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# Trends in Arbitration Agreements

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The New Jersey Supreme Court in late November 2019 heard oral argument in *Flanzman v. Jenny Craig, Inc.*, 456 N.J. Super. 613 (App. Div. 2018), *cert. granted*, 237 N.J. 310 (2019), in which the Appellate Division boldly refused to enforce arbitration agreements that fail to identify a specific "arbitral forum." At least one Justice hinted during the argument that *Flanzman* may have taken *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430, 447 (2014) – the Supreme Court's landmark decision requiring arbitration agreements to waive unambiguously the parties' "time-honored right to sue" in court – to an unintended extreme.

*Atalese* focused on the need for arbitration provisions to reflect, through unequivocal language, the parties' understanding of the rights they give up by agreeing to arbitration. *Id.* at 443-45. *Flanzman*, by contrast, held they must also demonstrate they understand the process that will replace those rights. According to the Appellate Division, only a mutual assent to a specific "arbitral forum" – which it defined as the "mechanism" or "setting" for arbitration – reflects "a meeting of the minds about what rights the parties gave up and what rights they received." 456 N.J. Super. at 624. Justice Patterson, noting this foundational gap in *Flanzman*'s premise, remarked, "*Atalese* is about what you're giving up."

In fact, *Flanzman* rested not so much on *Atalese* as on the Appellate Division's decision in *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545 (App. Div. 2016). In *Kleine*, the arbitration clause named the AAA, but when the suit arose the AAA no longer arbitrated claims of that type. The appellate court, finding no mutually agreed-on forum should the AAA prove unavailable, held the clause unenforceable for lack of mutual assent; it then proceeded to ground its holding in *Atalese*: "As *Atalese* instructs, the party . . . must be able to understand – from clear and unambiguous language – both the rights that have been waived and the rights that have taken their place." *Id.* at 552-53. But *Atalese* spoke only of the waived rights; it said nothing about an understanding of the rights that will take their place.

As for how to adequately show the parties' mutual understanding, *Flanzman* stressed the need to identify an arbitral forum. According to *Flanzman*, different sets of arbitral rules – for example, those of the AAA and JAMS – can mean different substantive and procedural rights for the parties. *Flanzman*, 456 N.J. Super. at 626-27. But the significance of that identification was not obvious to the Court. "How will knowing the name of the arbitrator assist your client in knowing the rules of the game?" Justice Albin asked. *Flanzman* itself conceded that parties, instead of actually naming a forum, may agree to decide later on a forum when the need arises, or to each select an arbitrator who would, in turn, select a third. *Id.* at 629. However, the court did not explain how such a broad provision would inform the parties of their rights in the arbitral process. Nor did it say how much detail an arbitration clause must contain, insisting only that parties "generally address in some fashion what rights replace those that have been waived." *Id.* at 626. "The question is, what is essential?" Justice LaVecchia asked. In reply, respondent's counsel tried to direct the Court's focus towards *Flanzman*'s larger point: "How can you waive your right to a jury trial if you have absolutely zero information?"

The Justices' comments and questions may have shown a reluctance to broaden *Atalese*, itself a bold decision that stopped just short of enforcing arbitration agreements more narrowly than other contracts, which the Federal Arbitration Act forbids. Interestingly, in a 2019 unpublished decision, the Appellate Division declined an opportunity to limit *Atalese* to consumer and employment agreements. The court explained that *Atalese*'s central concern – that waiver of the right to judicial resolution must be clear and unambiguous – applies to sophisticated parties, too. *See Itzhakov v. Segal*, No. A-2619-17T4, 2019 N.J. Super. Unpub. LEXIS 1829, *10 (App. Div. Aug. 28, 2019). That decision was in keeping with *Atalese*, which continues to control New Jersey courts' enforcement of arbitration agreements. Nonetheless, the Court may well decide, under the Federal Arbitration Act and established principles of contract law, that it has gone far enough in requiring greater specificity in arbitration provisions.

## ATTORNEYS MENTIONED

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