New Jersey Appellate Ruling Further Restricts Enforceability of Arbitration Clauses by Adding New Criterion to Enforce Arbitration

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More than twenty-five years ago, Chief Justice Robert Wilentz remarked that the "judiciary's modern history of anti-arbitration bias" persisted despite national recognition of a statewide plan to provide resources to facilitate ADR in every vicinage. A recent decision by the New Jersey Appellate Division reveals that this skeptical view of arbitration – insofar as the enforceability of arbitration clauses – continues today as the court's ruling has added a new criterion to enforce arbitration.

On November 13, 2018, the Appellate Division declined to enforce a provision which failed to identify any arbitration forum or process for conducting arbitration. In *Flanzman v. Jenny Craig, Inc.* (approved for publication), the defendant employer sought to enforce a clause which stated that "[a]ny and all claims or controversies arising out of or relating to [plaintiff's] employment . . . shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration." Notwithstanding the explicit waiver of the plaintiff employee's right to bring her claims in court and have a jury resolve the dispute, the Appellate Division voided the clause because it "omitted any reference whatsoever to an arbitral forum." The court reasoned that there could not have been a meeting of the minds between the parties because they did not agree on the forum or the process for conducting arbitration. In other words, the parties did not agree which rights "ostensibly replaced plaintiff's right to a jury trial." The court opined that without the knowledge of which forum and process would resolve the dispute – such as AAA, JAMS, or another ADR institution - the parties were "unable to understand the ramifications of the agreement[]" and may not have comprehended the rights they relinquished. In the court's mind, selecting a forum would have, at a minimum, informed the parties of the institution's general arbitration

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rules and procedures and further highlighted the unavailability of the judicial forum.

By way of background, the New Jersey Supreme Court established the baseline standard for an enforceable arbitration clause in *Atalese v. U.S. Legal Servs. Grp., L.P.*, requiring "clear and unambiguous language" which explained that the plaintiff was waiving the right to "bring her claims in court or have a jury resolve the dispute." Since that ruling, courts have invalidated arbitration clauses on several occasions, typically for lack of mutual assent.

The takeaway from *Flanzman* is that the selection of an ADR forum is now required in order to draft an enforceable arbitration clause, which must identify which ADR forum (defined as "the mechanism – or setting – that parties utilize to arbitrate their dispute") will manage the ADR process. Notably, the parties need not identify the specific arbitrator, but only the arbitral forum. The court in *Flanzman* made clear that its "opinion should not be misread to hold that the parties' failure to identify a specific arbitrator renders the agreement unenforceable." So long as the contract identifies a forum, the parties can either mutually agree on an arbitrator or they can make an application under the New Jersey Arbitration Act to have the court appoint the arbitrator.

The parties should also be mindful whether the chosen forum can hear their type of dispute at the time the contract is signed. For instance, the arbitration clause in the matter *Kleine v. Emeritus at Emerson* was invalidated because the chosen forum was no longer accepting the type of dispute contemplated by the contract. Consequently, parties should consider identifying an alternate forum in the event their preferred forum becomes unavailable.

If you have any questions concerning the issues discussed in this Alert, please contact the author, **Kersten Kortbawi**, a member of the firm's Litigation Department.