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ARE YOU SURE THAT FOREIGN FORUM-SELECTION CLAUSE OR CHOICE-OF-LAW CLAUSE IS VOID AND UNENFORCEABLE UNDER ORS 701.640?

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As regular construction law practitioners are likely aware, many states have restrictions on choice-of-law and forum-selection provisions in construction clauses, often based on the rationale that "if you build in [home state], you litigate in [home state]."[1] As a result, contract clauses that require disputes to be resolved in foreign states or subject to the laws of another state are often glossed over based on the presumption that public policy should void enforcement of such a contract provision in the event of a dispute.

For the uninitiated, a choice-of-law clause defines the state law that will govern a dispute. A forum-selection clause defines the forum in which claims must be resolved under the contract. Often these two clauses will go hand in hand, for example, requiring litigation in state court in New York subject to the laws of New York. But uniformity is not necessarily required, and a construction contract might govern work in State A, require disputes to be resolved in State B and subject disputes to the laws of State C.


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Under ORS 701.640, the state of Oregon created a statutory restriction preventing litigation or arbitration of Oregon construction contract disputes outside of Oregon or under the laws of a foreign state. This statute provides in relevant part:

> (1) A construction contract may not include any provision, covenant or clause that:
>
> (a) Makes the construction contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the construction contract to be conducted in another state . . . .
>
> . . . .
>
> (2) Any provision, covenant or clause described in subsection (1) of this section is void and unenforceable.

Notably, ORS 701.640 provides that any contract clause contrary to subsection (1) above—*i.e.*, a clause requiring foreign law or a foreign jurisdiction to govern an Oregon construction contract dispute—is "void and unenforceable." As relevant here, "'[c]onstruction contract'" is defined as "a written or oral construction agreement . . . relating to . . . [c]reation or making of a building, structure or superstructure."[2]

However, while certain ***litigation*** outside of Oregon under foreign laws may be prohibited, ***arbitration*** conducted outside Oregon's borders under foreign laws may not be. As commentators have noted, including in this publication, the interplay between arbitration provisions, the Federal Arbitration Act ("FAA") and ORS 701.640 creates the possibility that ORS 701.640 may not void contract clauses that require ***arbitration*** in a foreign jurisdiction or under foreign law.[3] But similar concerns and analysis based on the FAA do not typically apply when an Oregon construction contract requires litigation (not arbitration) in a foreign jurisdiction or pursuant to the law of a foreign state.

Other situations may also impact the application of ORS 701.640. A case recently decided by the United States District Court for the District of Oregon suggests that ORS 701.640 may not always void clauses in construction contracts that run afoul of subsection (1) above. In *United States for Use & Benefit of Hamer Electric, Inc. v. Wu & Associates, Inc.*, No. 3:23-CV-01515-AN, 2024 WL 3102817 (D. Or. June 21, 2024) ("*Hamer*"), a subcontractor, Hamer Electric, that performed work on the Portland International Airport entered into a subcontract for the airport project with a general contractor, Wu. The parties' subcontract called for disputes to be resolved in the courts of the state of New Jersey, the state where Wu was headquartered. Following a dispute, Hamer Electric filed suit against Wu in federal court in Oregon. In response, Wu filed a motion to change or transfer venue to a court in the state of New Jersey, relying on the subcontracts' forum-selection clause. Hamer Electric contested the motion to transfer venue based largely on ORS 701.640, which the subcontractor argued voided the subcontractors' forum-selection clause requiring disputes to be resolved outside the state of Oregon.

The District Court granted Wu's motion to transfer venue of the lawsuit to New Jersey. Regarding Hamer Electric's ORS 701.640 argument, the Court held that the validity of the subcontractor's forum-selection clause was governed by federal law and not ORS 701.640 or state law analyzing ORS 701.640. The Court did appear to acknowledge that ORS 701.640 could be relevant to the extent it reflects a strong public policy of the state of Oregon to have certain disputes resolved in the state of Oregon, but the Court was "unconvinced that any public policy expressed by ORS § 701.640 necessitates that the dispute be adjudicated in Oregon," relying in large part on the fact that subcontractor Hamer Electric was incorporated in the state of Washington with its principal place of business in Washington.[4]

The *Hamer* decision raises several issues for contractors and construction counsel to consider for Oregon construction disputes:

First, is the public policy expressed by ORS 701.640 to protect Oregon *contractors* or Oregon

projects? On its face, ORS 701.640 does not distinguish between Oregon and non-Oregon contractors; instead, it requires Oregon law and an Oregon venue for Oregon construction projects. Under both Oregon and federal law, the purpose of a statute is generally determined primarily by the text of the statute itself.[5] Accordingly, one might argue that the public policy expressed by ORS 701.640 is what it says on its face—it guarantees Oregon law and an Oregon venue for disputes about Oregon construction projects.


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Second, is it possible to construe ORS 701.640 to benefit Oregon contractors (however defined) over non-Oregon contractors without running afoul of other legal doctrines, such as the dormant Commerce Clause? It is well-established that courts are to construe statutes to avoid constitutional problems, not to create them.[6] Here, interpreting ORS 701.640 as only protecting Oregon contractors would seem to subject ORS 701.640 to significant constitutional scrutiny under the dormant Commerce Clause.[7] Again, a further reminder of the complex issues that can be raised by construction contract issues.

Third, assuming it is possible to construe ORS 701.640 to only invalidate forum-selection clauses for Oregon contractors, how does one determine whether a party is an "Oregon contractor"? ORS 701.640 provides no criteria by which a court should determine whether an entity is an Oregon or non-Oregon contractor. As a result, it is possible that even a contractor incorporated and headquartered outside of Oregon could be deemed an "Oregon contractor" depending, for example, on whether the contractor is licensed by the Oregon Construction Contractor's Board, regularly performs business in Oregon, maintains any offices in Oregon, employs any Oregonians, pays taxes to the state of Oregon, employs Oregon-based subcontractors, and any number of additional factors that could come into play.

Finally, does a similar analysis apply to a choice-of-law clause in a construction contract? *Hamer* does not appear to address the interplay of federal law, ORS 701.640 and choice-of-law provisions. Other decisions in this District have found that ORS 701.640 invalidates a choice-of-law provision in a construction contract for an Oregon project that purports to require foreign law to be applied.[8] How a court in the future might analyze the choice-of-law issue remains to be seen.

In summary, construction contract issues are often complex and nuanced, even when they may appear relatively straightforward. Just as a facially invalid forum-selection clause under ORS 701.640 may be deemed valid and enforceable when factoring in an arbitration provision and the interplay with the FAA, other issues, such as whether the project is governed by state or federal law, or the state of incorporation of the party seeking to invalidate the forum-selection clause, may also come into play. Contractors and construction counsel should keep these issues in mind when reviewing their next construction contract.

[1] *Dancor Constr., Inc. v. FXR Constr., Inc.*, 64 N.E.3d 796, 813 (Ill. App. Ct. 2016).

[2] ORS 701.620(1)(b).

[3] *See*, *e.g.*, Jacob Zahniser, *ORS 701.640 May Not Void Forum-Selection and Choice-of-Law*, Constr. L. Newsletter, Issue No. 61, Spring 2019.

[4] *Hamer*, 2024 WL 3102817, at *3 ("Put simply, plaintiff has not demonstrated that, even if ORS § 701.640 evinces a strong public policy, plaintiff is an entity that the legislature intended to protect via that policy.").

[5] *See L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 803 (9th Cir. 2017) ("[T]he language of the statute is 'the best guide to the purposes of a statute,' because 'statutes are records of legislative compromise.'" (quoting *Am. Ass'n of Retired Pers. v. EEOC*, 823 F.2d 600, 604 (D.C. Cir. 1987))); *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042 (2009) ("[T]here is no more persuasive evidence of the intent of the legislature than '"the words by which the legislature undertook to give expression to its wishes."'" (quoting *State ex rel. Cox v. Wilson*, 277 Or. 747, 750, 562 P.2d 172 (1977))).

[6] *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001).

[7] *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) ("If a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'" (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986))).

[8] *See First Mercury Ins. Co. v. Westchester Surplus Lines Ins. Co.*, 152 F. Supp. 3d 1320, 1323-24 (D. Or. 2016), *aff'd*, 731 F. App'x 716 (9th Cir. 2018); *id.* at 1323 ("I find that Virginia does not have a substantial interest in having its law applied to a case involving the construction of an Oregon bridge and where the application of Oregon law will not disadvantage the only Virginia party.").

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JOINT VENTURES AND GENERAL PARTNERSHIPS IN CONSTRUCTION: FORMATION, OPERATIONS, AND BREAKUPS

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Often when bidding on projects that involve complex issues or that require certain diversity and inclusion benchmarks, construction firms seek out "partnerships" or "joint ventures" with other firms to collectively pool resources and expertise. Conceptually, this makes perfect sense and can benefit not only the firms involved, but the community at large. But often parties pursue these relationships without considering all the potential legal implications. As a result, even when reduced to writing, agreements between partners or joint venturers often fail to address critical aspects of the relationships.

When advising construction firms on a potential joint venture, it is important to understand what creates a partnership, what are the obligations and responsibilities of the parties (both the partners and the partnership itself), and what happens when things go wrong. Using that baseline knowledge, an attorney can better craft an agreement to achieve the intent of the parties and help avoid future conflict.

Alex

I. Pre-Bid: Formation

Unless the parties form an LP, LLP, LLC, or other statutory corporate entity, a joint venture is simply a "species of partnership" (a partnership for a single transactions) and is therefore governed by ORS Chapter 67. Stone-Fox, Inc. v. Vandehey Dev. Co., 290 Or 779, 793, 626 P2d 1365 (1981); see also Dority v. Driesel, 75 Or App 180, 183, 706 P2d 995 (1985) ("Simply stated, a joint venture is a partnership for a single transaction, and partnership law controls joint ventures.") ORS 67.055(1) provides, " *** [T]he association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership." (Emphasis added.) ORS 67.055(4)(d) provides for a rebuttable presumption that an entity that shares profits of a business is a partner, unless payment is for wages, or other debts. Finally, ORS 67.055(4)(a) establishes five factors to be considered when evaluating a partnership:

(A) Their receipt of or right to receive a share of profits of the business;
(B) Their expression of an intent to be partners in the business;
(C) Their participation or right to participate in control of the business;
(D) Their sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and
(E) Their contributing or agreeing to contribute money or property to the business.

The five factors listed in ORS 67.055(4)(a) are not exclusive and therefore "[e]xamination of the entire factual setup as a whole, [ ] remains a proper inquiry when determining whether a partnership has been created." Wirth v. Sierra Cascade, LLC, 234 Or App 740, 759, 230 P3d 29 (2010), rev den, 348 Or 669 (2010). And no single factor is required to prove the existence of a partnership. Johnson and Henderson P'ship v Henderson, 321 Or App 134, 143, 516 P3d 726 (2022), rev den, 370 Or 714 (2023). In fact, the statute expressly provides that an agreement to share losses is not necessary to prove a partnership. ORS 67.055(4)(e) ("An agreement to share losses by the owners of a business is not necessary to create a partnership.").

The statute also makes it clear that intent to be a partner is no longer an "essential test" in determining the existence of a partnership. "Most importantly, under ORS 67.055(1), a partnership may be created unintentionally by the parties. Thus, the parties' actual intent is no longer the 'essential test' for determining the existence of a partnership." Wirth, 234 Or App at 758-759. Instead, intent to be partners in the business is merely one of the five factors to be considered. As a result, it is the objective conduct of the parties that governs. "In the absence of an express agreement codifying the relationship, the status may be inferred from the conduct of the parties in relation to themselves and to third parties. In other words, if they function as a partnership, they must assume the attendant duties and liabilities." Hayes v. Killinger, 235 Or 465, 471, 385 P2d 747 (1963).

In sum, even if not formed as a corporate entity under other statutes, construction firms may, through conduct alone, establish a joint venture partnership (JV partnership). Once that occurs, a JV partnership becomes a separate and distinct legal entity, with its own rights and liabilities. Moreover, the relationship of the entities involved changes, and new obligations and liabilities are created for the JV partners, either by written agreement or, if not spelled out in writing, imposed by law.

To avoid any unintended consequences, parties engaging in discussions to jointly pursue large commercial projects should have a detailed agreement in place before investing substantial resources collaborating. The agreement should govern the relationship of the parties, but at a minimum it should clearly establish the limits of the scope of the relationship and its termination, to avoid establishing an unintended partnership for other projects or endeavors.

Last, another reason for a pre-bid agreement is to address any confidentiality concerns. Often, in collaborating on a bid, sensitive or proprietary information may be shared between the construction firms. These concerns can be addressed through a confidentiality provision included in a partnership agreement.

II. Construction: Management and Operations

In most cases, if a project is awarded to a joint venture, it likely makes sense for the parties to form an LLP or LLC to limit liability of the partners. Regardless, some written agreement is critical for operations and management.

Management

Unless otherwise provided for in a written partnership agreement, each partner has equal rights in the conduct of the partnership business. ORS 67.140(7). A JV partner's equal right to manage the JV partnership exists irrespective of profit sharing or ownership allocation. Moreover, unless otherwise affirmed in a written agreement, each partner is an agent of the partnership for purposes of the business activities and, therefore, has authority to bind the JV partnership. Accordingly, it is important for the JV partnership to have a written agreement that spells out how the entity will be managed, especially if a JV partnership is not intended to be managed equally, including such matters as who has authority to enter into agreements on behalf of the JV partnership, incur debts and liabilities, and make other key decisions.

Fiduciary Duties

As soon as a JV partnership is created (whether formally or by conduct), the construction firms involved owe fiduciary duties to one another. "Partners in a joint venture owe a fiduciary duty to one another." Com. Mortg. Co. v. Indus. Park Co., 101 Or App 345, 352, 791 P2d 132 (1990). The duty owed includes the duty of loyalty and duty of care. Specifically, a party to a JV partnership must refrain from competing with the partnership or representing interests adverse to the JV partnership. ORS 67.155(2)(c). Parties must also refrain from engaging in grossly negligent or reckless conduct. ORS 67.155(3). Because of these duties, it is essential to set out in writing a detailed description of the purpose of the JV partnership, so as to avoid any ambiguity regarding whether the parties' non-partnership activities run afoul of their fiduciary obligations.

Non-Monetary Contributions and Use of Equipment

One big issue in JV partnerships that is especially important in the realm of commercial construction is accounting for non-monetary contributions and use of partnership assets during the term of the JV partnership. Unlike other business ventures, construction joint ventures do not typically involve a large contribution of cash by the partnership, but rather investment of existing

equipment, personnel, and intangible assets (such as expertise, bonding capacity, etc.). The default rule is, absent a written agreement to the contrary, any property not held in the name of the JV partnership is not partnership's property, unless the title documents indicate the property is being held for the benefit of the JV partnership. ORS 67.065. But if it is partnership property, then the partners may only use it only for the benefit of the JV partnership. Accordingly, a written agreement should clearly distinguish between what assets are being contributed to the JV partnership and assets loaned or leased to the JV partnership by the JV partners.

Profit and Losses

Allocating profits and losses is always the most important consideration. The default rule is that partners share equally in all profits. Therefore, if the parties intend for a different allocation, it must be clearly established in a written agreement. Conversely, JV partners are jointly and severally liable for all JV partnership liabilities, regardless of what a written agreement may provide for. ORS 67.105. Accordingly, it is critical for the written agreement to identify contribution rights between the JV partners, to ensure that the liability is shared in proportion to the ownership structure contemplated by the parties.

III. Breakups

Partnership breakups are often messy, and even more so in the world of complex commercial construction. It becomes particularly problematic if the breakup occurs without a written agreement. If there is no written agreement, a JV partner can "dissociate" from the JV partnership at any time, for any reasons, without liability. ORS 67.225. This can leave the remaining partner or partners with substantial exposure to liability. In a situation where there are only two JV partners, if one JV partner dissociates, the remaining JV partner is left with the impossible decision to wind down the JV partnership (which may not be practical mid-construction) or elect to carry on the business of the JV partnership. ORS 67.290-295. The dissociating partner may still own some of the liability under any existing agreements between the JV partnership and a third-party (such as a construction agreement), but not necessarily. ORS 67.260(4). So, to avoid being left holding the bag, a written agreement should establish certain terms and conditions under which a JV partner is permitted to dissociate. Finally, there is no statutory right to attorney fees in a partnership dispute unless there is a written agreement with an attorney fee provision.

IV. Conclusion

The above discussion points are not exhaustive, and there are many other considerations when advising a construction company on a potential joint venture. But to recap, the key terms to reduce to writing as part of any joint venture include: (i) scope of the venture (limited to a single project); (ii) term (when does the relationship end); (iii) limits on management and decision-making authority; (iv) ownership of assets; (v) allocation of losses and contribution rights; and (vi) terms for leaving the partnership.

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