Your Place or Mine? Drafting Forum Selection Clauses in the Wake of Rieth-Riley

By Edward J. Hood / Jan 06, 2016

A recent opinion from the Michigan Court of Appeals reveals that in drafting a forum selection clause, it may not be enough simply to name a specific forum if the parties intend that forum to be the sole place where disputes may be resolved.

The case is *Rieth-Riley Construction Co., Inc v Ecopath Contracting LLC*, Docket No. 321562 (June 9, 2015). Both parties were headquartered outside of Michigan, but conducted business in Michigan. The defendant, Ecopath, an Arizona limited liability company, contracted to supply an asphalt-rubber material to the plaintiff, Rieth-Riley, in furtherance of a highway project for the Michigan Department of Transportation. The contract incorporated Ecopath's terms and conditions which, *inter alia*, provided for the application of Arizona law and the following jurisdiction clause:

> Buyer and Seller each hereby irrevocably submits to the personal jurisdiction of the federal and state courts sitting in Arizona with respect to any and all claims that either party hereto may assert against the other arising out of or relating to this Service Agreement and each party hereto waives any defense to the exercise of such jurisdiction based on venue or **forum non conveniens** defenses.

Ecopath allegedly failed to fulfill its obligations under the contract. Rieth-Riley filed suit against Ecopath in Michigan. Ecopath moved to dismiss the action, arguing that the parties had contracted to litigate any disputes in Arizona. The trial court agreed with Ecopath and dismissed the case pursuant to MCL 600.745(3).

The Court of Appeals reversed. The court noted that, while the parties had indeed agreed to submit to the jurisdiction of Arizona courts, the parties did not agree that Arizona was the *exclusive* forum in which disputes between them *could* be resolved. The court observed that the statute on which Ecopath relied, MCL 600.745(3), plainly states that, subject to certain exceptions, an action may be dismissed "[i]f the parties agreed in writing that an action on a controversy shall be brought *only* in another state and it is brought in a court of this state . . . ." (emphasis in original). The contract in question failed to use exclusionary language such as "only," "solely" or "exclusively" when describing the jurisdiction of Arizona courts. Furthermore, the contract did not contain mandatory language such as "shall" or "must" regarding resolution of disputes in Arizona. Therefore, the statute did not require dismissal.

In other words, while the contract made Arizona courts *possible* forums, the contract did not preclude resolution of disputes in other forums in which jurisdiction was proper, including Michigan. This was likely not the outcome that Ecopath had expected.

Contractors are well-advised to examine their standard contracts, terms and conditions, and similar documents to ensure that any forum selection clause satisfies the requirements of MCL 600.745(3) as explained by the Court of Appeals in the *Rieth-Riley* case, or other applicable forum selection laws. Otherwise, contractors may find themselves litigating in unexpected places.

If you have questions regarding the content of this update, please contact Ed Hood at (313) 965-8591 | ehood@clarkhill.com or another member of Clark Hill's Construction Law Team.

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