

CONSTRUCTION LAW NEWSLETTER

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TRENDS IN CONSTRUCTION LAW

Many provisions which appear in construction contracts are unenforceable because they are either against public policy in New York State or they are expressly prohibited by an applicable statute.

Some provisions which regularly appear in construction contracts, but which are unenforceable, include:

- (1) Pay-if-paid provisions which make receipt of payment from the owner a condition precedent to payment to the subcontractor;
- (2) Prospective waiver of lien rights prior to performing work;
- (3) Waiver of the right to expedited arbitration

on a prompt payment law project;

- (4) A provision making laws of another state apply to a prompt payment law project
- (5) A provision setting venue for a dispute in another state on a prompt payment law project;
- (6) A provision making the contractor's representative the "sole arbiter" of disputes on the project;
- (7) Public improvement bonds which are more restrictive than the rights conferred by State Finance Law §137.

When reviewing a contract, a strategic decision must be made regarding whether to challenge these provisions, or just leave them alone



because they are unenforceable anyway.

Some contractors challenge the provisions and then use them in the negotiating process to obtain more favorable terms on other subjects, knowing that they are ultimately unenforceable.

CASE LAW UPDATE

On June 29, 2016, the Second Department Appellate Division decided the case of *Structure Tek Constr., Inc. v. Waterville Holdings, LLC*.

The case centered on a contractor who performed construction work on a restaurant.

After a dispute arose between the parties, they agreed to submit the matter to arbitration. After a hearing, the arbitrator issued an award in favor of the contractor.

Thereafter, the prevailing contractor filed a petition in the Supreme Court to confirm the arbitration award and enter judgment against the owner. The owner in turn sought to vacate the arbitration award.

The Appellate Division upheld the arbitrator's decision, re-affirming the enforceability of arbitration awards with statements such as: "judicial review of arbitrations is extremely limited"; "a party seeking to overturn an arbi-

tration award...bears a heavy burden"; "an arbitrator may do justice as he or she sees fit, applying his or her own sense of law and equity to the facts as he or she finds them to be and making an award reflecting the spirit rather than the letter of the agreement"; "an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice."

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