to the negligence or fault of anyone other than the indemnitor, its agents, representatives, subcontractors, or suppliers. For example, a provision for the contractor to indemnify the owner for property damage caused to any extent by the owner would be unenforceable except to the degree of the contractor’s negligence or fault or the negligence or fault of the contractor’s agents, representatives, subcontractors, or suppliers. The statute would similarly limit the enforceability of a provision for the contractor to indemnify the owner for property damage caused by any third party that is not the contractor’s agent, representative, subcontractor, or supplier. This is a significant change from the earlier version of the statute, which only restricted the enforceability of an indemnity against the indemnitee’s sole negligence or fault.[17]

The 2015 legislation also makes unenforceable a provision “that attempts to circumvent” the statute’s anti-indemnity effect by choosing the law of another state to govern the contract or “that requires any litigation, arbitration, or other alternative dispute resolution proceeding arising from the construction agreement or construction contract to be conducted in another state.”[18] Another interesting aspect of the 2015 legislation is that the anti-indemnity law now affords a seemingly broad, but not necessarily clear, exemption for construction contracts in the oil and gas industry.[19]

The statute leaves several questions unanswered, some created by the 2015 amendments, and others carrying over from the previous version of the statute. The issues include:

- To what extent are indemnities in construction contracts enforceable in relation to damage arising from events other than death, bodily injury, or property damage (e.g., penalties for violations of law or regulation, injury to reputation, or damage resulting from breach of contract, tortious interference, or infringement of intellectual property rights)?
- What is the significance of the distinct statutory definitions of “construction agreement” and “construction contract” given that the operative terms of the statute apply equally to construction agreements and construction contracts?[20]
- What will courts make of the fact that the restriction not only applies to an indemnity given by any entity that is a party to a construction contract but...
also to an indemnity imposed on the entity’s insurer? Can this aspect of the statute be argued to modify or regulate insurance contracts? Does it apply to agreements by which an entity agrees to backup an indemnity with insurance, such as through contractual liability coverage? How might this provision of the statute affect an agreement for a party to a construction contract to provide liability insurance on a project-wide basis under an owner-controlled insurance program or a contractor-controlled insurance program?

- Potentially related to the immediately preceding questions, what is the effect of the provisions that exclude from the definitions of “construction agreement” and “construction contract” “an insurance contract, a construction bond, or a contract to defend a party against liability”? Even if the legislative intent in excluding insurance contracts and construction bonds may be relatively clear, what are we to make of the exclusion of contracts to defend? Does that exclusion allow contracting parties to evade the anti-indemnity statute simply by using a separate indemnification contract that stands apart from a related construction contract?

- Does the restriction against a choice of foreign law clause or a forum-selection clause in a construction contract apply only if the clause is interpreted as an attempt to circumvent the anti-indemnity rule? Is it relevant to know whether a party included such a clause specifically for the purpose of contravening the Arkansas anti-indemnity policy? Is every choice of foreign law clause and every forum-selection clause in a construction contract subject to challenge, or only with respect to indemnification?

- How will courts interpret the exclusion that applies to contracts for “construction work or services to an operator or other person directly related to activities stemming from the exploration, drilling, production, processing, gathering, or movement of oil or gas . . . ” Does this mean that only certain parties to a construction contract in the oil and gas industry may insist on indemnification or that any party to a construction contract with an operator may insist on indemnification from any other party? And how broadly can an indemnity be in a construction contract with an operator? May it extend to damage attributable to the sole negligence of the indemnitor?

- Might there be a viable basis under Arkansas law or the U.S. Constitution to challenge the different treatment of indemnity provisions in construction contracts generally in contrast to indemnity provisions in construction contracts in the oil and gas industry?

### 4. Flow through clauses

Through these clauses a general contractor commonly incorporates by reference into subcontracts terms of the prime contract between the owner and the contractor. Flow down primarily refers to passing through to the subcontractor duties that the general contractor owes to the owner. Flow through clauses also pass through to the subcontractor rights that the general contractor has in relation to the owner, and this effect is sometimes referred to as flow up. Flow through clauses provide an efficient technique for coordinating the terms of related contracts without extensive duplication of language, but the impact of these clauses is not always as simple as the concept seems to imply. Lawyers drafting and reviewing subcontracts must take care to insure that the scope of the duties and rights passed along to the subcontractors are properly limited to avoid overly broad or illogical results.

AIA Document A401, Standard Form of Subcontract Between Contractor and Subcontractor, illustrates a typical approach to these clauses. Section 1.2 provides that, except as otherwise specified in the subcontract documents, the general conditions incorporated into the owner-contractor agreement (typically AIA Document A201) also govern the subcontract. Article 2 then spells out the flow down and flow up concepts as follows:

17 The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201-2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Owner, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

Experienced construction industry participants will have no difficulty understanding that these provisions are intended to pass through to the subcontractor those rights and obligations of the prime contract that are relevant to the scope of the subcontractor’s work. They will also recognize that the provision must be construed in a way that is consistent with the subcontract’s function of providing for the subcontractor to perform a portion of the scope of work of the prime contract. But will the intended or logical application of these clauses necessarily be apparent to a mediator, arbitrator, or court when a dispute arises? The application will be relatively easier to appreciate with respect to certain aspects of the project than others.

For example, if the prime contract defines certain technical terms when expressly used with reference to mechanical work, then there should be little doubt that the flow through clause will cause those same definitions to apply under the subcontract with the mechanical subcontractor (unless the subcontract documents expressly use other terms or definitions), but those definitions would not necessarily apply to the owner-contractor agreement (typically AIA Document A201) also govern the subcontract. Article 2 then spells out the flow down and flow up concepts as follows:

17 The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201-2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Owner, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.
apply under the subcontract with the grading subcontractor. And if the prime contract provides that the contractor is to carry public liability insurance with a specified dollar limit, but the roofing subcontract calls for the roofer to carry public liability insurance with a lower specified dollar limit, it will be obvious that the express terms of the subcontract control over those of the prime contract with reference to that insurance requirement. But confusion or potentially surprising applications may result when the parties to a subcontract that includes a flow through clause fail to address a topic expressly. An issue that has come up with some frequency is whether or how an arbitration provision in the prime contract applies to a subcontractor.[26] Of course, one would hope that a well-drafted subcontract would address dispute resolution processes comprehensively, but that does not always turn out to be the case.

Thus, one can see how standard flow through clauses can cause mischief. If the parties rely too completely on incorporation by reference, or if they fail to recognize how the literal and automatic pass-through effect of the clauses may create problems in a particular situation, they might neglect to address a topic in the subcontract that merits distinct treatment or they might fail to modify the application of a particular right or obligation in the general contract in a way that is appropriate for purposes of the subcontract.

5. Electronic data protocols

Extraordinary technological advances have revolutionized the process of preparing, disseminating, and using design and construction documents. In light of these innovations, key project participants and their lawyers are beginning to develop and include in design and construction contracts electronic data protocols to address the associated liability and other legal concerns. [27] Many of the most significant considerations relate to the use of integrated project delivery (IPD) systems in conjunction with building information modeling (BIM), a digital technology that allows a project to be simulated through a computable model. These concerns and related issues are reviewed in detail in an article recently published in the Arkansas Law Review. [28] Here are some of the highlights.

Controlling, managing, and using a BIM model or other digital design tools. Current technology, and BIM in particular, can integrate massive amounts of data and can account for the functional relationships between the elements of a project. Moreover, multiple participants can benefit from using a BIM model in an iterative design process. There are, however, risks involved in allowing multiple users. Design professionals in particular are concerned about potential liability risks when consultants, contractors, and key trades and suppliers all have access to and collaborate in a shared, digital design process. Who will manage the digital design process, and will there be a single point of responsibility for the final, integrated design? A project architect using BIM, for example, may want to lock down the model so that other participants in the process can refer to the model for some purposes but cannot change or manipulate it. Should the parties engage a special consultant to manage the process when the project uses BIM? If more than one model is being used, or even if proposed design changes are being submitted by several project participants to be incorporated into a single model managed by a primary BIM consultant, concerns beyond those common to traditional design may arise relating to design conflicts and errors. For these, and other reasons, special contractual protocols for dealing with digital design and data are essential. Several specific questions commonly must be addressed.

23 Who selects the BIM software, who inputs the basic data into the program to generate the model, and who may make changes to the model? How should questions of interoperability be managed as two or more participants create or manipulate their own models or versions of the model and as different software applications exchange information with each other during the modeling process? What procedures will best protect against the introduction of modeling errors, corruption of the model, or loss of data? Might contractors be better positioned than design professionals to take the lead in utilizing BIM?[29]

24 Legal status of digital design. Should the parties recognize a BIM model or other digital design data as part of the contract documents with the same standing in that regard as physical drawings and specifications? Who can rely on the digital design, especially if it deviates in some respects from other contract documents? What should be the precedence between traditional design documents and digital design data?

Intellectual Property Issues. Special contractual protocols should also be considered to govern property rights in the digital data. Who owns a BIM model and the information and design that it incorporates? Which project participants may use the model and for what purposes? The parties should work out the answers to these questions at the beginning of the project. Formal licensing agreements may be appropriate, especially if any participant may wish to use a BIM model in future projects. If the project owner will not own the model or other digital design assets, the owner at least should have a license to use the model or digital work product for operational and maintenance purposes during the life cycle of the project, and may also want rights to use it for future alterations to the project. To the extent that rights in the digital design may be shared, the contracting parties should consider any appropriate indemnity or other risk allocation arrangements.

6. Designated decision maker role in claims and dispute resolution

Construction contracts often designate a participant in the project, or someone whose interests are generally aligned with a participant, to render a decision on a claim or dispute involving that participant and another party to the contract. For example, a provision in an owner-contractor agreement may call for the owner's architect to rule on a claim or dispute, either as an initial or interim dispute resolution step or even as the final authority. A project engineer sometimes serves in such a capacity in certain civil engineering projects. In federal contracts, the contracting officer often plays a central role in ruling on claims. And state and local public works contracts sometimes refer claims and disputes between the owner and the contractor to an employee, agent, or representative of the public owner. Given the close relationship that typically exists between the owner and the owner's design profession, and the even closer relationship between an owner and its employee or agent, troubling prospects for conflicts of interest are inherent in such dispute resolution processes.

Section 15.2 of the current version of the American Institute of Architect's popular Document A201, General Conditions of the Contract for Construction, illustrates this approach. That provision gives the owner and the contractor the option to name an "Initial Decision Maker" but specifies that the owner's architect will serve in that role if the parties do not name someone else. Under the A201, the parties must submit most disputes and claims to the Initial Decision Maker as the first step in a managed dispute resolution process and, as to many claims and disputes, that initial decision is a condition precedent to moving on to the next step in the process. While a party has the right to continue the dispute resolution process following the initial decision by submitting the matter to mediation and ultimately to arbitration or litigation, the recommendation of the Initial Decision Maker becomes final if neither party pursues the next step in the process in a timely manner.

Section 14.2 of the AIA A201 provides an even more striking instance of this phenomenon whenever the owner wishes to terminate the contract based on an alleged breach of contract by the contractor. For that situation, Section 14.2 provides that the owner may terminate the contractor's employment and exercise other remedies based on one of the enumerated default circumstances, but only "upon certification by the Initial Decision Maker that sufficient cause exists to justify such action." Where the owner's architect serves as the Initial Decision Maker, this condition precedent forces the architect either to support or to resist the legal position taken by the client who hired and pays the architect—an especially awkward situation because the threat of termination will almost always involve conflicting and seriously disputed versions of the relevant facts. Not surprisingly, architects caught in this dilemma sometimes wind up defending themselves against tort claims subsequently brought by the terminated contractor. One can also imagine that the architect who refuses to provide the requested certification might face a suit by the owner-client for breach of contract or for professional malpractice.

7. Termination for cause clauses

Rather than relying on general principles of contract law to govern the parties' options in the event of material default, standard construction contracts carefully spell out what occurrences will allow either party to terminate the relationship. What is just as important, they also establish the procedures a party must follow to exercise a right to terminate. An attorney advising a client about rights and options in the face allegations of default should carefully review the terms of the contract. A party that is arguably in material default is typically entitled under the contract terms or under applicable law (or both) to a written notice of default and an opportunity to take curative action to avoid termination.

But it is not sufficient for the attorney simply to advise a client as to the contract's provisions concerning termination for cause and the general principles of contract law governing breach of contract. Procedures under written contracts can be modified by the parties' behavior during the course of the project, and principles of waiver and estoppel may cause a party to lose contractual rights. For these reasons, the attorney must investigate the underlying circumstances, including the manner in which the parties have conducted themselves during the relationship, to assess whether, in light of applicable case law, contract terms are likely to be enforceable strictly as written. An attorney representing the party complaining of a default may conclude, sometimes much to the client's disappointment, that the most prudent course of action will be to afford the other party a liberal opportunity to cure an apparent default and thereby avoid termination.

Moreover, termination of a construction contract for default is almost always risky business for at least two reasons. First, a construction project is a complex network of undertakings involving many highly interdependent relationships among the participants. It is rarely possible to determine with confidence the source or sources of the problem even after thorough investigation conducted with the assistance of experts, let alone on the basis of a preliminary review that considers only one party's perspective. The termination of a construction contract will almost always occur in the midst of considerable disagreement and uncertainty about what a party will be able to prove should litigation or arbitration follow. Second, termination usually produces severe economic consequences for all the parties affected. Once construction stops due to a dispute, the costs of completing the project normally skyrocket and the effects of delay...
quickly mount, thereby magnifying damage claims on all sides. Experienced construction lawyers know that it will likely be to the advantage of all participants to find a way to address disputes and claims without stopping the project.[37]

8. Termination for convenience clauses

Due to the many uncertainties inherent in construction, owners often want to reserve the privilege to terminate the construction contract. There are many reasons for this. For example, anticipated financing may fall through, total costs may begin to exceed the owner's budget, or changing business or economic circumstances may simply call for a complete re-assessment of the owner's program or the outright abandonment of the project. A termination for convenience clause provides an alternative to the far riskier tactic of trying to draft a termination clause that aims to specify in advance what developments should allow the owner to exercise this privilege without incurring liability for breach of contract. So common is this concern that many owners routinely expect to reserve the unrestricted privilege to terminate, and many industry contract forms include termination for convenience clauses.[38]

Contractors will logically agree to allow an owner to terminate for convenience provided that the clause offers reasonable compensation to offset the economic impacts involved. At a minimum, the contractor will expect payment for work performed and services rendered, plus reimbursement for unavoidable costs incurred by reason of the termination. Beyond this, the contractor will seek a termination fee as compensation for lost revenue. The economic interests of the contractor may extend beyond lost profits to include overhead expenses that the contractor expected to cover from the contract price.

While, in principle, the owner and the contractor logically should be able to agree on the concept of an economically reasonable termination fee, they will often have significantly different perspectives on the proper components of that fee. An attorney negotiating a construction contract for an owner should determine whether the circumstances call for the client to reserve the right to terminate for convenience. If so, it may not be sufficient to rely on a standard provision. Similarly, a contractor's attorney should carefully analyze the terms of any termination for convenience clause to determine whether it adequately protects the client's economic interests.

Depending on the circumstances, many different considerations may be relevant, especially if termination is a foreseeable prospect rather than a mere theoretical possibility.[39]

- Are there steps the contractor can reasonably take to minimize the costs of termination, such as negotiating favorable termination fees with subcontractors and suppliers? If so, the contract should provide for the contractor to take these precautions.
- Should the contractor adopt any special recordkeeping practices to make it easier to establish what costs are unavoidably attributable to termination? If so, it may be to the advantage of one party or the other, or both of them, to provide for those practices.
- How should the contract determine any termination fee in excess of demonstrable expenses attributable to termination? A stipulated amount or percentage fee is simple to draft, but that approach may prove to be economically illogical and, therefore, unacceptable to one of the parties in retrospect should termination actually occur. Should the specified dollar amount or percentage vary depending on when during the course of the project termination occurs? Should a percentage fee be based on the entire contract price for the completed project, or on the portion of the contract price earned up to the time of termination or on the remaining balance? Is it feasible to determine whether or the extent to which the contractor will realize savings by reason of the termination (as in the case of a stipulated sum contract under circumstances in which the contractor would have been required to absorb unanticipated cost increases)? Is it appropriate to assume that the contractor cannot recoup any overhead expenses by taking on other work following the termination?

Considerations such as these may lead the parties to adopt a more precise method for compensating the contractor, or they may lead them adopt a stipulated sum or percentage formula as the most practical and workable solution.

9. Forum selection clauses

The inspiration for addressing forum selection clauses comes from the Atlantic Marine Construction Co. case decided by the U.S. Supreme Court in 2013.[40] That case involved a dispute under a subcontract between Atlantic Marine, the general contractor, and J-Crew Management, Inc., the subcontractor, relating to a U.S. Army Corps of Engineers project at Ft. Hood in Texas. Atlantic Marine was a Virginia corporation with its principal place of business in Virginia, and the subcontract provided that any disputes between the parties “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.”[41] Despite this provision, when a dispute arose, the Texas subcontractor chose to sue the general contractor in the Western District of Texas.

Justice Alito, writing for a unanimous Court, held that the federal statute governing transfer to another federal forum firmly favored enforcement of the parties’ contractual agreement. “When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the
The Court rejected the approach taken by the district court and the court of appeals that called for weighing a variety of private and public interest factors, with the parties’ contractual selection of a forum being only one such factor. Justice Alito instead held that federal law calls for almost complete deference to the bargain struck by the parties. In the face of the forum selection clause, a federal district court should give no weight to a plaintiff’s choice of forum, nor should it consider arguments about the parties’ private interests. The court should still consider public interests but, “[b]ecause those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases.”

Justice Alito noted that the public interest factor sometimes weighs against transfer of a case because it would often be appropriate for the transferee court to apply the choice of law rules of the original venue. Again reflecting deep judicial respect for freedom of contract, however, he held that the principle favoring the choice-of-law rules of the original venue does not apply “when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum.”

A recent commentary on Atlantic Marine concludes that the case makes it “increasingly important for construction lawyers to consider the impact of forum-selection clauses.” While the Court clarified that federal courts will not give favorable treatment to challenges to otherwise valid forum selection clauses based on private interest factors, the authors of that commentary note that the case leaves unresolved several important legal and practical considerations for construction lawyers. Among other things, they offer the following observations.

- The case has no direct application to a forum-selection clause if the dispute is being litigated in state court.
- A party to a case in federal court wishing to challenge a transfer to the forum selected in the contract may still be able to articulate public interest factors that weigh against transfer under the particular circumstances of the case.
- Because the holding is limited to valid forum-selection clauses, it leaves open the question whether a clause may be invalid under controlling state law (even if the case is filed in federal court). This possibility seems especially significant in those states in which statutes make unenforceable a provision in a construction contract that requires disputes to be litigated in a state other than the one in which the project is located. (The authors count 24 states with such statutes.)
- “If the potential for litigation seems high, and the burden presented by a forum-selection clause seems great, lower-tier trades may be better counseled to strongly consider building in a significant risk factor into their bid, or forgoing the subcontract entirely, rather than to blindly agree to an exclusive far-away forum.”
- Even a contracting party with sufficient bargaining power to insist on a clause requiring litigation to occur in its home jurisdiction should recognize that litigating a construction dispute away from the project site can introduce significant inefficiencies if the key witnesses and records are likely to be located far from that jurisdiction.

Conclusion

The topics discussed in this article represent but a small sampling of the issues that must be commonly addressed. The terms of any construction contract must respond to the circumstances of a particular project within the context of a dynamic industry. Standard industry contracts and common contract clauses are important tools, but they must be used and construed with care.

Notes

[1] This article is derived from materials presented by the author at the Construction Law CLE sponsored by the Construction Law Section of the Arkansas Bar Association on April 24, 2015. That presentation highlighted ethical problems that these issues and others sometimes create for construction lawyers.


[3] See generally Bruner & O’Connor, supra note 2, § 14.23. See also Bryan v. City of Cotter, 2009 Ark. 456, 344 S.W.3d 654 (reversing summary judgment granted to the project owners in a case involving the interplay between a standard differing site conditions clause and an excusable clause that arguably shifted the risk back to the contractor).


[15] The Publisher’s Notes in the 2015 Supplement indicate resolution of the difference by applying the rule of priority that provides that when the Legislature enacts more than one act during the same session concerning the same subject matter, the act last signed by the Governor controls. Ark. Code Ann. §1-2-207 (2008 Repl.). As noted in footnote 14, supra, however, it appears that both acts were adopted on the same date.


[20] These definitional distinctions roughly correspond to definitions in the Uniform Commercial Code, but they do not seem to serve a similar function. See Ark. Code Ann. § 4-1-201(3) & (12) (Supp. 2015).


[22] The severability clause of the statute provides that a contractual provision that contravenes one of the statutory restrictions does not cause the entire contract to become unenforceable. Ark. Code Ann. § 4-56-104 (Supp. 2015). The clause does not, however, include any language that seems to allow a choice of law or forum-selection provision itself to be severed into applications that are unenforceable as to indemnity provisions of the contract and applications to other provisions of the contract not involving indemnification.


[26] Bruner & O’Connor, supra note 2, § 3:32.


[29] Id. at 920-21.


[31] See Mark G. Jackson, *A Dispute Resolution Strategy for Federal Construction Projects*, Construction Briefings No. 2000-6 (Thompson West, St. Paul, Minn.), June, 2000 (commenting that, in a federal project, the contracting officer “may be the most important person in the disputes process”).


[34] See, e.g., DiMaria Constr., Inc. v. Interarch, 799 A.2d 555 (N.J. Sup.Ct. 2001) (upholding a $750,000 jury verdict on a contractor’s a tortious interference with contract claim against the project architect and an interior designer); Dehnert v. Arrow Sprinklers, Inc., 705 P.2d 846, 850 (Wyo.1985) (holding that the “architect who acts within the scope of his contractual obligations to the owner will not be liable for advising the owner to terminate a contractor’s performance unless the architect acts with malice or bad faith”).


[38] See, Bruner & O’Connor, supra note 2, §§ 18:45 – 18:46.


[41] Id. at 575.

[42] Id. at 581. (The Court also resolved a question concerning which procedural statute applied to the defendant’s attempt to enforce the forum-selection clause.) Id. at 575.

[43] Id. at 582.

[44] Id. at 582-83.


[46] Id. at 15-16.

[47] Arkansas is not on that list, but it should be in the future as a result of the 2015 amendments to the Arkansas anti-indemnity statute, as discussed earlier in this article. See, supra, note 18 and accompanying text. The general policy under Arkansas law is to enforce a forum-selection clause unless the court deems it unfair or unreasonable. Provence v. Nat’l Carriers, Inc., 2010 Ark. 27, 360 S.W.3d 725, 728-30 (2010).