# State Statutes

## Governing Law and Forum Selection Provisions: Part 3

*By Gail S. Kelley, P.E., Esq.*

Part 1 and 2 of this series (STRUCTURE, February and March 2018) provided an overview of both governing law provisions and forum and venue selection provisions. A *governing law provision*, also referred to as a *choice of law* provision, specifies that the law of a designated jurisdiction will govern disputes arising out of the agreement, regardless of where the dispute is adjudicated. Forum and venue selection provisions specify the location of the adjudication. A *forum selection* provision indicates the state where the adjudication is to take place; *a venue selection* provision indicates the actual location of the court. For a case in state court, the venue would be a county; for a case in federal court, the venue would be a district. This final article in the series takes a closer look at the some of the state statutes that may override provisions that the parties have agreed to in their contracts, as well as issues related to governing law provisions.

### What Provisions Apply to Design Agreements?

It is not always clear whether a statute that sets the governing law or forum for a construction project applies to an agreement for engineering services. Statutes regarding construction often reflect the lobbying efforts of subcontractor associations. As a result, a strict interpretation of the wording of a statute might lead to the assumption that the statute only applies to construction contractors and subcontractors.

Nevertheless, when courts interpret these statutes, they tend to look at the intent of the statute, rather than the wording. For example, Cal. Civ. Proc. Code § 410.42 prohibits enforcement of a provision in a contract between a contractor and a subcontractor with its principal offices in California if the provision requires the subcontractor to litigate a dispute with the contractor in another state, provided the dispute arises out of a construction project performed in California. In *Vita Planning and Landscape Architects, Inc. v. HKS Architects, Inc.*, 240 Cal.App.4th 763 (2015), the California Court of Appeals interpreted the word "contractor" as used in Cal. Civ. Proc. Code § 410.42 to include architects and other design professionals. The court found that Vita was unquestionably a "subcontractor" because it was awarded a portion of HKS's contract with the Owner and it did not have a direct contractual relationship with the Owner. The court was not persuaded by HKS's contention that section 410.42 did not apply because HKS was an architect rather than a general contractor.

Several of the statutes in the tables provided in Part 1 and 2 of this series indicate that they apply to any contract for an improvement to the property. This is also the language found in the mechanic's lien laws of many states; it is generally considered to apply to design agreements unless there is a specific limitation. As an example of such a limitation, the Florida venue statute appears to apply only to those contracts where the engineers are working pursuant to a design-build contract.

> *Any venue provision in a contract for improvement to real property which requires legal action involving a resident contractor, subcontractor, sub-subcontractor, or materialman, as defined in part I of chapter 713, to be brought outside this state is void as a matter of public policy.*

Part 1 of Chapter 713 (713.01 (8)) of the Florida code states that the term contractor "*includes an architect, landscape architect, or engineer who improves real property pursuant to a design-build contract* ..." When a statute specifically includes certain entities, it is generally held to exclude those not listed; thus the Florida venue selection statute does not appear to apply to engineers unless they are working pursuant to a design-build contract.

In contrast, the New Mexico code (Stat. Ann. § 57-28A-1) explicitly defines a construction contract to include engineering services:

> *§ 57-28A-1 C. As used in this section, "construction contract" means a public, private, foreign or domestic contract or agreement relating to construction, alteration, repair or maintenance of any real property in New Mexico and includes agreements for architectural services, demolition, design services, development, engineering services, excavation or other improvement to real property, including buildings, shafts, wells and structures, whether on, above or under real property.*

However, if a statute simply refers to either "the construction contract" or the "contractor" without specifically referencing the engineer, and there is no court case interpreting the statute, a party trying to invoke the statute to cover a design agreement may find that the other party challenges its applicability. The California court's holding in the Vita case can be cited in cases involving the law of other states, but it is not binding precedent in such cases.

Statutes may also be specifically limited by subject matter. For example, 73 Pa. Stat Ann. §514 states that "*a contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state, shall be unenforceable*." However, in the case *Stivason v. Timberline Post and Beam, 947 A.2d 1279* (Pa. Super. Ct. 2008), the Pennsylvania Superior Court found that because the code section was part of the Pennsylvania Contractor and Subcontractor Payment Act, a forum selection provision that required lawsuits to be filed in Ohio was enforceable even though the project was in Pennsylvania, because the dispute at issue did not involve payment.

### Enforceability of Governing Law Provisions

When there is no applicable statute with respect to governing law to the contrary, courts will generally enforce a governing law provision in a contract, provided there is some relationship between the transaction and the

law that would govern, and there is no overriding public policy concern. *Donaldson v. Fluor Engineers, Inc.*, 169 Ill. App.3d 759 (1988) is an example of when a court refused to enforce the governing law provision in a contract due to a public policy concern. This case involved an employee of one of Fluor's subcontractors who was injured while working on a project in Illinois. The injured employee sued Fluor in an Illinois court, and Fluor brought a third-party suit against the subcontractor for indemnification. The contract between Flour and the subcontractor stated that California law would govern; under California law at that time, the subcontractor would be required to indemnify Fluor for Fluor's own negligence, provided Fluor's negligence was not the sole cause of the injury. However, under Illinois' anti-indemnity statute, an agreement to indemnify another person from that person's own negligence is void as against public policy and wholly unenforceable. Even though the contract specified that California law governed, the Illinois court refused to enforce the governing law provision because California law would allow enforcement of the indemnification provision, whereas Illinois law would not.

## Choice of Governing Law

An analysis of the merits and disadvantages of selecting a particular state's law as the governing law for a design agreement would require research into the applicable statutes, cases that have interpreted the statutes, and cases that have interpreted contractual language. A state's anti-indemnity statute might be one consideration. Other considerations might include whether design professionals are covered under the state's mechanics' lien law; the statute of limitations/statute of repose for bringing claims for design defects; whether a certification of merit is required for a negligence claim against an engineer; whether the state's interpretation of the "economic loss doctrine" would allow an entity that was not in contractual privity with the engineer to bring a tort claim for economic damages; and whether an engineer can be held personally liable for an allegedly defective design.

## Conclusion

This series of articles has provided an overview of the governing law and forum/venue selection provisions that are often found in design agreements. The series also reviewed the state law relevant to these provisions, where "state law" includes both statutes and case law (cases that have interpreted the statutes and cases that have interpreted contractual language). It should be noted, however, that determining whether a statute applies to a particular design agreement will often require research into the relevant case law, preferably by an attorney with expertise in the laws of the state where the project is being constructed.

*Disclaimer: The information in this article is for educational purposes only and is not legal advice. Readers should not act or refrain from acting based on this article without seeking appropriate legal or other professional advice as to their particular circumstances.*▪

*Gail S. Kelley is a LEED AP as well as a professional engineer and licensed attorney in Maryland and the District of Columbia. Her practice focuses on reviewing and negotiating design agreements for architects and engineers. She is the author of Construction Law: An Introduction for Engineers, Architects, and Contractors, published by Wiley & Sons. Ms. Kelley can be reached at gail.kelley.esq@gmail.com.*


ADVERTISEMENT–For Advertiser Information, visit www.STRUCTUREmag.org