ARTICLES

An Arbitration Agreement Must Identify the Forum and Rules

By Robert E. Bartkus – January 29, 2019

In a precedential appellate opinion, a New Jersey court has upended the parties' intention to arbitrate their disputes, unless their agreement provides for a particular arbitration institution, "forum" and rules, or a process for making those determinations. Especially because the opinion does not say that it is limited to adhesive employee agreements, all should take heed. *Flanzman v. Jenny Craig, Inc.*, 456 N.J. Super. 613, A-2580-17, 2018 N.J. Super. LEXIS 156 (N.J. Super. Ct. App. Div. Nov. 13, 2018).

Facts and Trial Court Ruling
Ms. Flanzman, a 82 year-old and long-time employee of Jenny Craig, sued her employer for wrongful termination under the New Jersey Law Against Discrimination. Flanzman alleged that, due to her age, Jenny Craig gradually reduced her hours to such an extent as to constitute constructive discharge.

Jenny Craig moved to dismiss the litigation and compel arbitration, relying on a broad one-page, stand-alone arbitration agreement that Flanzman signed in 2011 as a condition to her continuing employment. The agreement explained that arbitration was "in lieu of a jury or other civil trial" as would be required by the New Jersey Supreme Court in *Atalese v. United States Legal Services Group, L.P.*, 219 N.J. 430 (2014), and it explicitly covered statutory claims of discrimination.

Flanzman opposed arbitration, arguing (among other things) that the agreement did not designate the arbitrator, forum or procedures for conducting the arbitration or how to make these decisions. Instead, the agreement merely said all claims "shall . . . be settled by final and binding arbitration." The trial court held that the absence of these provisions did not render the agreement unenforceable. However, "in the interest of fairness," the trial court said that plaintiff could select the American Arbitration Association, JAMS, or another arbitration provider.

Reversal by Appellate Court
Plaintiff appealed, and the Appellate Division reversed, without oral argument, in an opinion filed in October. That initial opinion was withdrawn, apparently because the panel belatedly realized they had not mentioned section 5 of the Federal Arbitration Act or its state court analog in the Revised Uniform Arbitration Act, N.J.S.A. § 2A:23B-11(a), neither of which had been briefed by the parties at the trial or appellate level. The court's opinion was reissued on November 13, 2018, and included a discussion of those statutes, but with the same result. Oddly, there was no request for further briefing or oral argument, and there is no indication that the court had the benefit of such.

Mutual Assent Requirements
Atalese and other New Jersey cases have said that no "magic language" is necessary for an enforceable waiver of the right to a court or jury determination. However, *Atalese* does say that

the parties to a consumer arbitration agreement must have "a clear mutual understanding of the *ramifications* of [their assent to a jury waiver]." 219 N.J. at 443 (emphasis added in *Flanzman*).

Dictum in *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545, 552-53 (App. Div. 2016), drawn from *Atalese*, said that a party to a nursing home agreement "must be able to understand—from clear and unambiguous language [in their arbitration agreement]—both the rights that have been waived and *the rights that have taken their place*" (emphasis added). The agreement in Kleine said that disputes could not be brought "in any manner not *expressly* set forth in this paragraph, including but not limited to the right to a jury trial" (emphasis added). Since the arbitral institution named in the agreement, the American Arbitration Association (AAA), was not accepting nursing home disputes, *Kleine* held that this language meant that only the AAA could administer any disputes, without considering whether cases decided under Section 5 of the Federal Arbitration Act (FAA) or Section 11(a) of the New Jersey Revised Uniform Arbitration Act (NJ RUAA) required that result.

Flanzman considered the language and result in *Kleine* but took it a step farther.

After analyzing the AAA and JAMS rules, *Flanzman* found that the differences in the rules of arbitration institutions, generally, are "significant aspects of the arbitration process." Jenny Craig's "ignor[ing]" them meant that "the parties lacked a 'meeting of the minds' because they did not understand the rights under the arbitration agreement that ostensibly foreclosed plaintiff's right to a jury trial" and not identifying any forum negated the possibility of their mutual assent to arbitration.

The court summarized by stating, in terms seemingly applicable to all arbitration agreements:

> without . . . knowledge [of the alternate forum], [persons being required to arbitrate] are unable to understand the ramifications of the agreement . . . . without [identifying the provider or a means to make that selection], they have no realistic idea about the rights that replace judicial adjudication because not all arbitration forums, mechanisms, or settings are alike.

The FAA and NJ RUAA

Possibly because *Kleine* did not consider the effect of Section 5 of the FAA or Section 11(a) of the NJ RUAA, the initial *Flanzman* opinion also did not consider those statutes. The reissued opinion's attempt to cure that omission may be viewed as many as a contorted analysis.

Section 5 of the FAA, 9 U.S.C. § 5 (emphasis added in *Flanzman*), provides, in relevant part:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators . . . such method shall be followed; but if no method be provided therein . . . or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators . . . then *upon the application* of either party to the controversy the court shall designate

> and appoint an arbitrator or arbitrators . . . as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

The New Jersey analog, N.J.S.A. 2A:23B-11(a) (partial) (emphasis added in *Flanzman*), is similar:

> If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed . . . . If the parties have not agreed on a method . . . the court, *on application* of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

Having raised the issue *sua sponte*, the court concluded that neither statute was relevant for two reasons.

First, the court noted that the defendants had not moved to appoint an arbitrator (and neither side had briefed the issue). Hence, the trial court could not address an issue ignored by the parties, though the trial court did try to deal with the issue by suggesting plaintiff might select the AAA or other provider. The Appellate Division criticized as interference this effort to cure what it viewed as defects in the language of the arbitration agreement.

Second, the court noted that both statutes addressed the appointment of an "arbitrator," whereas the court was concerned that the Jenny Craig arbitration agreement did not identify an "arbitration *forum*." "In this opinion, we defined a 'forum' as the mechanism—or setting—that parties utilize to arbitrate their dispute."

The court then held that there must be a meeting of the minds about the *forum* "and, then, if the parties are unable to agree on a 'method for appointing an arbitrator,' they can arguably make an application [under the statute]." The missing element, it thought, was the absence in the agreement of any specified forum or rules. The court stated that a court cannot use the FAA or the RUAA to appoint a "forum"—as though the ability to appoint an arbitrator did not exist.

Given this construct, the court found it relatively "easy" to distinguish cases decided under Section 5 in which a court had appointed an arbitrator when an identified arbitral "forum" had "failed" to do so.

Commentary
Flanzman v. Jenny Craig, Inc. is best understood as an effort to avoid requiring arbitration of an employment dispute, despite the U.S. Supreme Court's mandate that arbitration agreements must be placed on an equal footing with other contracts.

The FAA explicitly anticipates situations where the parties' agreement requires arbitration but does not specify how the arbitrator is to be chosen. Section 2 states that "an agreement in writing to submit to arbitration" should be enforced, and Section 3 authorizes a court to compel arbitration when there is "an agreement in writing for such arbitration." These sections do not require that the parties specify an arbitration forum or the "mechanisms, or settings" (as described in the *Flanzman* opinion). Moreover, once there is an enforceable arbitration agreement, Section 5 says a court shall appoint an arbitrator – not a forum, mechanism or setting – whenever "no method is provided therein . . . ." A contract cannot be unenforceable when Section 5 provides precisely the element *Flanzman* says as missing.

The NJ RUAA, N.J.S.A. 2A:23B-11(a) similarly says a court shall appoint an arbitrator "[i]f the parties have not agreed on a method [for doing so]."

Approaching the issue from a different direction, that is whether a contract has been formed pursuant to general principles of state law, the question should be: Is requiring arbitration "sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty"? *Weichert Co. Realtors v. Ryan,* 128 N.J. 427, 435 (1992) (setting out elements of contract formation). See *also* Restatement (Second) of Contracts § 33(2) (sufficient if capable of ascertaining "an appropriate remedy"). It is not just that arbitration is readily found in a dictionary—and not a unique term of art. Rather, to the extent the court thought the term indefinite, generally accepted contract principles permit a court to supply gap fillers. For example, in contracts governed by the Uniform Commercial Code, the statute often supplies gap fillers or permits a court to impose reasonable commercial terms, e.g., N.J.S.A. 12A:2-204(3) ("a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy").

In an arbitration contract, either the FAA or a state's enactment of the RUAA also may provide gap fillers to carry out the parties' intent and the general policy favoring the enforcement of arbitration agreements. The "remedy"—to use the language of the Restatement (Second)—is found in FAA Section 5 (above).

It therefore is not unusual, as revealed by numerous reported state and federal cases and as experienced by arbitrators themselves, for parties to agree in their contracts merely that disputes must be resolved "by arbitration" in a specified city, state, or country. These parties may have intended that to be sufficient to carry out their agreement; they may just have not focused on being more specific. After all, arbitration has been around for ages, parties regularly negotiate in good faith regarding the site, and the amount of discovery to be permitted or other procedural details to fit the circumstances of a dispute whose contours are unknown at contract inception.

It should be no surprise that, prior to this New Jersey decision, courts have not required parties to designate the arbitration provider or arbitration rules in a pre-dispute arbitration clause. New Jersey courts preceding and including *Atalese* have not mentioned this as an element of an arbitration contract or court/jury waiver, and the absence of such a designation does not appear to

have been previously cited as justification for refusing to enforce an otherwise valid arbitration agreement. Courts regularly enforce agreements for non-administered arbitrations, such as those designating arbitration "by a retired judge" without naming the retired judge or the procedures he or she would follow. Indeed, computer research reveals a number of federal cases finding that the failure to designate a provider has not been an impediment to enforcing an arbitration agreement. *See*, e.g., *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308 (11th Cir. 2005); *Hodsdon v. Bright House Networks,LLC*, 2013 U.S. Dist. LEXIS 36269 (E.D. Cal. Mar 15, 2013) (R&R), *adopted*, 2013 U.S. Dist. LEXIS 52494 (E.D. Cal. Apr. 11, 2013); *cf*. *Premier Real Estate Holdings, LLC v. Butch*, 24 So. 3d 708 (Fl. Ct. App. 2009) (looking at state statute); *Guthrie v. Barda*, 533 P.2d 487 (Co. 1975).

Nor must parties move for the appointment of an arbitrator, as *Flanzman* required. Indeed, parties typically negotiate over the designation of an arbitrator once arbitration is required under Section 3 of the FAA. Furthermore, as noted above, the FAA treats enforcement of arbitration agreements and appointment of arbitrators separately and independently. *Cf*., *ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151, 156-57 (2d Cir. 2003).

Conclusion

Because *Flanzman* is precedential, binds lower New Jersey courts, and is couched in broad terms not limited to employment cases, it may well be used even in cases involving commercial contracts. Contract clauses, bills of sale, or standard terms and conditions should be checked to be sure they do not raise an issue.

Robert E. Bartkus is of counsel to McCusker, Anselmi, Rosen & Carvelli, P.C., in Florham Park, New Jersey.