

DIMENSIONS

ARBITRATION CLAUSES WITHOUT EXPRESS LITIGATION WAIVERS MAY BE UNENFORCEABLE IN NEW JERSEY

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In Atalese v. U.S. Legal Services, 219 N.J. 430 (2014), the New Jersey Supreme Court held that an arbitration clause in a consumer contract is not enforceable if the clause does not contain express language providing that the consumer is waiving his or her statutory right to seek relief in a court of law. While Atalese involved a traditional type of “consumer” contract, its holding would clearly apply to construction contracts that involve “consumers.” A previous New Jersey Supreme Court case held an arbitration clause in a residential construction case unenforceable because the clause did not make clear that arbitration was the only remedy [Marchak v. Claridge Commons, Inc., 134 N.J. 275 (1993)]. Atalese has since been cited in Dispenziere v. Kushner Co., 438 N.J. Super. 11 (App. Div. 2014), which found an arbitration clause in a public offering statement for residential condominiums unenforceable.

Contracts for large, commercial construction projects are not typically considered “consumer contracts.” Such contracts are usually carefully negotiated by sophisticated parties. Nonetheless, such entities can be considered consumers when they are purchasing goods or services that are not for resale or fall outside of the

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entity’s area of expertise. For instance, a commercial entity that is a party to a construction contract for new facilities may be deemed a “consumer” for purposes of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, etc. It is not a leap to argue that under Atalese, any arbitration clause in a construction contract involving a commercial “consumer” must include an express waiver of litigation to be enforceable.

Interestingly, few of the standard form industry commercial construction contract arbitration clauses contain this type the litigation waiver language required by Atalese. For instance, the standard form AIA A201 does not.

Contracts between subcontractors and general contractors are not “consumer contracts” because the work being performed by the subcontractor is passed

on through re-sale. Nonetheless, there is an argument that one result of any flow-down clause in the subcontract (see ¶ 5.3 “Subcontractual Relations” in AIA A201-2007 for an example of a flow-down clause) would be to permit a party to a subcontract to render an arbitration clause unenforceable under the Atalese “consumer” requirement.

Of course, there are countervailing arguments that can be made against applying Atalese to construction contracts between sophisticated entities. But, at least in New Jersey, picking and choosing between contracts to decide whether to include an express waiver under Atalese is dangerous. The consequences of a wrong determination is the loss of the arbitration clause. The prudent solution is simple: include the requisite waiver in all arbitration clauses. Adding it where it is not required doesn’t harm anything. The waiver doesn’t need to be complicated. An adequate waiver could simply say, “By executing this agreement, the parties waive their rights to resolve their differences through litigation in a court of law.” Including the waiver language ensures that you will neither lose your carefully considered arbitration clause, nor will you have to engage in debate as to whether a waiver was required.

About the Author:

Ed Dunham is a lawyer with the Princeton, New Jersey office of Eckert Seamans. He practices in the area of commercial litigation, with an emphasis in construction law. Ed counsels contractors, subcontractors, and owners with the negotiation and administration of construction contracts and in dealing with the claims that often arise on major construction projects. He can be reached at 609.989.5021 or edunham@eckertseamans.com.