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NEWSLETTERS

Illinois Appellate Court Says New York Statute Trumps Illinois Contractual Provisions For Project Built In New York

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Barnes & Thornburg Construction Law Update, March 2017

Readers of this newsletter likely know Illinois has a statute that prohibits application of another state's law or litigation outside of Illinois for Illinois construction projects. Section 10 of the Illinois Building and Construction Contract Act provides as follows:

> 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. Such a provision is void and unenforceable. 815 ILCS 665/10 (West 2014)

New York has a virtually identical statute. Section 757(1) of the New York General Business law states:

> The following provisions of construction contracts shall be void and unenforceable: A provision, covenant, clause or understanding in, collateral to or affecting a construction contract, with the exception of a contract with a material supplier, that makes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state." N.Y. Gen. Bus. Law § 757(1) (McKinney 2012).

So what happens when an Illinois general contractor fires a New York subcontractor who was working on a New York project under a subcontract that required Illinois law to apply and litigation to take place in Illinois? Unfortunately for litigants, what can happen is nearly three years of jurisdictional litigation in both New York and Illinois, and then dismissal of the Illinois case less than 60 days before trial with an order directing the case to be re-filed in New York. This is what happened in *Dancor Construction, Inc. v. FXR Construction, Inc.,* 2016 IL App. (2d) 150839 (September 29, 2016). A copy of the decision is available here.

Understanding the jurisdictional and statutory issues addressed in the *Dancor* decision could help you and your clients avoid this kind of jurisdictional nightmare. The decision initially discusses forum selection clauses under Illinois law. In Illinois, a forum selection clause is *prima*

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facie valid, and will be enforced unless it violates a fundamental Illinois public policy. See *Maher & Associates, Inc. v. Quality Cabinets*, 267 Ill. App. 3d 69, 75 (1994). If the contract states that it is governed by Illinois law "without regard to such State's choice of law considerations," Illinois law will apply, and the forum selection clause will enforced unless it is determined to be unreasonable under a multi-factor test. See *IFC Credit Corp. v. Rieker Shoe Corp.*, 378 Ill. App. 3d 77, 86 (2007) (listing factors considered).

Because the subcontract at issue in *Dancor* did not require the court to ignore choice-of-law rules, the court engaged in a choice-of-law analysis to determine if Illinois or New York law applied. The court had to determine, first, whether there was an actual conflict between Illinois and New York law. The decision holds that there was an actual conflict because the forum-selection clause in the contract would be *prima facia* valid under Illinois law but void under New York law.

The court next had to determine whether Illinois or New York law applied under Section 187(2) of the Restatement (Second) of Conflict of Laws. Under this Section of the Restatement, the law of the state chosen by the parties prevails unless one of the two exceptions applies. The court focused on the second exception, which requires the other state's law to apply if failure to do so would be contrary to a fundamental policy of that other state, and if the other state has a materially greater interest in determination of the issue.

The decision holds that the second exception was satisfied, and that New York law therefore applied, stating that New York's statute "clearly evinces New York's public policy that construction contracts for New York construction projects be litigated in New York," and that New York had the greater interest because the only connection to Illinois was the location of the general contractor. Accordingly, the subcontract provisions that required application of Illinois law and an Illinois forum were held to be void and unenforceable, and the case was dismissed so that it could be re-filed in New York.

Important to Illinois construction lawyers, the decision also confirms that Illinois' virtually identical statute is a fundamental policy of the State of Illinois. Therefore, in situations where Illinois law applies, we would expect the Illinois statute to control.

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