ROHLFING & OBERHOLTZER

ATTORNEYS & COUNSELORS AT LAW
1 East Wacker Drive, Suite 2420, Chicago, Illinois 60601
Telephone: 312.923.7100 Facsimile: 312.923.9023
www.rolaw.net

Building and Construction Contract Act – Home Fights are Fairer Fights

by

James T. Rohlfing

Business litigation is nothing fancier than a struggle to resolve disagreements costeffectively. Sure, good laws, competent judges and skilled lawyers produce fairer results, and encourage early settlements, but a smart business person walks away from the "great case" when attorneys' fees are likely to exceed the recovery. That construction companies see more than their share of litigation is unsurprising, considering the uniqueness of building projects, the importance of labor, and a need for effective communication; factors that inevitably produce some misunderstandings - the cause of most business disputes. Therefore, the contract provisions imposed by many large out-of-state general contractors forcing Illinois subcontractors to litigate or arbitrate disputes in distant jurisdictions governed by foreign laws, put Illinois subcontractors at an unfair disadvantage. This disadvantage occurs before, and often in spite of, the substantive merits of claims and counterclaims of the parties arising from construction projects in Illinois. Rather than incur the costs of retaining an attorney in a distant state and traveling to that state to litigate under unfamiliar laws, the subcontractors often settle their claims at drastically reduced prices, or simply go unpaid for their work.

The Building and Construction Contract Act (House Bill 811), approved by Governor George Ryan on July 16, 2002 as Public Act 92-0657 (the "Act"), works toward leveling the playing field in litigation between local construction trades and multi-state general contractors. The bill was advanced and supported by the Construction Law Committee of the Chicago Bar Association, as well as by construction industry groups in the state, including the Illinois Mechanical and Specialty Contractor's Association (IMSCA) and ASA Chicago, a Chicago area subcontractor association. The Act makes void and unenforceable construction contract provisions which would require that a building contract be interpreted under the laws of another state, as well as provisions that require the parties to litigate, arbitrate, or otherwise resolve their disputes outside of the State of Illinois. The new law applies to "building and construction contracts" and documents executed "in connection with" such contracts. A building and construction contract is described as "a contract for the design, construction, alteration, improvement, repair, or maintenance of real property, highways, roads, or bridges."

There are two important exceptions to the Act's coverage. First, it does not apply to any contract awarded by the United States or another state. Second, it does not apply to a person primarily engaged in the business of selling tangible personal property. These exceptions were included at

he insistence of representatives for those industries, and they do not undercut the Act's primary benefits.

The Act is a victory for the construction industry in Illinois because it facilitates more efficient and economical dispute resolutions of construction disputes by requiring the parties to apply already familiar Illinois law to the disputes and by requiring as well, that the disputes be resolved in Illinois. As a result, the parties, adjudicators, arbitrators, or mediators involved in the dispute will necessarily be applying law that is well-known to them at a location which is not prohibitively expensive or inconvenient for the participants to attend. Simultaneously, the Act discourages the filing of construction-related lawsuits outside of Illinois and it discourages applying the laws of other states in resolving such disputes.

The Act does not represent a departure from Illinois' already articulated public policies favoring the application of local law and the local adjudication of disputes involving realty. Generally, actions directly related to Illinois real estate must be filed in the county in which the real estate is situated. 735 ILCS 5/2-103. Similarly, section nine of the Illinois Mechanics Lien Act (770 ILCS 60/9) requires mechanics lien foreclosures to be filed in the county in which the real estate is located. Moreover, the Act is not the first time the Illinois legislature has chosen to protect subcontractors from inequitable contract provisions. Section 1.1 of the Mechanics Lien Act (770 ILCS 60/1.1) already declares void and unenforceable contract provisions which force a party to waive mechanics lien rights. Indeed, Illinois law governs the procedural aspects of all mechanic's lien and mortgage foreclosure proceedings against Illinois real property.

Since all foreclosure suits against Illinois real estate must be heard in Illinois, the new Act will encourage potential litigants to consolidate their claims into a single lawsuit brought here in Illinois, thereby reducing the number of suits filed and conserving judicial resources. The Act implicitly recognizes that Illinois judges have a better understanding than out-of-state judges of the policies and concerns of the State, local governments, and the public at large regarding real estate development and planning within Illinois' borders. Further, by applying Illinois law to all construction disputes concerning Illinois real estate, the Act encourages a uniformity of case law, and reduces the need for Illinois judges to apply unfamiliar laws in Illinois courts.

Retroactive Application of the Act

By its language, the Act does not state whether it is to be applied retroactively to affect choice of law and choice of forum provisions in construction contracts executed before its enactment. As a general rule, new legislation, even legislation declaring contract provisions void as against *public* policy, is applied prospectively, *Booth vs. Cebula,* 25 Ill App2d 411 (1960). If this rule is applied to the Act, the Act would only apply to contracts made on or after July 16, 2002. There is, nonetheless, a substantial basis for believing that the Act should be interpreted and applied

retroactively, as merely a restatement or clarification of existing Illinois public policy. This argument is supported by the requirement under the Illinois Mechanics Lien Act, 770 ILCS 9, that lien litigation be brought in Illinois and by the broad venue requirement to bring all actions affecting Illinois real estate here. A choice of law or forum construction contract mandating dispute resolution elsewhere is arguably contrary to the general policies that those laws espouse. Because Illinois follows the rule that statutes which clarify pre-existing laws be applied retroactively (*See, e.g., Bailey and Associates, Inc. vs. Illinois Department of* Article re venue11-19-02 ver7 3

Employment Security, et al, 289 Ill App3d 310, 321 (1997); Continental Illinois Nat. Bank & Trust Co., vs. Lenckos, 102 Ill2d 210, 220 (1984)), the Act should be applied retroactively.

The Act is Constitutional

Many other states have enacted statutes which mandate a choice of venue within their state to resolve issues related to real estate. When courts have examined those laws, they have generally found that a venue selection imposed by contract or statute is enforceable as long as there is at least a minimal connection between the controversy and the forum selected by the parties or by the applicable statute. All that is required for a venue selection to be enforceable is its compliance with the constitutional requirement that the selected venue must have a nexus to the litigation or arbitration. *See, e.g., Dace International, Inc. vs. Apple Computer, Inc.,* 275 Ill App3d 234 (1995); *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272 (7th Cir. 1997); *First of Michigan Corp. v. Bramlet*, 141 F.3d 260, 264 (6th Cir. 1998)(The appropriate forum for a case is any forum in which a substantial part of the events or omissions giving rise to the claim occurred.) A law mandating that lawsuits arising out of construction on real estate be filed in the state where the real estate is found, demonstrates an understandable nexus between the action and the venue to pass constitutional muster.

Numerous state and federal courts have reviewed the constitutionality of state laws mandating the choice of venue or the application of a state's statutes to specific types of controversies. For example, courts in New Jersey, California, Rhode Island, Virginia, and the Commonwealth of Puerto Rico have upheld laws that require certain categories of disputes arising in those states, including construction claims, be litigated or arbitrated there. Our neighboring state, Wisconsin, for example, adopted a similar law which imposes both choice of venue and choice of law restrictions for construction disputes. Examples of federal cases that have considered mandatory venue laws include: *M.C. Const. Corp. v. Gray Co*., 17 F. Supp.3rd 541 (W.D. Va. 1998); *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising* Article re venue11-19-02 ver7 4

Corp., 184 F.3d 42 (1st Cir. 1999); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.;* 723 F.2nd 155 (1st Cir. 1983); *Doctors' Associates, Inc. v. Hamilton*, 150 F.3d 157, 163 (2nd Cir. 1998). Thus, plenty of authority supports the conclusion that Illinois' new Act is constitutional.

The Federal Arbitration Act Would Still Pre-empt Conflicting State Laws

Despite's the Act's constitutionality, its application to arbitration disputes may well be limited by Federal court decisions construing similar state laws viewed as curtailing the rights of parties to arbitrate wherever they choose, as set forth in the Federal Arbitration Act ("FAA"). Several Federal courts have limited the application of laws seen as conflicting with an enforceable contract clause requiring arbitration in another forum. These Federal decisions rely upon the Supremacy Clause of the United States Constitution in holding that the FAA preempts state statutes that limit the right to enforce arbitration agreements that substantially affect interstate commerce. *See, e.g., M.C. Const. Corp. v. Gray Co*., 17 F. Supp.2d 541 (W.D. Va. 1998); *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 723 F.23 155 (1st Cir. 1983); *Doctors' Associates, Inc. v. Hamilton*, 150 F.3d 157, 163 (2nd Cir. 1998). Therefore, despite the new Act, an arbitration provision in a contract for construction in Illinois requiring a choice of venue outside of Illinois still might be enforced, pursuant to the FAA, as long as the contractual provision would otherwise be enforceable, and the subject matter of the contract substantially affected interstate commerce.

The application of the Act to contracts purporting to mandate litigation outside of Illinois (rather than arbitration) would not be so limited. Such contract clauses would be unenforceable under the new Act. By illustration, in *Kubis & Perszyk Assocs. v. Sun Microsystems*, 146 N.J. 176, 680 A.2d 618 (1996), the Supreme Court of New Jersey upheld a New Jersey statute to retroactively prohibit enforcement of forum selection clauses that require suit to be filed outside of New Jersey. *Kubis* cites the United States Supreme Court's decision in *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972), which held that "a contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id., at 15.* Clearly, the *M/S Bremen* decision supports a state's right to require certain matters (especially local real estate disputes) to be decided within its borders.

The Act Encourages Venue in Illinois, Subject to Traditional Venue Analysis

Though the Act encourages venue in Illinois, it does not invalidate other Illinois laws concerning venue selection, so a trial court would still consider other relevant factors in deciding upon a motion to transfer venue. Although the Act establishes Illinois public policy favoring the

resolution of construction disputes in Illinois, and, in addition, it expressly invalidates contract provisions that undermine that policy, a court could still require a dispute over Illinois construction be heard outside of Illinois if other public policies, independent of the now unenforceable contract term, strongly outweighed the policy expressed by the Act. For example, when hearing a motion by a defendant to transfer venue, a court should still examine all relevant factors, such as the convenience of the parties, judicial economy, expediency, and witness availability; and if it is found that those factors strongly favored a venue other than that selected by the plaintiff, the court should transfer venue. Hence, though the Act strikes down contractual provisions requiring venue outside of Illinois, as well as those providing for the application of non-Illinois law to construction disputes, a court would still be expected to exercise its discretion and employ traditional venue analysis. Thus, the Act does not mandate venue in Illinois under all circumstances, but strongly tips the balance in favor of litigating in Illinois when the dispute arises out of a contract concerning construction in Illinois.

In any event, if all parties to a dispute found it more convenient to litigate outside of Illinois, they could do so. Established Illinois law provides that any objection to venue must be made at the beginning of an action, or it is waived. At that point, the action would proceed in the plaintiff's chosen forum. Section 2-104 of the Illinois Code of Civil Procedure requires a defendant to raise a venue objection by the date he or she is required to appear in a case. 735 ILCS 5/2-104(2001). Therefore, if litigants simply failed to raise the Act, a court would not be required to transfer venue to Illinois, and the parties could litigate elsewhere.

CONCLUSION

The application of the Act to disputes concerning Illinois construction can be expected to promote uniformity of appellate court decisions, which would help trial court judges to interpret and apply the law, and help litigants to predict the outcome of litigation, thereby encouraging earlier settlement of disputes. Further, being able to predict where a case will be heard also increases predictability for potential litigants. Accomplishing these efficiencies may, in turn, help ease the burden of litigation upon the Illinois construction industry and even the playing field for smaller Illinois contractors battling with large multi-state concerns. Therefore, the passage of the Building and Construction Contract Act is a victory not just for the Illinois construction industry, but a victory for the state as a whole.