

Caution: Unsigned Does Not Mean Unenforceable for Arbitration Provisions

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Arbitration—an alternative method of dispute resolution where an independent third party makes a binding decision on the outcome through a private “trial” process—is the ultimate double-edged sword. On the one hand, arbitration can be beneficial to contractors because it is a discrete, confidential, and sometimes a quicker way to resolve disputes in comparison to navigating the court system. Conversely, mandatory arbitration can be detrimental to a weaker party because the playing field is not always equal, the remedies are limited, and the right to appeal a judgment is almost completely surrendered.

Because arbitration provisions have a significant impact on a contractor’s options for resolving disputes, knowing whether your contract contains an arbitration provision is critical. Notably, arbitration provisions in contracts are sometimes enforceable even when one or both parties do not sign the contract. As a result, it is crucial that contractors and subcontractors know whether their contracts—signed or unsigned—contain arbitration provisions.

The Federal Arbitration Act (“FAA”) governs arbitration provisions in contracts involving interstate commerce, which is the buying, selling, or moving of products across state lines. Construction contracts regularly implicate interstate commerce through the use of out-of-state contractors and subcontractors. The FAA states that written arbitration provisions are valid and enforceable. Notably, the FAA does not have a signature requirement and therefore arbitration provisions in unsigned contracts involving interstate commerce

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may be enforceable. Moreover, even if a contract does not implicate interstate commerce, a written, unsigned arbitration provision may still be enforceable depending on the particular state's law. For example, similar to the FAA, Nebraska's Uniform Arbitration Act does not require that an arbitration agreement be signed, only that it be in writing.

In order to enforce an arbitration provision in an unsigned contract, there must still be an underlying enforceable agreement. An unsigned agreement may nonetheless be enforceable if the conduct of the party resisting enforcement demonstrates its agreement to the contract. Such agreement to be bound to a contract may be proven when a party behaves as if there is a completely executed contract, even though there is not. This situation is common in ongoing business relationships where performance begins before, and continues after, a subsequent written—but unsigned—contract is exchanged.

To illustrate by way of example: Contractor and Subcontractor enter into an oral agreement for a job involving interstate commerce. Subcontractor begins performance. Soon after, Contractor sends a written contract containing a mandatory arbitration provision to Subcontractor. Subcontractor never signs the contract but continues performance. A dispute arises a few months later and Contractor seeks to enforce mandatory arbitration. The written arbitration provision will likely be enforceable under the FAA even though Subcontractor never signed the contract.

One requirement for the enforceability of an arbitration provision in an unsigned construction contract is that it must be clear that the conduct acting as agreement to the contract is related to the specific contract with the arbitration provision. For example: Contractor and Subcontractor enter into an agreement containing a mandatory arbitration provision that controls all projects originating between January 1, 2022 and December 31, 2022. Subcontractor does not sign the contract but performs in accordance with its terms. Contractor will likely be able to enforce the written arbitration provision for all disputes arising from projects that originated in 2022, even though the contract was not signed, because Subcontractor consented to the specific contract by taking affirmative action consistent with its terms.

However, if Contractor and Subcontractor begin new projects following December 31, 2022 but do not enter into a new agreement with a mandatory arbitration provision, a court would likely determine that those projects beginning after December 31, 2022 are not subject to the mandatory arbitration provision in the original agreement. This is because the mere continuation of a working relationship between Contractor and Subcontractor does not demonstrate the existence of an agreement to arbitrate disputes arising after the term of the original agreement.

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In summary, a court may enforce a written arbitration provision in an unsigned contract based on the FAA or a particular state's arbitration laws, like Nebraska's Uniform Arbitration Act. Accordingly, it is important to know whether there is an arbitration provision in any written contracts you receive, even if the agreement is not signed. If you have any questions about arbitration provisions in construction agreements, please do not hesitate to contact one of the members of Koley Jessen's Construction Industry Practice Area.