



CONSTRUCTION E-BRIEF

It's Not What You Know; It's What You Can Prove: Third Party Discovery Challenges in Arbitration

The use of arbitration in the construction industry has become very popular. The 2007 AIA A102 standard form contract between owner and contractor along with the 2007 AIA B101 standard form contract between owner and architect both allow the parties to select arbitration as a means of binding dispute resolution. The parties often select arbitration due to the perception that arbitration is a quicker and more affordable method of dispute resolution than traditional litigation. In addition, construction arbitrators often have more expertise in the construction industry and, therefore, can better understand the complex relationships and processes that construction projects involve. This expertise can lead to a more equitable result.

Yet, arbitration has its drawbacks. For example, submitting to arbitration may limit a party's ability to obtain evidence during a dispute because arbitration typically involves a more limited "discovery" process than traditional litigation. This problem is especially troublesome for construction industry participants since construction claims are often factually complex and require detailed evidence. This puts limitations on a party's ability to obtain the necessary evidence which may be fatal to its claim or defense.

There are two primary ways in which submitting to arbitration can limit a party's ability to obtain evidence from a third party.

About E-Brief

E-Brief is a periodic email newsletter that is sent to our clients and friends to provide information that is important to their success.

Comments Welcome

We welcome your comments on our E-Brief. If there are topics you are interested in learning more about, please email us at: e-brief@woodsaitken.com

About Woods & Aitken LLP

Woods & Aitken has been representing clients in the [construction](#) industry since the firm was founded in 1921. For more information about the firm and our attorneys, please visit our website:

www.woodsaitken.com.

Compelling Production of Documents Before an Arbitral Hearing

First, some jurisdictions do not allow an arbitrator to compel a third party to produce documents before an arbitral hearing. In jurisdictions where such a limitation is present, a party may not have access to all of the relevant evidence until the final arbitral hearing is held. Without an opportunity to thoroughly review and process such evidence a party's case can be severely prejudiced.

Compelling Evidence from Third Parties Who Reside Outside of the Local Federal Court's Jurisdiction

Second, an arbitrator may not be able to compel the production of any evidence from parties who reside outside of the local federal court's jurisdiction. When seeking documents or testimony from a person who is not a party to the arbitration, an arbitrator may issue a subpoena which seeks to compel the non-party to produce the desired evidence. Arbitrators, unlike judges, do not have the inherent power to compel the production of evidence from third parties, who have not expressly agreed to the authority of the arbitration panel. Thus, the party seeking the documents will have to ask a court to enforce the subpoena issued by the arbitrator; however, a court's jurisdiction is also limited. As a result, there are a number of reported decisions where courts have refused to enforce a subpoena issued by an arbitrator against a third-party.

Rules Before You Sign

***This issue's rule* – Understand Potential Discovery Limitations in Arbitration.**

Follow our "Rules" before signing the contract to reduce your contract issues and problems.

In modern construction disputes, success is usually based not on what one knows, but what one can prove. Access to evidence is crucial to successfully prosecuting or defending one's case. Yet submitting to arbitration may limit a party's ability to compel evidence from a third party. Accordingly,

signing a contract with a mandatory arbitration clause can end up hindering a party's case. Experienced legal counsel can help a party minimize this risk. For example, counsel may be able to seek the necessary evidence without the aid of the arbitrator. In addition, counsel may be able to maximize the chances that a party will have access to third party evidence through careful contracting. Finally, counsel can help a party generally assess and plan for the discovery risks that are inherent in submitting to arbitration.

D E N V E R • L I N C O L N • O M A H A • W A S H I N G T O N , D . C .

This E-Brief is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. An attorney-client relationship is not created or continued by reading this article.

To unsubscribe please [reply](#) to this email

Woods & Aitken LLP | 301 South 13th Street, Suite 500 | Lincoln | NE | 68508