Must the Arbitrator, Arbitral Forum or Selection Process be Identified in the Agreement?

Judge Abraham J. Gafni (Ret.)
Published on October 28, 2020, in The Legal Intelligencer

Arbitration agreements vary significantly. Some set out precise and extensive details with respect to each aspect of the arbitration process. Others name an arbitrator or arbitral forum to conduct the arbitration. Many merely state, however, that in the event of a dispute, the parties will arbitrate, but provide no further detail suggesting how, when, where and under whose direction it will proceed.

Does a simple reference to arbitration assure its being required if the provision does not state how and by whom the arbitration will be conducted? This issue was faced most recently by the New Jersey Supreme Court when it reversed its Appellate Division. (*Flanzman v. Jenny Craig,*(company)*,* A-66 September Term, 2018, (N.J. Sept. 11, 2020).

Flanzman was an 83-year-old company employee who sued claiming, inter alia, age discrimination and constructive discharge. The company moved to dismiss the lawsuit and compel arbitration.

Flanzman had signed an employment agreement that provided, “Any and all claims or controversies arising out of or relating to employee’s employment, the termination thereof, or otherwise arising between employee and company shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration.” This was followed by an extensive list of issues that might be arbitrated. The agreement also provided that the arbitrator “shall not have the authority to add to, subtract from or modify any of the terms of this agreement.”

Flanzman opposed the company’s motion, alleging that the arbitration agreement was invalid because it identified no forum for the proposed arbitration. The trial court, recognizing the policy favoring arbitration in both the Federal Arbitration Act (FAA) and the New Jersey Arbitration Act (NJAA) rejected this contention. (It should be noted that the provisions of the NJAA referenced in this article are similar to those contained in Pennsylvania’s Revised Statutory Arbitration Act.)

The New Jersey Appellate Division agreed that the failure to name a specific arbitrator in the Agreement would not render it unenforceable, as the NJAA provides for the judicial selection of an arbitrator in such circumstances.

However, it added that if an "arbitral forum" was not identified, the agreement must at least identify "the general process for selecting an arbitration mechanism or setting." It reasoned that the identification of an arbitral forum or mechanism "informs the parties at a minimum about that institution's general arbitration rules and procedure."

Otherwise stated, "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 … or any other ADR setting—*deprived the parties of knowing what rights replaced their right to judicial adjudication.*"

On appeal to the N.J. Supreme Court, the company relied on an earlier N.J. Supreme Court opinion which held that an agreement is sufficient if it "clearly and unambiguously" explains that by agreeing to arbitration, a court trial is waived. *Atalese v. U.S. Services Group, 219* N.J. 430, 99 A.3d 3016 (2014). (Note: In *Flanzman, the court sometimes* refers to a "clear and unmistakable" rather than a "clear and unambiguous" standard).

Flanzman countered that neither the FAA nor the NJAA obviates specifying an arbitral forum. Rather, parties should know which organization will administer "the arbitration before agreeing to waive the right to litigate claims in court." Further, they should understand "not only what rights they waive by their agreement but what procedures will take the place of court proceedings should there be a dispute." Otherwise, they cannot be presumed to have "clearly and unambiguously" elected arbitration as an alternative to court proceedings.

In rejecting the ruling of the Appellate Division, the New Jersey Supreme Court explained that both the FAA and NJAA are "default" statutes, which supply substitute provisions for some that may be missing in the arbitration agreement.

The court noted that generally, when a contract is found to have emanated from an agreement on essential material terms, the gaps created by silence "may be filled in by adding terms that accomplish a result that was necessarily involved in the parties' contractual undertaking."

The court found that here the NJAA filled in such gaps as it contained "a default provision for the selection of an arbitrator and general guidance for the administration of the arbitration".

As noted earlier, the NJAA provides that "a court can act when the parties have not agreed on a specific arbitrator or designated a method for choosing an arbitrator, or when an agreed-upon selection process has failed."

The NJAA further provides general guidance by setting forth the authority of the arbitrator when dealing with such matters as pre-trial conferences, evidence, summary dispositions, discovery and protective orders. It also requires that parties have the right to be heard, present evidence and cross-examine witnesses.

Thus, the Supreme Court found that the agreement clearly and unmistakably advised the parties that final and binding arbitration would take the place of a jury or other civil trial. While acknowledging that this language provides "only a general concept of the arbitration proceeding that would replace a judicial determination of Flanzman's claims, it makes clear that the contemplated arbitration would be very different from a court proceeding."

It rejected, therefore, the Appellate Division's conclusion that without the identification of an arbitral institution or the general process for selecting an arbitration mechanism, parties would not understand their rights under an arbitration agreement that foreclosed their right to a court trial. Rather, it held that the NJAA's default provisions, which include the selection of an arbitrator with significant authority together with general guidance for the conduct of the arbitration, provide sufficient explanation; and, therefore, the identification of an arbitral institution or an arbitration selection mechanism are nonessential contract terms.

Nonetheless, the Supreme Court agreed with certain principles enunciated by the Appellate Division, noting that:

- "a detailed description of the contemplated arbitration in the arbitration agreement enhances the clarity of that agreement."
- "If the parties identify a specific arbitrator or arbitrators or agree to retain an arbitrator affiliated with a given arbitration who will apply that organization's rules, they may avoid future disputes."
- "it may be advantageous for parties to designate an arbitral organization but also provide an alternative method of choosing an organization should the parties' primary choice be unavailable."

The court recognized, however, that sometimes parties may have good reason for not inserting such provisions initially. In particular "they may choose to defer the choice of an arbitrator to a later stage, when they will be in a position to assess the scope and subject of the dispute, the complexity of the proposed arbitration, and considerations of timing and cost."

Depending on the nature of the dispute, these circumstances might involve whether one or three arbitrators is preferred, what rules of evidence should apply, whether an arbitrator should be selected who specializes in a particular area of the law, how should discovery be conducted, and a host of others.

It is not clear, of course, that courts in other states will concur with the N.J. Supreme Court's conclusion that the simple mention of arbitration, accompanied by a waiver of court trial, adequately explains what rights have replaced court adjudication—or, indeed, whether the arbitration agreement must even state that the parties have waived a court proceeding. In any event, it is apparent that careful consideration must be given as to how much detail should appear in the arbitration agreement and to what extent one may comfortably rely on the default provisions in the FAA or state legislation. These decisions, although not always easy to make, are critical when advising a client as to the advisability of agreeing to the arbitration of a future dispute the details of which are not yet known. •

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