

# New Mexico Holds One-Sided Dispute Resolution Provisions Are Unenforceable

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Dispute resolution provisions that grant one party the unilateral right to choose either litigation or arbitration to resolve disputes are common in the construction industry. The main difference between the two forums is that courts are more likely to strictly enforce contract terms as written as well as the applicable law, while arbitrators make decisions on more equitable considerations, untethered to the contract terms and—to some degree—the law. The party with the sole discretion to select the dispute resolution procedure can select the process most beneficial to its interests based on the nature of the dispute, regardless of who brings the claims. In *Atlas Electrical Construction, Inc. v. Flintco, LLC*, 550 P.3d 881 (N.M. Ct. App. 2024), the Court of Appeals of New Mexico recently held that an arbitration provision in a subcontract, under which the contractor retained the exclusive right to choose whether disputes arising under the subcontract were litigated in court or arbitrated was unreasonably one-sided, substantively unconscionable, and unenforceable.

The *Atlas Electrical* case involved two sophisticated entities with equal bargaining strength to negotiate the terms of a subcontract. The parties agreed to a subcontract provision which provided in the relevant part:

In the event [contractor] and [subcontractor] cannot resolve the dispute through direct discussions or mediation ... then the dispute shall, at the sole discretion of [contractor], be decided either by submission to (a) arbitration ... or (b) litigation ...

The subcontractor filed a lawsuit in court, and the contractor moved the court to compel arbitration. The lower court granted the contractor's motion, and the subcontractor appealed, claiming the arbitration provision was substantively unconscionable and unenforceable. The Court of Appeals analyzed the arbitration provision under the principles of state contract law, which calls for enforcing the terms of a contract unless there is a claim of fraud, unconscionability, or other grossly inequitable conduct.

On appeal, the contractor conceded that the arbitration provision was facially one-sided but still fair and reasonable and should be enforced. The contractor argued that both parties were sophisticated parties with equal bargaining power, the subcontract price was over \$10.7 million, the subcontractor was able to, and did, in fact, negotiate the subcontract terms and failed to make any changes to the arbitration provision—the court rejected this argument. Since the contractor retained the exclusive

right to choose whether disputes arising under the subcontract are litigated or arbitrated and the subcontractor retains no right under the subcontract to choose the forum for dispute resolution for any reason whatsoever, the contractor carved out a choice of forum for its preferred claims while also forcing the subcontractor to submit to contractor's choice of forum for the subcontractor's preferred claims. The court held that such an arbitration provision is so unreasonably one-sided and substantively unconscionable that it is unenforceable. The court ordered the arbitration provision to be severed from the subcontract and remanded the case to the lower court for further proceedings.

While this decision is limited to New Mexico, contract law analysis is similar in most other states, and the reasoning in this case may resonate with other state courts as well.

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