Forum-Selection Clauses After *Atlantic Marine*

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In the construction industry, many contracts (and subcontracts) include forum-selection clauses, which call for disputes arising out of the contract to be resolved in a particular place, court, or forum. Often coupled with *choice-of-law* clauses, these provisions are designed to make litigation more predictable and efficient for construction companies. Particularly where a company works over broad geographical areas, forum-selection clauses are a way to avoid the drudgery and expense of having to litigate disputes in a large variety of different forums.

Although there can be many advantages to these provisions, forum-selection clauses often raise concerns about fairness. Where larger companies require lower-tier trades to agree predispute to an exclusive adjudicatory forum, it raises the possibility that if (or when) a dispute arises, the lower-tier contractor or material supplier will be burdened by that choice of forum much more than the larger company. This concern has only grown over time, as forum-selection clauses have become common in the industry proprietary contracts.

Particularly burdensome forum-selection clauses can make it difficult for an injured party to get its day in court. This often happens when a forum-selection clause requires all disputes to be adjudicated near the larger company's home office, but hundreds or thousands of miles from where the dispute arose and where the injured party may reside.[1]

In theory, construction participants would factor this dilemma into their contract negotiation strategy. In practice, however, larger companies often present forum-selection clauses in take-it-or-leave-it fashion to lower-tier trades in their standard form contracts. In that setting, and with limited bargaining power, lower-tier trades may believe their time is better spent on other contract issues. It is not rare to see a forum-selection clause take a back seat to other important provisions, such as provisions related to payment or scope of work.

If lower-tier construction participants knew the impact forum-selection clauses can have, they might not agree to them. However, in reality, the importance of such clauses can easily fall through the cracks and be overlooked in the hustle to have the documents signed and begin the project. If a forum-selection clause is particularly burdensome, this can quickly become a problem for construction participants who may have not given much thought to the clause during negotiation. Courts in the United States have regularly enforced even the most burdensome forum-selection clauses, citing a variety of policy rationales, including the usefulness of forum-selection clauses in modern commerce, the importance of safeguarding judicial resources otherwise spent adjudicating venue disputes, and freedom of contract.[2] Despite challenges that can run the gamut from unconscionability to coercion to duress, courts have often enforced the language of the contract.[3]

Late last year, the Court was again asked to address the enforceability of a burdensome forum-selection clause in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*.[4] What made this case particularly interesting from the perspective of a construction lawyer was that the forum-selection clause at issue in *Atlantic Marine* was found in a construction subcontract.

In December 2013, the US Supreme Court issued its unanimous decision in *Atlantic Marine*, stating that federal courts will enforce valid forum-selection clauses in "all but the most exceptional cases."[5] Although the opinion clarifies federal law related to the enforcement of forum-selection clauses, it simultaneously muddies some important underlying issues. For example, the Court did not once mention 24 state statutes that explicitly void or make voidable forum-selection clause like the clause found in J-Crew's subcontract. Instead, the opinion left open important questions about how forum-selection clauses will influence future construction contract disputes.

As a result, it has become increasingly important for construction lawyers to consider the impact of forum-selection clauses, whether drafting the contract from scratch or negotiating a contract using someone else's language. In an article published in the Summer 2013

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Construction Lawyer, Jason A. Lien analyzed forum-selection clauses in construction contracts prior to the upcoming decision in *Atlantic Marine*.[6] Although the Court had not yet heard arguments in *Atlantic Marine*, Mr. Lien's article provided a solid starting point for analyzing forum-selection clauses in construction contracts. This present article builds from Mr. Lien's thoughts and analyzes the issue after the Court's opinion in *Atlantic Marine*, noting the opinion's ramifications for construction lawyers.

This article is organized in the following manner. First, we will lay out the contours of the lower-court decisions leading up to the Court's decision and then the *Atlantic Marine* decision itself. This background is needed to understand the significance of *Atlantic Marine* and its impact. Next, we will highlight what few arguments now exist to challenge a valid forum-selection clause after *Atlantic Marine*. Although the Court left open a viable window to challenge certain forum-selection clauses, questions posed at oral argument and the opinion itself suggest that the "public-interest factor" window is narrow.

We will then emphasize one of the most curious features of Justice Alito's opinion in *Atlantic Marine*. What impact, if any, will *Atlantic Marine* have on the 24 state statutes[7] that void, or make voidable, forum-selection clauses that require adjudication of a construction-related dispute outside the state where the project occurred? To answer that question, this article will examine whether, in a construction dispute, *Atlantic Marine* goes as far as it appears on first glance.

Finally, we will make note of the practical importance of *Atlantic Marine* for construction attorneys who must apply it in practice. Although forum-selection clauses can be useful in some contexts, construction participants and their attorneys should think twice before including such provisions in their standard form contracts.

The *Atlantic Marine* Decision

Though the facts in *Atlantic Marine* were relatively simple, the law the dispute implicated—as one might expect—was not as clear-cut.

The Facts and Lower Court Opinions

Atlantic Marine involved a construction project wherein a small local subcontractor, J-Crew, contracted with a large national general contractor, Atlantic Marine, to build a child-care facility in Fort Hood, Texas. Although all of the construction work occurred within Texas's borders, the child-care facility also sits on property owned by the federal government.[8]

Even though the project occurred entirely within Texas's borders, the general contractor (Atlantic Marine) and the subcontractor (J-Crew) contractually agreed, using Atlantic Marine's form subcontract, that all disputes between the parties arising out of the subcontract "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."[9] Those Virginia courts were located more than 1,400 miles away from the project site but only a few miles from Atlantic Marine's headquarters in Virginia.

When a payment dispute arose out of the subcontract, J-Crew sued Atlantic Marine in the US District Court for the Western District of Texas in San Antonio, Texas, only a short drive away from the project. Pointing to the forum-selection clause in the subcontract, Atlantic Marine moved to dismiss J-Crew's lawsuit, arguing that venue in the Western District of Texas was "wrong" under section 1406(a) or "improper" under Federal Rule of Civil Procedure (FRCP) 12(b)(3) and that the case should therefore be dismissed. In the alternative, Atlantic Marine argued that the Western District of Texas should transfer the case to the Eastern District of Virginia under section 1404(a), which provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.[10]

The Western District of Texas

The Western District of Texas denied Atlantic Marine's motion on both grounds. First, the Western District held that section 1404(a), instead of section 1406 or FRCP 12(b)(3), is the exclusive mechanism governing the transfer of a case to a different federal court where venue is proper in that court under 28 U.S.C. section 1391.

The Western District's holding rests heavily on the language of section 1391, which provides:

> (a) Applicability of Section.—Except as otherwise provided by law—
>
> (1) this section shall *govern the venue of all civil actions* brought in district courts of the United States; and
>
> ...
>
> (b) Venue in General.—A civil action may be brought in—
>
> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which *a substantial part of the events or omissions giving rise to the claim occurred*, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may

> otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.[11]

From that language, the Western District's first holding rested on a simple deduction—that federal venue statutes, not private contract, must control whether venue exists in a particular federal court.

The Western District concluded that because "a substantial part of the events or omissions giving rise to the claim occurred" in Texas—the project occurred entirely in Texas—venue was proper in the Western District. Though the forum-selection clause in the parties' subcontract required that any dispute arising out of the contract be resolved in Virginia,[12] the Western District concluded this did not make venue "improper" or "wrong" in the Western District because federal law, and not private contract, controls whether venue exists in a particular federal court. Otherwise, section 1391 would not actually "govern the venue of all civil claims." Rather, Atlantic Marine needed to prove that transfer to Virginia would be appropriate under the framework established in section 1404(a).[13]

In its second holding, the Western District found that Atlantic Marine had not met its burden of proving that transfer to Virginia would be appropriate. As Atlantic Marine was the party seeking transfer, the Western District reasoned that Atlantic Marine should have to prove that transfer to Virginia would be appropriate under section 1404(a).[14] This meant that Atlantic Marine needed to provide proof that transfer would be "for the convenience of parties or witnesses" or "in the interest of justice."

Considering the forum-selection clause in the parties' contract alongside private- and public-interest factors, the Western District concluded that transfer to Virginia would not be appropriate under section 1404(a). The Western District was careful to state that it gave significant but not dispositive weight to the parties' forum-selection clause.[15] However, the Western District concluded that factors opposing transfer—including (1) the inconvenience of litigating 1,400 miles away from the project site and (2) J-Crew's loss of compulsory process power over essential evidence in Texas—outweighed the parties' contractual choice to litigate in Virginia.[16] Because Atlantic Marine failed to meet is burden of proof, the Western District denied the motion to transfer.

The Fifth Circuit Court of Appeals

Atlantic Marine immediately petitioned the Fifth Circuit Court of Appeals for a writ of mandamus to direct the Western District to either dismiss the case under section 1406(a) and FRCP 12(b)(3) or, in the alternative, transfer the case to the Eastern District of Virginia under section 1404(a). Atlantic Marine's primary argument was that the Western District gave too little consideration to the parties' forum-selection clause. However, the Fifth Circuit affirmed the Western District and denied Atlantic Marine's petition on both grounds.

First, the Fifth Circuit agreed with the Western District that section 1404(a) is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum.[17] The Fifth Circuit agreed with the Western District that "the choice between Rule 12(b)(3) and § 1406 on the one hand and § 1404 on the other depends on whether private parties can, through a forum-selection clause, render venue improper in a court in which venue is otherwise proper under § 1391."[18]

Given that choice, the Fifth Circuit agreed with the Western District that federal venue statutes *alone* control whether venue exists in a particular federal court. In doing so, the Fifth Circuit adopted the minority approach among the federal appellate courts by holding that section 1404(a), rather than FRCP 12(b)(3) or section 1406, is the exclusive mechanism governing transfer to another federal forum.

To reach that result, the Fifth Circuit relied heavily on the US Supreme Court decision in *Stewart Organization, Inc. v. Ricoh Corp*,[19] a case that involved facts almost identical to *Atlantic Marine*. There, a plaintiff sued in the Northern District of Alabama, defying a forum-selection clause that selected the Southern District of New York as the exclusive forum to adjudicate disputes. The Court was asked whether federal district courts should apply federal law—section 1404(a)—or state law to enforce the parties' valid forum-selection clause. Given that issue, *Stewart* held that where an action is filed in federal court under diversity jurisdiction, section 1404(a)—rather than state law—governs a motion to transfer.[20]

Essentially, the Fifth Circuit's reasoning was based on an inference drawn from *Stewart*. The Fifth Circuit reasoned that *Stewart* "implicitly held that a forum selection clause does not render the venue of an otherwise properly venued claim improper."[21] Because the *Stewart* Court held that section 1404(a) controlled motion to transfer, rather than section 1406, *Stewart* implicitly concluded that venue was not "wrong" in the original district court. Because *Stewart* applied section 1404(a) instead of section 1406, the Fifth Circuit reasoned the US Supreme Court had already decided the issue: venue is proper where venue exists under section 1391, notwithstanding the parties' contractual choice of forum.[22] That is, federal law, not private contract, controls where venue rests.

This result made practical sense to the Fifth Circuit. If private parties could make venue "wrong" or "improper" in a district court where venue would otherwise rest under section 1391, private parties would have the power to transcend duly enacted statutes of Congress.[23] But the Fifth Circuit stated that the US Supreme Court had already resolved this issue, noting that "[t]he core of *Stewart* is the directive of Congress that allocation of matters among the federal district courts is *not wholly controllable by private contract*."[24] Instead, the parties' agreement is merely a factor in a district court's venue analysis, with the district court retaining the authority to temper the private

agreement upon a reflection of private and public interests related to the case.[25]

With the threshold issue out of the way, the Fifth Circuit then held that the Western District did not "clearly abuse its discretion" in refusing to transfer the case to Virginia.[26] First, the Fifth Circuit concluded that "no part of . . . *Stewart* necessarily requires the burden to be placed on the non-moving party."[27] Rather, placing the burden on the moving party, according to the Fifth Circuit, would still give adequate deference to the parties' forum-selection clause. In response to the arguments that this burden-shifting would "disfavor forum-selection clauses or allow litigants to easily circumvent their contractually-chosen forum," the Fifth Circuit reasoned "by incorporating the forum-selection clause into the [section 1404(a) analysis], it will be difficult for a party to avoid the contractually-chosen forum."[28] In other words, because district courts would already give substantial weight to valid forum-selection clauses under section 1404(a), it was not also necessary to force the nonmoving party to bear the burden of proof.

The Fifth Circuit then held that while a contracted-for forum-selection clause must be a "significant factor" in a district court's analysis under section 1404(a), *Stewart* also clarified that the existence of a valid forum-selection clause is not controlling.[29] Under Stewart, the Fifth Circuit reasoned, a valid forum-selection clause is "a significant factor that figures centrally in the district court's calculus" under section 1404(a).[30] However, federal judges were also required to consider "public- and private-interest factors" that weigh for or against transfer in that section 1404(a) analysis, including any "inconvenience" to the parties and their witnesses as well as other "institutional concerns."[31]

By weighing the parties' forum-selection clause against private- and public-interest factors—including the inconvenience of traveling to Virginia to litigate their dispute and J-Crew's loss of subpoena power over important evidence in Texas—the Fifth Circuit concluded that the Western District's holding was not "clear error" and denied Atlantic Marine's petition for mandamus, declining to enforce the parties' forum-selection clause.

Petition and Grant of Certiorari to Resolve Circuit Split

Emphasizing the split in the federal circuit courts, Atlantic Marine then petitioned the US Supreme Court for certiorari. The federal appellate courts split on the proper method by which district courts should enforce valid forum-selection clauses in three directions.

First, the majority of federal circuit courts used either section 1406 or Rule 12(b)(3) to enforce forum-selection clauses.[32] In those circuits, when a party sued in a forum different from the forum selected in their forum-selection clause, the district court would either (1) dismiss the case automatically because venue in that court was "wrong" under section 1406 or "improper" under FRCP 12(b)(3); or (2) transfer the case to the selected forum under section 1406. Under the majority approach, courts reasoned that venue does not rest in any court not selected in the parties' forum-selection clause.

Second, a minority of circuit courts used the approach adopted by the Fifth Circuit and the Western District in *Atlantic Marine*, enforcing forum-selection clauses using a balancing-of-interests analysis under section 1404(a) or through the doctrine of *forum non conveniens*.[33] These courts reasoned that federal law—namely 28 U.S.C. section 1391—controls whether "venue" is proper in a particular forum, rather than private contract. These courts also reasoned that although *Stewart* required courts to give significant weight to forum-selection clauses in a section 1404(a) analysis, it was equally clear that the presence of an enforceable forum-selection clause was not dispositive of a motion to transfer.[34] Rather, courts were to consider competing private- and public-interest factors that may overcome the weight of the parties' contractual choice of forum.

The Atlantic Marine opinion left open important questions about how forum-selection clauses will influence future construction contract disputes.

A third, and final, approach was taken by the First Circuit, which held that although venue is controlled exclusively by federal venue statutes under section 1391, any forum other than the forum selected in the parties' valid forum-selection clause lacks authority to "grant relief."[35] Under this final approach, federal courts in the First Circuit used FRCP 12(b)(6) to dismiss cases brought in a forum other than the selected forum in the forum-selection clause. This approach was argued in an amicus brief written by Professor Stephen Sachs of Duke University Law School.[36] However, the Court ultimately declined to address this third approach—implicitly rejecting it—as neither Atlantic Marine nor J-Crew had argued for its application in *Atlantic Marine*.[37]

The US Supreme Court granted certiorari in *Atlantic Marine* on April 1, 2013, and heard arguments on October 9, 2013. Only a few months later, on December 3, 2013, the Court issued its unanimous opinion, delivered by Justice Alito.

Atlantic Marine*'s Two Key Holdings*

The Court's decision in *Atlantic Marine* embodies two key holdings. Although both are important, *Atlantic Marine* will ultimately be most remembered for this point: absent

any contrary law (as discussed below), forum-selection clauses, freely negotiated in a construction contract, will be enforced by federal courts interpreting them, except in the most exceptional of cases.

First, the Court Adopted the Minority Approach Among Circuit Courts

In its opinion, the Court first resolved the circuit split on which mechanism federal district courts should use to enforce forum-selection clauses. After making it clear that federal law, not private contract, controls whether venue lies in a particular federal court,[38] the Court adoptedthe approach urged by J-Crew (the minority): so long as venue exists in the original district court under section 1391, section 1404(a)—not section 1406(a) or FRCP 12(b)(3)—is the proper mechanism to enforce a forum-selection clause that points to another federal forum. Equally, when a forum-selection clause points to a nonfederal forum (e.g., a state or foreign court) and where venue is proper under section 1391 in the district court hearing the motion to transfer, that district court should apply a similar balancing-of-interest test from the doctrine of forum non conveniens.[39] Justice Alito noted that section 1404(a) is merely a codification of the *forum non conveniens* doctrine for the subset of cases in which the transferee forum is another federal court.[40]

Atlantic Marine needed to provide proof that transfer would be "for the convenience of parties or witnesses" or "in the interest of justice."

Underlying the Court's first holding is the conclusion that where venue is proper in a federal district court under section 1391[41]—as it was in *Atlantic Marine*—venue exists in that district court *notwithstanding* the language in the parties' contract. In other words, the Court rejected Atlantic Marine's argument, and the majority approach among the Circuit Courts, that when a plaintiff brings its lawsuit in a district court different from a court selected in a forum-selection clause, venue is rendered "wrong" under section 1406 or "improper" under Rule 12(b)(3).

The Court reasoned that using section 1404(a) was the correct approach because using section 1406 and FRCP 12(b)(3) would produce strange and inconsistent results. First, under the approach Atlantic Marine favored, if private parties select a *nonfederal* forum in their forum-selection clause, venue might not lie in *any* federal district court. This could happen where a forum-selection clause points to a nonfederal forum. In that context, venue would be "wrong" or "improper" in *every* federal forum. The Court reasoned that this result would contravene the overall structure of Congress's venue statutes, which ensure "that so long as a federal court has personal jurisdiction over [a] defendant, venue will always lie somewhere."[42] Second, the Court reasoned Atlantic Marine's approach would contradict the express language of section 1391. That section states explicitly that the provisions contained within section 1391 "*govern all civil actions* brought in district courts of the United States."[43]

Second, the Court's Reconstructed Section 1404(a) Analysis

Though the Court's first holding resolved an important circuit split, the Court's second holding will have even greater significance moving forward. After deciding that section 1404(a) is the exclusive mechanism to enforce a valid forum-selection clause that points to a federal forum, the Court was then asked to decide what weight a forum-selection clause should be given in a district court's section 1404(a) analysis.

Though the Court followed the minority approach in its first holding, it was clear that despite the its opinion in *Stewart*—that a forum-selection clause is not dispositive of the issue—the lower courts in *Atlantic Marine*, and district courts following the minority approach across the country, gave too short shrift to valid forum-selection clauses. Rather than a mere factor in a district court's section 1404(a) analysis, the Court stated that "*only under extraordinary circumstances unrelated to the convenience of the parties* should a motion for change of venue for the convenience of the parties, in the interests of justice, be denied."[44]

The Court was concerned that under any other test, forum-selection clauses could lose their primary benefit: providing certainty that all disputes arising out of a particular agreement will be resolved in a particular location. As Justice Alito put it, "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system."[45] This was the same concern expressed in Judge Hayne's concurring opinion in the Fifth Circuit. Judge Hayne hypothesized that if section 1404(a)'s language were left open to "the vicissitudes of virtually unfettered judicial discretion," private parties would be free to avoid their freely negotiated contractual obligations.[46]

Justice Alito also took issue with the factors the Western District considered in its section 1404(a) analysis. Though both the Western District and the Fifth Circuit recognized that the language of section 1404(a) requires a balance-of-interests analysis, the Court concluded that factors the Western District considered in its section 1404(a) analysis should have been disregarded. The Supreme Court noted that where there is a "*valid*" forum-selection clause, the district court should give no weight

to "private-interest factors" but should consider "public-interest factors" *exclusively*. The Court also disagreed with the Western District and the Fifth Circuit, which concluded that the party seeking transfer bears the burden of proving that transfer under section 1404(a) is appropriate. Rather, the Court concluded, the burden should rest on the party defying the forum-selection clause.[47]

Perhaps the most significant aspect of *Atlantic Marine* is the Court's declaration that the presence of a valid forum-selection clause takes away the ability of the district courts to give any weight to "private-interest factors." As Justice Alito put it, "[w]hen parties agree to a forum-selection clause, *they waive the right* to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation."[48] As a result, a motion to transfer to the selected-forum from any other court will happen "in all but the most exceptional cases."[49]

With that framework laid out, the Court essentially concluded that most of what J-Crew had argued was irrelevant to a district court's proper analysis under section 1404(a). As a result, the "private-interest factors" the Western District considered, which included: (1) which forum provided the most readily available sources of proof to the litigants; (2) the ability of one party to secure attendance of witnesses at trial; and (3) the cost to secure attendance for willing witnesses were all non-factors given the parties' forum-selection clause. Even the fact that transfer to Virginia would be particularly burdensome on J-Crew—because compulsory process would not be available and its witnesses would incur significant expense traveling[50]—could not be considered by the Western District.

The Court reasoned this was the correct result because both parties voluntarily agreed to the selected forum. The Court had no sympathy for J-Crew's arguments about how burdensome the forum-selection clause would be to them or their witnesses, stating:

> when J-Crew entered into a contract to litigate all disputes in Virginia, it knew that a distant forum might hinder its ability to call certain witnesses and might impose other burdens on its litigation efforts. It nevertheless promised to resolve its disputes in Virginia, and the District Court should not have given any weight to J-Crew's current claims of inconvenience.[51]

The Court mentioned that district courts should consider what it labeled "public interests" in its section 1404(a) analysis.[52] Although the Western District considered what it labeled "public interests," including: (1) the efficiency of the Virginia court system as compared to the Western District in resolving cases, (2) the fact that the Western District would be more familiar with Texas state law than courts in Virginia, and (3) the fact that the local Texas community had an interest in the project while the local Virginia community did not, the Court held that the Western District gave too much weight to these competing interests.

Acknowledging the argument that Texas judges were more familiar with Texas law, the Court concluded that this interest alone was not enough to overcome a valid forum-selection clause, stating:

> [a]lthough *it is conceivable* in a particular case that the district court would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause, such cases will not be common.[53]

After reconfiguring the proper section 1404(a) analysis in the presence of a forum-selection clause, the Court reversed the judgment of the Fifth Circuit and remanded the case to the Western District.

Analysis of *Atlantic Marine*

Although cursory reading of the *Atlantic Marine* decision leaves the impression that forum-selection clauses will generally be strictly enforced by federal courts, the opinion left open a few questions, which we will attempt to answer here. For one, the question remains what "public-interest" factors exist that may defeat a forum-selection clause? Although the argument that Texas judges would be more familiar with Texas law was not enough for the Court in *Atlantic Marine*, the Court left open the possibility that other "public interests" may indeed sometimes outweigh parties' contractual choices. Can this happen in a construction-related dispute?

Next, how broad is *Atlantic Marine*'s holding, given the seemingly peculiar fact pattern? Remember that *Atlantic Marine* arose from a project that took place entirely on federal property, where no state law applied. If Texas law had applied, a Texas statute would have made the forum-selection clause voidable at the option of J-Crew.[54] This fact may significantly narrow the sweep of *Atlantic Marine*. In the construction industry, does *Atlantic Marine* only apply in the states that have not (yet) enacted statutes to void forum-selection clauses in construction contracts?

***Public-Interest Factors After* Atlantic Marine**

Although several issues were left unresolved after *Atlantic Marine*, one point of law is clear. Where there is a valid forum-selection clause, that clause "represents the parties' agreement as to the most proper forum" and district courts hearing a motion to transfer should not consider arguments about the parties' private interests.[55] A party seeking to defeat a forum-selection clause will have to rely on arguments that relate to the validity of the clauses and/or the "public-interest factors" weighing against transfer.

However, what is not as clear is what "public-interest factors" are, or which public-interest factors could be deemed important enough to overcome valid forum-selection clauses in future cases. Although it does not specifically define "public-interest factors," Justice Alito's

opinion in *Atlantic Marine* rejected at least one argument that J-Crew made in the lower courts.

In its section 1404 analysis in *Atlantic Marine*, the Western District concluded that public-interest factors weighed against transfer to Virginia. Part of that conclusion rested on the "public-interest factor" that federal judges in Texas are more familiar with Texas breach-of-contract law than their colleagues in Virginia and that transfer to Virginia would therefore be against "the interests of justice." Justice Alito rejected this argument, noting that federal judges routinely apply the law of a state other than the state in which they sit.[56]

If private parties could make venue "wrong" or "improper," they would have the power to transcend duly enacted statutes of Congress.

J-Crew also mentioned, and the lower courts accepted, other public-interest factors, including the inconvenience of Virginia courts to witnesses and the lack of subpoena power in Virginia courts.[57] However, Justice Alito's opinion alluded to the conclusion that J-Crew had no public-interest factors that "overwhelmingly disfavor[ed] a transfer" to Virginia courts.[58] The Court stated several times that transfer would be blocked by public-interest factors in a "rare" or "exceptional" case.[59]

Interestingly, Justice Alito's opinion did not mention two other public-interest arguments raised by the case.

The first was that the people of Texas have more of an inherent interest in a project that occurred in their own state. J-Crew argued the people of Texas, rather than the people of Virginia, should have a stake in resolving a dispute arising out of the project. The second public-interest factor was raised in some detail by an amicus brief submitted by the American Subcontractors' Association,[60] where ASA noted that a significant number of state legislatures have made forum-selection clauses *in construction contracts* void or voidable at the election of one of the parties. Without addressing these arguments specifically, it is difficult to say whether the Court rejected them as "public-interest factors." But it is telling that the Court, in setting forth the new standard of review, held that 1404(a) should be used where there is a "valid" forum-selection clause. What if the clause was not "valid" as would be the case in the 24 states that have voided such clauses? The project is a construction project, and state law applies to the dispute (something *not* the case in *Atlantic Marine* due to the lower court's conclusion that the project was on a federal enclave and thus not subject to state law), the contractual forum-selection clause could not be said to be valid because it would be void or unenforceable.

But where a dispute is not subject to such a law or policy argument, it would appear that post–*Atlantic Marine* the "public-interest factors" that are significant enough to overcome a valid forum-selection clause are likely narrow. During argument, the Justices were eager to discard J-Crew's arguments related to the convenience of what they labeled "third party witnesses." When Justice Alito pressed J-Crew's attorney, Mr. Allensworth, to come up with a list of public-interest factors that weighed against transfer, Mr. Allensworth began by noting the significant burden placed on "nonparty witnesses" who would be forced to travel from Texas to Virginia to testify:

> **Justice Alito:** So what were the public interests that—what were the interests that were weighed here that are not the interests of J. Crew?
>
> **Mr. Allensworth (counsel for J-Crew):** If I might, Your Honor, first off, the district court didn't give any shrift to our witness. He was concerned with the nonparty witnesses who were not a party to this—
>
> **Justice Alito:** Well if they're not your witnesses, then they're—they're Atlantic Marine's witnesses. So why should that be—why should the inconvenience of Atlantic Marine's witnesses be a factor that weighs against Atlantic Marine's position that the case should be tried in Norfolk?
>
> **Mr. Allensworth:** They were neither Atlantic Marine's witnesses nor our witnesses. They were *nonparty witnesses*, and the issue that Judge Higginbotham addressed in the Fifth Circuit—
>
> **Justice Scalia:** Just volunteer witnesses? Are they just going to walk in the courtroom and say I'd—I would like to testify? (Laughter)
>
> **Mr. Allensworth:** Exactly.
>
> **Justice Scalia:** Surely they're one side's or the other's, aren't they? What kind of—what kind of proceedings do they have there? (Laughter) . . .
>
> **Justice Alito:** Who—who is going to call these witnesses, you or Atlantic Marine?
>
> **Mr. Allensworth:** We'd be the ones calling them.
>
> **Justice Alito:** You do, so they're your witnesses. The fact that they don't work for you is immaterial here.

This line of questioning put Mr. Allensworth in an awkward position. Indeed, the lower courts had thought it was important, perhaps even dispositive, that certain witnesses would have to travel halfway across the country to testify in Virginia. Without knowing the Court would reconfigure the analysis under section 1404(a) to exclude private-interest factors, there was no way to know that the Court would not entertain arguments about the interests of his client. And there was no reason to believe that the Court would be unwilling to entertain any mention of inconvenience to *nonparty* witnesses over whom the litigants lacked control.

Later in argument, the band of "public-interest factors" was reduced even further, as the Court basically mocked the notion that a case involving Texas law should be resolved in Texas:

> **Justice Alito:** So let's say [the "third-party witnesses" are] out of the picture. Now, what else—what's left? What other public interests are involved?
>
> **Mr. Allensworth:** The law of Texas, which we think applies to this case, with which the district court—
>
> **Justice Alito:** Is—Texas contract law is so arcane that the judges in the Eastern District of Virginia can't figure it out? Is that right?

Later in the argument, Justice Alito telegraphed his opinion, stating: "If 1404 is the correct procedural route . . . the only factors that can be considered against the forum selection clause . . . are factors that have *nothing to do with the convenience of the party* that doesn't want it tried in the selected forum." Justice Alito also presented a revealing hypothetical, which may provide a strong indication of how few public-interest factors will be significant enough to outweigh forum-selection clauses in future cases:

> **Justice Alito:** So in your case, if there had been a hurricane that wiped out the courts of the Eastern District of Virginia for some period of time so no cases could be tried, or there was an incredible backload of cases there that would prevent the case from being tried . . . those would be something that might amount to an exceptional circumstance.

Justice Kagan jumped in to agree with Justice Alito, stating:

> **Justice Kagan:** It seems to me what Justice Alito said was absolutely right. You have given up the ability to claim private interests here by virtue of your choice to sign that contract. The only thing that could weigh in balance against that is if there is something that has nothing to do with your convenience but is instead . . . *something about why it's important to the judicial system, to the public interest, about keeping the trial in one place.* As Justice Alito suggested, you have not been able to point to anything, nor would there be anything to point to, in most cases involving forum selection clauses.

Construction lawyers seeking to avoid enforcement of a forum-selection clause will have to remember that if the forum-selection clause is otherwise valid, Justice Kagan's comments indicate that a "public interest" to defeat enforcement of the clause may only relate to arguments about why it is important to the judicial system—rather than to the interests of their own client—that the case be resolved in a forum other than the chosen one. Construction lawyers who wish to enforce a valid forum-selection clause now have authority to argue that the "public-interest" window is very narrow.

Although *Atlantic Marine* leaves the door open for litigants to argue that forum-selection clauses are trumped by public-interest factors, if the clause is otherwise valid, public-interest factors that are important enough to outweigh a valid forum-selection clause seem few and far between. In the states that have voided or made unenforceable forum-selection clauses in construction contracts, construction attorneys have a clear peg on which to argue that the forum-selection clause is invalid from the start: there is little further analysis needed.

But as difficult as the task may be for attorneys seeking to enforce a forum-selection clause in a state where such clauses are void or unenforceable, the tables turn in states without such statutes. In those states, the Supreme Court's statement that the party defying the forum-selection clause bears "the burden of showing that public-interest factors *overwhelmingly* disfavor a transfer"[62] to defeat the clause.

In those states, the open door to avoid a valid forum-selection clause using public-interest factors may look more like a small window. A few potential arguments are that: (1) the people who reside in the state where the project is located have an inherent interest in the outcome of the dispute, and therefore should have a stake in resolving its outcome, or (2) numerous state legislatures have explicitly invalidated forum-selection clauses in construction contracts, many of those statutes actually going so far as to explicitly state that forum-selection clauses that require adjudication outside the project state are "contrary to public policy" and that even though the dispute may not be subject to such laws, the same interests are at play. Other arguments to consider are that the selected forum is unable to hear the case (Justice Alito's hurricane hypothetical) or that an unprecedented case log in the selected forum would make it "against the interests of justice" to force parties to litigate there.

Limited Scope of *Atlantic Marine* in Construction Disputes

Despite the decisive language of *Atlantic Marine*, and the justices' questions during oral argument, Justice Alito's

opinion still left viable an important avenue that construction attorneys must be mindful of whether they are attacking or seeking to enforce a forum-selection clause in a construction contract.

First, at least for now, the presumption would appear to be that *Atlantic Marine* will control a motion to transfer to a different forum when the case exists in the federal system. But *Atlantic Marine* has no direct application to state courts, and thus the opinion may matter directly only where a federal court has jurisdiction over a construction-related dispute.[63]

Second, possibly the most significant limiting factor is that although the Court stated that "a *valid* forum-selection clause should be given controlling weight in all but the most exceptional cases," the Court did not mention the numerous state statutes that either void or make voidable forum-selection clauses that require litigation outside the project state.[64]

The Court's decision in Atlantic Marine embodies two key holdings. Although both are important, one dramatically changes the law to favor the enforcement of forum-selection clauses.

Even though the dispute in *Atlantic Marine* arose from a construction dispute, the Court did not discuss or even allude to any of these state statutes—an odd occurrence, as these statutes seem highly relevant, particularly given the Court's insistence that controlling weight should generally be given to enforcement of "valid" forum-selection clauses.[65]

Because those 24 state statutes make such clauses invalid, the holding of *Atlantic Marine*, while broad in application to commercial contract forum-selection clauses, seems significantly limited. Although the Court held that a valid forum-selection clause will control except in "the most exceptional cases," it may be more common to see a construction-related dispute *not* transferred to the selected forum if that forum is in a state outside of the state where the project occurred. This is because if a construction dispute arises in one of the 24 states with statutes voiding or making voidable forum-selection clauses that require adjudication in a different state, those state statutes will make the forum-selection clauses "invalid."[66]

Language from a typical state statute comes from the State of Ohio:

> Any provision of a construction contract, agreement, understanding, specification, or other document or documentation that is made a part of a construction contract, subcontract, agreement, or understanding for an improvement, or portion thereof, to real estate in this state that requires any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding to occur in another state *is void and unenforceable as against public policy*. Any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding shall take place in the county or counties in which the improvement to real estate is located or at another location within this state mutually agreed upon by the parties.[67]

Ohio's state legislature is one of 24 that have prohibited or made unenforceable the use of forum-selection clauses in construction contracts. Thus, the public policy in these states, as reflected by the statutes, is that private parties cannot agree to adjudicate construction disputes in a forum other than the state where the project was located. It is, obviously, a rare situation to be in where a party seeks to enforce a contract clause that is unenforceable in the state where they are litigating. As such, when the dispute is subject to state law and in a state that has invalidated construction contract forum-selection clauses, *Atlantic Marine*'s central holding would not seem to apply.[68]

Remember that the dispute in *Atlantic Marine* arose out of a seemingly rare set of facts. Because the project arose on federal land, the Western District judge held that federal law, not state law, applied to the case.[69] As a result, Texas Business & Commerce Code section 272.001[70] did not apply. Resolution of the venue dispute shifted to the analysis that the Supreme Court eventually undertook, with its conclusion that a valid forum-selection clause will be enforced in all but the most unusual circumstances.

However, state law will apply in most cases. Even if a federal court has jurisdiction over a construction dispute, the district court in a state that voids or makes unenforceable such clauses will—by choice of law rules—usually have no choice but to apply the state statute. In those states, the presumption of invalidity of the clause would appear to apply. Once that happens, the district court would be prohibited from transferring the case to the selected forum using section 1404(a). Rather, the district court—not just state courts—will be forced to void the forum-selection clause.[71]

Thus, on one hand, *Atlantic Marine* strongly affirms a construction participant's right to choose where it litigates future disputes. Where *Atlantic Marine* applies, attorneys seeking to enforce a forum-selection clause have a solid basis to argue such clauses are presumptively enforceable, as the moving party must use only "public-interest factors" to argue against transfer. But on the other hand, the

Supreme Court left intact the numerous state statutes that void burdensome forum-selection clauses in construction contracts. This gives an equally solid ground for any attorney seeking to avoid transfer outside of a state that has legislatively restricted the enforceability of such clauses.

Forum-Selection Clauses After *Atlantic Marine*

The *Atlantic Marine* decision makes clear that where the case applies, federal courts will enforce even burdensome valid forum-selection clauses in all but the "most exceptional cases."[72] This makes it highly important for construction participants to carefully consider the use of forum-selection clauses and what it means to them.

The fact is, the forum in which a case is litigated can be outcome-determinative. In *Atlantic Marine*, enforcement of the forum-selection clause would force the five employees of the subcontractor to travel 1,400 miles to litigate a $159,000 payment dispute in a court that lacked the power to allow the subcontractor to subpoena what it claimed were important third-party witnesses and documents necessary to prove its case.[73]

With this much at stake, it is important for construction participants to assess the advantages and disadvantages of forum-selection clauses before agreeing to them in their contracts. Many general contractors and upper tiers who regularly perform work in multiple states will want such clauses in their contracts. At the very least, trades being asked to agree to such clauses should consider the impact a forum-selection clause can have on their chances of success in a future case as well as the likely reduction in value of legitimate claims. 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 faraway forum.

Benefits of Forum-Selection Clauses

The benefits to be gained from using a forum-selection clause—or a collection of forum-selection clauses across all standard form contracts—can be great. By selecting a forum close to their home offices, contractors use such clauses to capture the benefit of litigating "at home" instead of in a faraway location. The advantages of litigating at home, as opposed to in a faraway forum, range in importance. At one end of the spectrum, litigating closer to home may provide a jury pool that is sympathetic to your company. This is opposed to litigating in a foreign state where it may be much easier for opposing counsel to paint your company as a faceless corporation preying on a local company.

Another benefit to using a forum-selection clause if you perform work out of state is efficiency. Litigating at home spares potential significant travel expenses, with resulting time savings, but also brings with it the ability to use local counsel. Local counsel can have invaluable experience with and knowledge of their local courts, judges, court rules, and customs that foreign counsel cannot replicate.

Litigating at home also provides negotiating leverage to the contractor who is enforcing the clause, as the out-of-state company faces the reverse obstacles. However, the company seeking to void a forum-selection clause is typically the smaller entity with fewer resources to deal with increased travel costs, a less sympathetic jury pool, and the need to retain and engage outside counsel.

The advantages of using a forum-selection clause are lessened, however, when the selected forum is in a location a great distance away from the construction project. Forum-selection clauses that select a forum far away from a construction project create inefficiencies that can make its inclusion in the contract ill-advised.

Drawbacks of Forum-Selection Clauses

Litigating hundreds of miles from the project site also means litigating hundreds of miles from where the events leading to the dispute happened; hundreds of miles from where all of the parties involved in the dispute live and work; hundreds of miles from where all of the key evidence is stored; and hundreds of miles away from the people most affected by the project, the surrounding general public. If the selected forum is more than 100 miles away from the construction project, the parties may be unable to use the federal courts to subpoena necessary evidence and important witnesses.[74] All of these factors can make it inefficient for the parties *and* the body charged with deciding the dispute to fairly resolve the matter.

If the adjudicating forum is only a few miles away from the construction project, a mediator or arbitrator could easily get in his or her car and drive to the project site only a few miles down the road. But when parties litigate hundreds of miles away from the project site, this is no longer an option. This may not influence a private party's decision whether to include a forum-selection clause in its contract, but it may be an important consideration in a district court's analysis on a motion to transfer.

Finally, while larger companies doing business over broad geographical areas benefit from reducing litigation to one particular forum, those companies also should remember the inefficiencies caused when litigating a construction-related dispute far away from the construction site. The project location is where the dispute arose, where the work occurred, and where the damages were suffered. The project location is also where most, if not all, of the witnesses, records, and documents that are essential to resolving the dispute exist. In this way, litigating far away from the project site can present considerable difficulties for both parties to the contract. This may work directly against the purpose of including a forum-selection clause—making litigation, in reality, more inefficient and expensive for all.

Conclusion

In *Atlantic Marine,* the US Supreme Court reset the

framework in which district courts must analyze disputes over motions to transfer based on a forum-selection clause and in the process made it clear that federal courts will enforce a valid forum-selection clause in all but the "most exceptional cases." Though the standard the Court announced makes clear a basic presumption of validity of forum-selection clauses in almost all commercial contracts, the actual impact of the decision on construction disputes could be very narrow given (a) the peculiar set of facts in the case and (b) the prevalence of numerous state statutes invalidating such clauses in construction contracts. Nevertheless, until the issue plays out, this is an important issue for construction lawyers representing all trades and tiers of project participants, who would do well to focus on what the case means so their clients can fully appreciate why serious consideration is necessary to the desirability (or not) of including or agreeing to a forum-selection clause in their construction contract.

Endnotes

1. In *Atlantic Marine Construction Co. v. U.S. District Court*, 134 S. Ct. 568 (2013), a small local Texas subcontractor contracted with a large national general contractor to perform construction work in Texas. Despite the fact that all of the work occurred in Texas, the parties' subcontract included a forum-selection clause that required any dispute arising out of the agreement to be litigated in Virginia.

2. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972); *see also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593–94 (1991) (explaining that forum-selection clauses aid in avoiding confusion among parties regarding the proper forum, limiting litigation expenses, and "conserving judicial resources that otherwise would be devoted to deciding [venue disputes].").

3. *See, e.g.*, *Carnival Cruise Lines*, 499 U.S. at 585–86; Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 110, 130 (2010); Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 325 (1964).

4. 134 S. Ct. 568.

5. *Id.* at 581.

6. Jason A. Lien, *Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court's Pending Review of* Atlantic Marine, CONSTR. LAW., Summer 2013, at 27.

7. At least 24 states have enacted statutes that void forum-selection clauses in construction contracts that require adjudication of disputes in a forum outside of the project state, including Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Louisiana, Minnesota, Montana, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, and Wisconsin.

8. The U.S. District Court for the Western District of Texas held that because the project involved a construction project resting on federal property—a "federal enclave"—Texas law did not apply to the case. United States *ex rel.* J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co., Inc., 2012 U.S. Dist. LEXIS 182375 (W.D. Tex. Aug. 6, 2012). Instead, only federal law applied. This turned out to be a key ruling in the case because TEXAS BUSINESS & COMMERCE CODE § 272.001 otherwise would have allowed J-Crew to void the forum-selection clause in the parties' contract.

9. *Atl. Marine*, 134 S. Ct. at 575.

10. 28 U.S.C. § 1404(a).

11. 28 U.S.C. § 1391 (irrelevant parts omitted) (emphasis added).

12. *Id.* Also worthy of note, J-Crew did not challenge the clause's validity but argued only that transfer to Virginia was not appropriate.

13. 28 U.S.C. § 1404(a).

14. United States *ex rel.* J-Crew Mgmt. v. Atl. Marine Constr. Co., 2012 U.S. Dist. LEXIS 182375, at *20, 2012 WL 8499879 (W.D. Tex. Aug. 6, 2012).

15. *Id.* at *5.

16. *Id.* at *8.

17. *In re* Atl. Marine Constr. Co., Inc., 701 F.3d 736, 739–741 (5th Cir. 2012).

18. *Id.* at 739.

19. *Id.* (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988)).

20. *Id.*

21. *Id.* at 739–40 (quoting 14D CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed.)) (internal quotations omitted).

22. This is opposed to where venue is filed in an improper court under section 1391. In that latter case, section 1406, rather than 1404(a), would control because venue would be "wrong" as defined by section 1391.

23. "[B]ecause private parties should not have the power to transcend federal venue statutes that have been duly enacted by Congress and render venue improper in a district where it otherwise would be proper under congressional legislation." Wright, *supra* note 21.

24. *In re Atl. Marine Constr. Co.*, 701 F.3d at 743.

25. *Id.*

26. *Id.* at 741.

27. *Id.*

28. *Id.* at 742.

29. *Id.*

30. *Id.* at 741 (quoting Stewart Org., Inc. v. Ricoh Corp., 487, U.S. 22 (1988)). Per *Stewart*: "The Supreme Court merely insisted that the forum-selection clause be 'a significant factor that figures centrally in the district court's calculus.'" Per the Fifth Circuit: "While a contracted-for choice of forum remains a significant factor, it is not controlling." *Id.* at 742.

31. *Id.* at 742.

32. Courts of Appeals for the Second, Seventh, Eighth, Ninth, and Eleventh Circuits. *See* Union Elec. Co. v. Energy Ins. Mut. Ltd., 689 F.3d 968, 970–73 (8th Cir. 2012); TradeComet LLC. com v. Google, Inc., 647 F.3d 472, 478 (2d Cir. 2011); Slater v. Energy Servs. Grp. Int'l, Inc., 634 F.3d 1326, 1332–33 (11th Cir. 2011); Hillis v. Heineman, 626 F.3d 1014, 1016–17 (9th Cir. 2010); Muzumdar v. Wellness Int'l Network Ltd., 438 F.3d 759, 760–62 (7th Cir. 2006).

33. Courts of Appeals for the Third and Sixth Circuits. *See* Kerobo v. Sw. Clean Fuels, Corp., 285 F.3d 531, 535 (6th Cir. 2002); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877–78 (3d Cir. 1995).

34. In addressing the counterargument that providing judicial discretion would allow parties to easily avoid their contractual obligations, the Fifth Circuit concluded that by weighing the forum-selection clause against public and private interests, "giving the weight forum-selection clauses are entitled to . . . it will be difficult for a party to avoid the contractually-chosen forum." *In re Atl. Marine Constr. Co., Inc.*, 701 F.3d at 742.

35. Court of Appeals for the First Circuit. *See* Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 15 (1st Cir. 2009).

36. *See* Brief of Amicus Curiae Professor Stephen E. Sachs, Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568 (2013) (No. 12-929).

37. Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 580, 581 (2013) ("Even if a defendant could use Rule 12(b)(6) to enforce a forum-selection clause, that would not change our conclusions that § 1406(a) and Rule 12(b)(3) are not proper mechanisms to enforce a forum-selection clause and that § 1404(a) and the *forum non*

(Continued on page 48)

relating to those policies. There is a good discussion of the additional insured rider, which is a requirement of most prime contracts.

The book contains a chapter devoted to issues unique to design professionals and their subconsultant arrangements, covering topics such as standard of care, responsibility for design defects, limitations of liability, BIM, indemnity, insurance, additional services, and payment.

Finally, there are several chapters addressing miscellaneous subjects, including several cutting-edge topics. There are chapters on green building (green guarantees, green credits), international construction (Foreign Corrupt Practices Act, international ADR), project delivery systems (public-private partnerships, integrated project delivery, design-build), public projects (False Claims Act, pass-through claims, flow-down requirements), supply contracts (UCC), licensure, and teaming arrangements, all from the subcontracting perspective.

The editors and authors should be commended for producing an important, comprehensive book on a subject that is of such great importance to the industry. The book surely will be an important tool on the construction lawyer's bookshelf and should be a book that prime contractors and subcontractors regularly use.

Forum-Selection Clauses After *Atlantic Marine*

(Continued from page 16)

conveniens doctrine provide appropriate enforcement mechanisms.").

38. *Id.* at 578.

39. *Id.* at 580.

40. *Id.* at 580 (citing Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007)).

41. 28 U.S.C. § 1391(b) provides, in relevant part, that "[a] civil action may be brought in— . . . (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated."

42. *Atl. Marine Constr. Co.*, 134 S. Ct. at 578.

43. 28 U.S.C. § 1391(a)(1).

44. *Atl. Marine Constr. Co.*, 134 S. Ct. at headnote 14.

45. *Id.* at headnote 22.

46. *In re* Atl. Marine Constr. Co., Inc., 701 F.3d 736, 748 (5th Cir. 2012) (Haynes, J., concurring). The negotiation of a forum-selection clause involves various economic decisions and often requires parties to make concessions in exchange for the assurance that potential litigation will occur in a predetermined venue. Companies such as Atlantic Marine that conduct business throughout a broad geographical area rely on forum-selection clauses to ensure that they can anticipate business costs and avoid litigation in a plethora of possible venues.

47. *Atl. Marine Constr. Co.*, 134 S. Ct. at 581 ("party defying the forum-selection clause bears the burden of establishing that transfer to the forum for which the parties bargained for is unwarranted")

48. *Id.* at 582 (emphasis added).

49. *Id.* at 574 (internal citations, quotation marks, and brackets omitted).

50. United States *ex rel.* J-Crew Mgmt. v. Atl. Marine Constr. Co., 2012 U.S. Dist. LEXIS 182375, at *6, 2012 WL 8499879 (W.D. Tex. Aug. 6, 2012).

51. *Atl. Marine Constr. Co.*, 134 S. Ct. at 584.

52. *Id.* at 582.

53. *Id.*

54. Texas Bus. & Com. Code § 272.001.

55. *Atl. Marine Constr. Co.*, 134 S. Ct. at 581.

56. *Id.* at 584.

57. *Id.* at 582.

58. *Id.* at 583.

59. *Id.* at 582.

60. One of the authors of this article (Eric B. Travers) was one of the coauthors of the ASA amicus brief.

61. Transcripts of oral argument can be easily found at http://www.scotusblog.com/case-files/cases/atlantic-marine-construction-co-v-united-states-district-court-for-the-western-district-of-texas/.

62. *Atl. Marine Constr. Co.*, 134 S. Ct. at 583.

63. Diversity of citizenship will likely only happen on relatively large construction projects where the potential exists that the disputants will be from different states.

64. These statutes are referenced and described in great length in Lien, *supra* note 6.

65. The statutes were listed in at least one amicus brief to the Court, making it plausible—if not already certain—that the Court was aware of them. *See* Brief of Amicus Curiae Am. Subcontractors Ass'n, Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568 (2013) (No. 12-929). It is also plausible the Court did not perceive the issue as one pertaining only to construction. Indeed, the Chamber of Commerce argued that forum-selection clauses are essential in modern American business, for both small and large companies. *See* Brief of Amicus Curiae Chamber of Commerce of the United States of Am., *Atl. Marine Constr. Co.*, 134 S. Ct. 568 (2013) (No. 12-929).

66. *Atl. Marine Constr. Co.*, 134 S. Ct. at 573 ("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 convenience of the parties should a 28 U.S.C.S. § 1404(a) motion be denied.").

67. Ohio Rev. Code Ann. § 4113.62(D)(2) (West 2013) (emphasis added).

68. This is especially true in the 24 states with state legislation that voids forum-selection clauses in construction contracts.

69. United States *ex rel.* J-Crew Mgmt. v. Atl. Marine Constr. Co., 2012 U.S. Dist. LEXIS 182375, at *9, 2012 WL 8499879 (W.D. Tex. Aug. 6, 2012).

70. Texas Bus. & Com. Code § 272.001 provides: "(b) If a contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by the party obligated by the contract to perform the construction or repair."

71. State statutes that void or make voidable the statutes still protect the unwary or the weak subcontractor from the grasp of the larger general contractor.

72. Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 573 (2013).

73. A court 1,400 miles away from the project site lacks subpoena power over many, if not all, of the key personnel J-Crew needs to prove its position in its payment dispute against the general contractor. *In re* Volkswagen of Am., Inc., 545 F.3d 304, 316 (5th Cir. 2008) (when the distance between an existing venue and the proposed venue exceeds 100 miles, the proposed venue's subpoena power with respect to witnesses for purposes of deposition or trial would be subject to motions to quash).

74. *Id.*