

CELEBRATING OUR 24TH YEAR IN BUSINESS

What Happens if the Arbitral Forum or Arbitrator is Unavailable?

Parties entering into a business relationship are often advised that a fully formulated arbitration agreement should be carefully prepared so that if a dispute arises, the pathway to resolution is fixed and clear. Among suggested provisions is one identifying the arbitrator(s) or arbitral forum that will administer and, ultimately, enter a final award.

What happens, however, when the designated arbitrator or forum cannot or will not fulfill that obligation? Are the courts always empowered to designate a substitute arbitrator or forum or are there restrictions on their ability in this regard?

The answer to this question is not clear as there is conflicting case law among the federal circuits, including the U.S. Courts of Appeal for the Third Circuit and our neighboring Second Circuit.

A very recent case from the Second Circuit, *Moss v. First Premier Bank* (decided Aug. 29), reflects this conflict. In *Moss*, the plaintiff had filed RICO claims against banks alleging that they had facilitated illegal high-interest payday loans. The banks moved to compel arbitration based upon the agreements plaintiff had signed in her loan applications requiring that all disputes be resolved by and under the procedures of the National Arbitration Forum (NAF). Ultimately, however, the NAF was unable to accept the dispute pursuant to a consent judgment barring it from consumer arbitrations. Consequently, the plaintiff returned to the district court requesting that it vacate the order compelling arbitration as the NAF had declined to accept the case. The district court determined that the arbitration agreements "reflected the parties' intent to arbitrate



Judge Abraham J. Gafni
(Ret.)

exclusively before the NAF." Accordingly, a substitute arbitrator might not be appointed. [READ MORE](#)

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