



## E-Mail Can Waive Arbitration (sometimes)- A Cautionary Tale



We have discussed arbitration clauses at length here at Musings. From the judicious use of these clauses to [help resolve disputes](#) to waiver of rights under these clauses [through inaction](#), arbitration clauses permeate the construction landscape. A recent case out of the [Western District of Virginia](#) Federal Court adds a new wrinkle to this analysis. In [Protherapy Associates LLC v. AFS of Bastian, Inc et al](#), the Court considered an arbitration clause in a service agreement.

In this case, the Plaintiff provided therapy services to residents of nursing homes. It sued for breach of a contract that included a standard arbitration clause stating that all disputes relating to the contract are to be resolved through arbitration. Subsequently, the parties reached a settlement agreement through e-mail negotiation. The agreement, again in e-mail form, stated the amounts to be paid to the plaintiff by the defendants and on what schedule. The settlement e-mail also stated that any dispute relating to the non-solicitation provisions of the contract *would be resolved in the Western District of Virginia Federal Court*. However, this final e-mail did not provide for any particular jurisdictional requirements for payment disputes and explicitly left any unchanged portions of the original contract in full force.

The defendants brought a motion to compel arbitration under the original contract. The Court denied this motion relating to the non-solicitation claims and granted it as to the payment dispute. The Court reasoned that the parties specifically waived arbitration as to the non-solicitation provisions but specifically left arbitration in force regarding all other contractual claims.

While this case is not one relating to a construction contract, it provides some good lessons for construction professionals and the [construction lawyers](#) who advise them.

1. E-mails resulting in changes to a contract, even through settlement negotiations, can waive contractual provisions.
2. Choose your words in such e-mails carefully, you may end up in two different venues like the defendants in this case if you are not careful to either keep arbitration in force for all claims or for none.

3. The power in point 1 of this list, when used carefully, can assure that the parties to a contract end up in the venue that they desire when seeking to enforce a negotiated settlement.

In short, be careful when crafting a non-judicial settlement of a contractual dispute to avoid litigation over what the settlement means. It is expensive enough to litigate any breach of terms of a settlement without having a court tell you what those provisions entail.

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