

The Saiber Construction Law Column: February 2026

March 24, 2026

An arbitration clause is a contractual provision that requires parties to resolve certain disputes through arbitration rather than in court. New Jersey has a very strong public policy which favors arbitration as a quick, cost-effective way of resolving disputes. However, there are instances in which a court will nevertheless decide against enforcing an arbitration provision. The Supreme Court of Montana recently held in the context of a construction dispute that a party can waive its right to compel arbitration by not enforcing that right in a timely manner.

In *Monarch Heating & Cooling, LLC v. Petra, Inc.* a general contractor entered into a subcontract with an arbitration clause which provided that “claims, disputes and other matters in question” between the parties would be decided by arbitration. When the parties’ relationship deteriorated, the subcontractor filed a lawsuit rather than seeking arbitration. The GC answered the complaint and filed a counterclaim but did not seek to enforce the arbitration clause for nearly six months. The trial court, however, held that the GC’s delay in asserting its right to arbitrate was a waiver of its right to compel arbitration. The GC appealed.

On appeal, the Supreme Court of Montana affirmed, holding that the GC had waived its right to compel arbitration. The Court found that the GC failed to seek arbitration for six months after it was served with process. The Court also found that this delay had prejudiced the subcontractor, which was forced to spend time and money during the six-month interval. The subcontractor had also agreed to vacate a default entered against the GC based on the subcontractor’s expectation that the case would proceed in litigation.

Although New Jersey’s public policy favors enforcement of arbitration provisions, courts here will also find a waiver of the right to arbitrate in certain circumstances. The Supreme Court of New Jersey has identified seven factors to consider when determining if a party has waived its right to arbitrate a claim:

1. the delay in making the arbitration request;
2. the filing of any motions and their outcomes;
3. whether the delay was part of the party’s litigation strategy;
4. the extent of discovery conducted;
5. whether the party raised the arbitration issue in its pleadings as an affirmative defense, or
6. provided other notification of its intent to seek arbitration;
7. the proximity of the date on which the party sought arbitration to the date of trial; and
8. the resulting prejudice to the other party, if any.
9. Parties to an agreement with an arbitration provision must be vigilant in enforcing their contractual rights to arbitrate or they may end up waiving their right to arbitrate.

* * * * *

The information in each article is not intended to be legal advice and may not be used as legal advice. The article is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel.

For any question relating to this article, please contact Robert B. Nussbaum, Esq. at Saiber LLC at rnussbaum@saiber.com.