New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
VOL. 218 NO. 12 MONDAY, DECEMBER 29, 2014 NJLJ.COM

ARBITRATION

It's Not the Same as Court!

Arbitration clause invalidated for failing to advise parties "in plain language" that they are giving up their right to sue in court

By Andrew M. Moskowitz

Question: Which of the following arbitration clauses are enforceable under New Jersey law?

Arbitration Clause No. 1:

> Any other unresolved dispute arising out of this Agreement must be submitted to arbitration … [The arbitrators will have] exclusive jurisdiction over the entire matter in dispute, including any question as to arbitrability.
>
> *EPIX Holdings Corp. v. Marsh & McLennan Cos.,* 410 N.J. Super. 453 (App. Div. 2009).

Arbitration Clause No. 2:

> Any controversy or claim arising out of, or relating to, this agreement or the breach thereof, shall be settled by arbitration in Morristown, New Jersey, in accordance with the rules then obtaining of the American Arbitration Association, and judgement [sic] upon any reward [sic] rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof.
>
> *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.,* 168 N.J. 124 (2001).

Arbitration Clause No. 3:

> In the event of any claim or dispute … related to this agreement or related to any performance of any services related to this agreement, the claim or dispute shall be submitted to binding arbitration.… The parties shall agree on a single arbitrator to resolve the dispute. … Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction.
>
> *Atalese v. U.S. Legal Services Group,* 219 N.J. 430 (2014).

Answer: None.

In *Atalese,* the New Jersey Supreme Court examined Arbitration Clause No. 3. In reversing the Appellate Division and the lower court, the court held that the arbitration clause was unenforceable due to its failure to clearly and unambiguously advise the plaintiff that she was waiving her right to pursue statutory claims in court. The *Atalese* opinion provides important guidance to practitioners who seek to determine the enforceability of arbitration clauses.

Atalese involved a dispute between the plaintiff, Patricia Atalese, and defendant U.S. Legal Services Group (USLSG). Atalese had signed a contract with USLSG for the latter to provide "debt-adjustment services." Dissatisfied with USLSG's services, for which she paid approximately $5,000, as well as the company's failure to advise that it was not a licensed debt adjuster in New Jersey, Atalese brought a lawsuit and alleged violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, and the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18.

USLSG moved to compel arbitration. In support of its motion, USLSG pointed to a provision on page nine of its 23-page service contract. As noted above, USLSG's arbitration clause provided that "any claim or dispute" that was "related to this agreement or related to any performance of any services related to this agreement … shall be submitted to binding arbitration upon the request of either party.…" The provision stated that "[t]he parties shall agree on a single arbitrator to resolve the dispute.… Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction."

In his opinion, Justice Barry Albin noted that both the Federal Arbitration Act (FAA), 9 U.S.C. §§1–16, and the "nearly identical" New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, "enunciate federal and state policies favoring arbitration" as a means of dispute resolution. However, this "favored status" did not guarantee the enforceability of every arbitration clause. Rather, like any other contract, an agreement to arbitrate must involve "a meeting of the minds" and "be the product of mutual assent" in which the contracting party "clearly and unambiguously" agrees to waive her right to sue in court.

The *Atalese* court noted that contractual clauses—particularly in a consumer contract such as the one at issue in *Atalese*—"will pass muster when phrased in plain language that is understandable to the reasonable consumer." The court stressed that there were "[n]o particular form of words" that were required to demonstrate a clear and unambiguous waiver. Instead, the court cited approvingly to three different cases in which arbitration clauses appropriately explained to the parties that they were waiving their right to bring suit in

Moskowitz is of counsel to Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins in Springfield, N.J. He focuses his practice on employment law as well as commercial and personal injury litigation.

a judicial forum: *Martindale v. Sandvik,* 173 N.J. 76 (2002); *Griffin v. Burlington Volkswagen*, 411 N.J. Super. 515 (App. Div. 2010); and *Curtis v. Cellco Partnership*, 413 N.J. Super. 26 (App. Div. 2010), certif. denied, 203 N.J. 94 (2010).

In *Martindale*, the clause explained that the plaintiff agreed "to waive [her] right to a jury trial" and that "all disputes relating to [her] employment … shall be decided by an arbitrator." In *Griffin,* the clause stated that "[b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes." Finally, in *Curtis*, the parties were informed that, "[i]nstead of suing in court, we each agree to settle disputes (except certain small claims) only by arbitration." The clause stated further that "[t]he rules in arbitration are different. There's no judge or jury, and review is limited, but an arbitrator can award the same damages and relief, and must honor the same limitations stated in the agreement as a court would."

The court in *Atalese* noted that all of the above clauses advised the parties that they were forfeiting the "time-honored right to sue." In contrast, the court found that the arbitration clause in *EPIX Holdings Corp. v. Marsh & McLennan*—Arbitration Clause No. 1, above—was insufficient "to constitute a clear and unambiguous waiver of a consumer's right to sue in court."

In examining USLSG's arbitration clause, the court found that it lacked "plain language" that would clearly inform the average consumer that she is giving up her right "to bring her claims in court or have a jury resolve the dispute." The court noted that "[n]owhere in the arbitration clause is there any explanation that plaintiff is waiving her right to seek relief in court for a breach of her statutory rights." Moreover, the clause "does not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law."

In the aftermath of *Atalese,* two Appellate Division panels have invalidated arbitration clauses that failed to specifically inform the parties that they were waiving their right to seek relief in a court of law. First, in *Dispenziere v. Kushner Companies*, 438 N.J. Super. 11 (App. Div. 2014), the court reversed the lower court's order compelling arbitration. In *Dispenziere*, 22 of 33 purchasers of condominium units brought an action against the developer, alleging violations of the CFA as well as a number of common-law claims. The purchase agreement contained a provision stating in relevant part that "[a]ny disputes arising in connection with this agreement … shall be heard and determined by arbitration before a single arbitrator.… The decision of the arbitrator shall be final and binding." In reliance on *Atalese*, the court held that the arbitration clause was unenforceable because it did not provide the plaintiffs with notice "that they were waiving their right to seek relief in a court of law." In so holding, the panel rejected the defendants' argument that, because many of the plaintiffs retained counsel to represent them in the transaction, they were able "to fully review the arbitration provision, object to its inclusion in the purchase agreement, and terminate the contract if they were not satisfied."

Arbitration clauses should state that the parties are giving up their right to have a jury resolve the dispute.

In addition, in *Kelly v. Beverage Works NY*, Docket No. A-3851-13T4 (App. Div. Nov. 26, 2014), the Appellate Division, in an unpublished opinion, reversed a lower court order compelling arbitration in a case brought pursuant to the Law Against Discrimination, N.J.S.A. 10:5-1 to -49. The plaintiff was a member of a union, and the collective bargaining agreement (CBA) stated that any dispute "as to the existence of cause for discharge" would be determined "in accordance with the [CBA's] grievance and arbitration provisions.…" In turn, the relevant provision stated that, after first attempting "amicable adjustment," either the union or the employer "may elect" to have a dispute arising out of or under the CBA "arbitrated by a panel of arbitrators.…" In reversing the lower court, the panel held that neither the arbitration provision nor the employee handbook placed the plaintiff "on notice that he was waiving his right to try his claims in court." The panel rejected the defendants' argument that *Atalese* was distinguishable because it arose in the context of a consumer service agreement.

Post-*Atalese*, arbitration clauses must state that, for all claims including those arising under a statute, the parties are waiving their right to sue in court. They should contain some explanation, in terms that an average person would understand, of what the arbitration process entails and how arbitration is different from a proceeding in court. They should also state that the parties are giving up their right to have a jury resolve the dispute. Arbitration clauses that do not contain these provisions will, in all likelihood, not be enforced. ■