Forget the Forum, Forget the Arbitration

Insight into how a court might deal with an incomplete arbitration agreement.

BY STEVEN NUDELMAN

Every now and then a case with national implications pops up right here in my own backyard (New Jersey). No, we are not talking about a case affecting immigration policy, gun control or the midterm elections. Instead, we are talking about the less glitzy subject of arbitration agreements. More specifically, how does a court deal with an incomplete arbitration agreement? According to one appellate court in New Jersey, the parties lose the ability to arbitrate.

In Flanzman v. Jenny Craig, Inc., No. A-2580-17T1, 2018 WL 5914420 (N.J. App. Div. Nov. 13, 2018) (approved for publication), the Appellate Division of the Superior Court of New Jersey examined an arbitration clause in an employment agreement between an 82-year-old plaintiff and a national weight loss company. The plaintiff brought a wrongful termination case, citing age discrimination among other claims, against Jenny Craig. In response, Jenny Craig moved to compel arbitration, relying on the parties' arbitration clause in their employment agreement. The clause provided, in pertinent part:

Any and all claims or controversies arising out of or relating to [plaintiff's] employment, the termination thereof, or otherwise arising between [plaintiff] and [defendant] shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration. This agreement to arbitrate includes all claims whether arising in tort or contract and whether arising under statute or common law including, but not limited to, any claim of breach of contract, discrimination or harassment of any kind.

[Plaintiff] will pay the then-current Superior Court of California filing fee towards the costs of the arbitration (i.e., filing fees, administration fees, and arbitrator fees).

Flanzman, 2018 WL 5914420 at *1 (emphasis added).

Missing Forum

While this clause is clear that Flanzman was giving up her right to a jury trial, it says "nothing about what forum generally replaced that right (although it confusingly referred to California court filing fees)." Id. In other words, the clause says nothing about the specific mechanism or process used

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to conduct the arbitration. The process "is important because the rights associated with arbitration forums may differ depending on which forum the parties choose, or on how they define the arbitral process." Id.

Acknowledging this missing element of the parties' agreement, the trial court resolved the issue by directing the plaintiff to select the arbitral forum, As the Appellate Division succinctly stated, "[T]he judge — not the parties — decided who would pick the forum." Id. Not satisfied with this direction, Flanzman appealed, arguing that the arbitration agreement "lacked mutual assent" and was invalid as a matter of law. Id. at *2. Stated differently, she alleged that the parties did not reach a "meeting of the minds" regarding the forum that would replace her right to a jury trial. Id.

The Appellate Division agreed with Flanzman, noting that arbitration agreements are treated like any other contracts and the parties must evince a "meeting of the minds" or "mutual assent." The court noted that arbitration forums differ widely, with different rules and procedures under the American Arbitration Association (AAA) compared to Judicial Arbitration and Mediation Services (JAMS), for example.

"The failure to identify in the arbitration agreement the general process for selecting an arbitration mechanism or setting — in the absence of a designated arbitral institution like AAA or JAMS or any other ADR setting — deprived the parties from knowing what rights replaced their right to judicial adjudication." Id. at *7. The court noted that when a party gives up its right to a trial by jury, expecting to resolve its dispute in another forum, it is important for the party to know about that other forum. Id. at *8.

In this case, the parties' arbitration clause totally ignored the forum issue. Thus, at the time of contracting, neither Flanzman nor Jenny Craig knew how their arbitration would be administered and according to what rules and procedures. The failure to reach agreement on this issue when they entered into their employment agreement is

fatal to the enforceability of the agreement to arbitrate. As a result, the Appellate Division reversed the trial court and remanded the case for further proceedings in court.

Defunct Forum

Coincidentally one day earlier, the Supreme Court of Missouri reached a similar conclusion in a dispute between a lender and borrower in A-1 Premium Acceptance, Inc. v. Hunter, No. SC 96672, 2018 WL 4998256 (Mo. Oct. 16, 2018) (en banc). In A-1, the lender sought to arbitrate a counterclaim brought by the borrower before the "National Arbitration Forum (NAF), under the Code of Procedure then in effect." This was part of a clause in the parties' agreement.

Unfortunately, three days after the parties entered into their agreement, the NAF entered into a consent decree requiring it to stop conducting arbitrations for certain claims (including claims of the nature asserted in the lender's counterclaim). Similar to the Flanzman court in New Jersey, the Supreme Court of Missouri held the parties to the express terms of their contract:

> If the contract terms are unequivocal, plain, and clear, the court is bound to enforce the contract as written. Here, the plain and unambiguous language of the Agreement shows Hunter and A-1 agreed to arbitrate before — but only before — NAF. … Having made the choice to insist upon NAF — and only NAF — as the arbitration forum, A-1 cannot now look to [the Federal Arbitration Act] to expand the arbitration promise it extracted from Hunter in the Agreement.

A-1, 2018 WL 4998256, at *4 (citations omitted).

Takeaways

Businesses nationwide — even globally — confront arbitration regularly. So when cases are decided affecting a party's ability to arbitrate, attorneys who counsel such businesses sit up and take notice. You should, too. When reviewing the dispute resolution clause of your agreements, be mindful of the forum — whether it be in a court of law or an arbitration tribunal. Questions regarding whether to arbitrate or litigate, where and using what procedures are very fact sensitive.

Working together with your attorney, you should negotiate the provisions that best fit your particular facts and circumstances. In no event, however, should you totally ignore the issue as the parties did in Flanzman. And if you do select a specific forum, as the parties did in A-1, you may wish to consider including alternatives in the clause (e.g., other forums or another forum upon which the parties may agree) just in case the primary one is unavailable for any reason.

These alternatives help build a failsafe into your arbitration clause. Without them, as in Flanzman and A-1, you may unintentionally find yourself without an arbitration agreement to enforce. ●

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