NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2580-17T1

MARILYN FLANZMAN,

Plaintiff-Appellant,

v.

JENNY CRAIG, INC., LILLIAS PIRO, individually, and DENISE SHELLEY, individually,

Defendants,

and

JC USA, INC.,

Defendant-Respondent.

APPROVED FOR PUBLICATION

October 17, 2018

APPELLATE DIVISION

Submitted September 24, 2018 – Decided October 17, 2018

Before Judges Messano, Fasciale and Rose.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6238-17.

Zatuchni & Associates, LLC, attorneys for appellant (David Zatuchni, on the brief).

Ogletree, Deakins, Nash, Smoak & Stewart, PC, attorneys for respondent (Sharon P. Margello and Jocelyn A. Merced, on the brief).

The opinion of the court was delivered by

FASCIALE, J.A.D.

This appeal requires us to decide whether to invalidate an arbitration agreement because the parties failed to identify any arbitration forum and any process for conducting the arbitration. In general, a forum is the mechanism – or setting – that parties use to arbitrate their dispute. They could have designated an arbitral institution (like the American Arbitration Association (AAA) or the Judicial Arbitration and Mediation Services (JAMS)), or they could have communicated a general method for selecting a different arbitration setting. The process is important because the rights associated with arbitration forums differ depending on which is chosen, or how the arbitral process is defined. Here, the agreement ignored the subject altogether.

We hold that the parties lacked a "meeting of the minds" because they did not understand the rights under the arbitration agreement that ostensibly foreclosed plaintiff's right to a jury trial. We therefore reverse the order compelling arbitration for lack of mutual assent.

I.

At the time of her termination, plaintiff was eighty-two years old. She had worked for defendant JC USA, INC. – a weight loss, weight management, and nutrition company – for twenty-six years. During that time, plaintiff

provided weight loss counseling. Defendant gradually reduced plaintiff's full-time hours to only three hours per week. The substantial reduction in hours led to her termination.

Plaintiff filed her complaint alleging (1) age discrimination and harassment in violation of the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -49; (2) discriminatory discharge and/or constructive termination in violation of the NJLAD; and (3) aider and abettor liability under the NJLAD. Defendant then filed its motion to compel arbitration relying on the parties' arbitration agreement.

Plaintiff has no recollection of signing the document that contained the arbitration agreement, which the parties did not execute when defendant hired her. Rather, in 2011, twenty years after she was hired, defendant presented plaintiff with the document, which she signed to maintain her employment. In pertinent part, the agreement provides:

Arbitration Agreement

> 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) . . . .
>
> [(Emphasis added).]

If enforceable, plaintiff gave up her right to a jury trial by executing the agreement. That is not an issue. The agreement, however, said nothing about what forum generally replaced that right (although it confusingly referred to California court filing fees). The judge recognized this important omission when he suggested that "the choice of which arbitral body would conduct the arbitration would be turned over to the [p]laintiff." In other words, the judge – not the parties – decided who would pick the forum.

On appeal, plaintiff primarily argues that the arbitration agreement lacked mutual assent and is therefore invalid as a matter of contract law. She maintains that the parties did not reach a "meeting of the minds" as to the rights that replaced her right to a jury trial. She also argues that the arbitration agreement is unconscionable.[1]

Appellate courts exercise de novo review of a judge's decision on the enforceability of contracts, such as an arbitration clause. Morgan v. Sanford

[1] We need not reach the question of whether the arbitration agreement is otherwise unconscionable because we have invalidated the agreement for lack of mutual assent.

Brown Inst., 225 N.J. 289, 302-03 (2016). Whether a contractual arbitration clause is enforceable is a legal issue; therefore, this court affords no special deference to the judge's determination of that issue. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013).

II.

We begin by addressing plaintiff's contention that the arbitration agreement is invalid as a matter of law. Plaintiff emphasizes that there are significant consequences to the absolute absence of any reference in the arbitration agreement as to the process for generally selecting an arbitration forum. She asserts that without that information communicated somehow in the agreement – whether it be by designating AAA, JAMS, or some other mechanism intended to replace her right to a jury trial – there exists no mutual assent.

Longstanding principles of law govern our analysis. The Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1 to 16, and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, reflect federal and state policies favoring arbitration of disputes. Roach v. BM Motoring, LLC, 228 N.J. 163, 173-74 (2017). Congress enacted the FAA "to 'reverse the longstanding judicial hostility' towards arbitration agreements and to 'place arbitration agreements

upon the same footing as other contracts.'" Id. at 173 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

In Atalese v. United States Legal Services Group, L.P., the New Jersey Supreme Court recognized that "[t]he FAA requires courts to 'place arbitration agreements on an equal footing with other contracts and enforce them according to their terms.'" 219 N.J. 430, 441 (2014) (quoting AT&T Mobility v. Concepcion, 563 U.S. 333, 339 (2011)). As to the application of contract law principles to arbitration agreements, the Court stated:

> "[A] state cannot subject an arbitration agreement to more burdensome requirements than" other contractual provisions. An arbitration clause cannot be invalidated by state-law "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."
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> Arbitration's favored status does not mean that every arbitration clause, however phrased, will be enforceable. . . . Section 2 of the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.'" Accordingly, the FAA "permits states to regulate . . . arbitration agreements under general contract principles," and a court may invalidate an arbitration clause "'upon such grounds as exist at law or in equity for the revocation of any contract.'"
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> [Ibid. (citations omitted).]

Indeed the Supreme Court of the United States recently proclaimed that the FAA requires that courts place arbitration agreements "on equal footing with

all other contracts." Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. ___, 137 S. Ct. 1421, 1424 (2017).

New Jersey law governing the enforceability of arbitration agreements is well settled. Like any contract, the parties must reach such an agreement by mutual assent. Atalese, 219 N.J. at 442. There must be a "meeting of the minds" for the agreement to be enforceable. Ibid. The party from whom an arbitration clause has been extracted, must "clearly and unambiguously" agree to waive his or her statutory rights. Id. at 443 (quoting Leodori v. Cigna Corp., 175 N.J. 293, 302 (2003)). "[C]ontractual language alleged to constitute a waiver [of statutory rights] will not be read expansively." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001). "[B]ecause arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." Atalese, 219 N.J. at 442-43 (emphasis added).

Following basic principles of contract law, our courts have previously invalidated arbitration agreements. See, e.g., id. at 445-48 (concluding the agreement failed to clearly identify the waiver of a jury trial); Leodori, 175 N.J. at 302-07 (finding there existed no evidence that an employee consented to an arbitration provision in an employee handbook); Garfinkel, 168 N.J. at

132-36 (invalidating an arbitration agreement as ambiguous); Kleine v. Emeritus at Emerson, 445 N.J. Super. 545, 552-53 (App. Div. 2016) (reversing for lack of mutual assent because the arbitration process contemplated by the clause in question was unavailable when the parties executed their contract).

Kleine is similar to our facts but not directly on point. In Kleine, although the parties designated AAA as the arbitral forum, AAA was not available when they executed the arbitration agreement. 445 N.J. Super. at 550, 552. Applying the requirement for mutual assent to the enforceability of the agreement, we stated that

> when the parties contracted, their exclusive forum for arbitration was no longer available; there being no agreement to arbitrate in any other forum, arbitration could not be compelled. In short, . . . there was no meeting of the minds as to an arbitral forum if AAA was not available. As Atalese instructs, the party from whom such a provision has been extracted 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.
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> [Id. at 552-53 (emphasis added).]

The difference between Kleine and our case is that, here, the parties omitted any reference whatsoever to an arbitral forum. See, e.g., NAACP of Camden Cty. E. v. Foulke Mgmt., 421 N.J. Super. 404, 431 (2011) (voiding an agreement for a number of reasons, including the fact that "the documents do

not clearly and consistently express the nature and locale of the arbitration forum itself").

We now address the important consequences of failing to identify the process for selecting an arbitration forum, such as designating in the contract an arbitral institution itself or otherwise identifying a general method for selecting an arbitration forum.

A.

Selecting an arbitral institution informs the parties, at a minimum, about that institution's arbitration rules and procedures. Without knowing this basic information, parties to an arbitration agreement will be unfamiliar with the rights that replaced judicial adjudication. That is, the parties will not reach a "meeting of the minds."

For example, AAA uses certain procedures for arbitrating employment disputes.[2] AAA adheres to due process safeguards, which at a minimum meet the standards outlined in the National Rules for the Resolution of Employment Disputes. Ordinarily, when parties select AAA, they make AAA's rules part of their arbitration agreement. Such rules address, but are not limited to,

[2] For an analysis of AAA's employment arbitration rules, see www.adr.org. This site identifies AAA's rules amended as of November 1, 2009, with a revised introduction as of October 1, 2017.

notification requirements, the initiation of the proceedings, management conferences, discovery, the location of the hearing(s), the number of arbitrators, communications with the arbitrator(s), attendance at the hearings, dispositive motions, evidence, modification of awards, applications to court, fees, expenses, and costs. Picking AAA, for example, helps the parties reach a "meeting of the minds" as to the rights that replace the right to a jury trial in court.

Similarly, JAMS provides its own set of arbitration rules and procedures applicable to its alternative dispute resolution (ADR) services, such as JAMS' employment arbitration rules and procedures.[3] We need not detail those rules here. The point is that selection of JAMS as an arbitral institution – or any other ADR forum – informs parties about the rights that replace those that they waived in the arbitration agreement. We are not talking about insignificant aspects of the arbitration process. The associated rights connected with the selection of an arbitral forum generally establish the substantive and procedural setting for the entire arbitration process.

Take, for example, the relevant part of the arbitration agreement reached by the parties in Atalese. They identified AAA, JAMS, and the applicable rules. The agreement stated in part:

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[3] See www.jamsadr.com.

> [T]he claim or dispute shall be submitted to binding arbitration . . . . The parties shall agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by [JAMS] or [AAA] . . . . The conduct of the arbitration shall be subject to the then current rules of the arbitration service.
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> [Atalese, 219 N.J. at 437 (emphasis added).]

We do not mean to imply that there must be "magic words" in the agreement as to the rights that replace the right to judicial adjudication. Imposing such a requirement would upset the "equal footing" that arbitration contracts enjoy with all other contracts. But it is important, as explained by Atalese, that the arbitration agreement reflect a "clear mutual understanding of the ramifications" of the parties' mutual assent to waive adjudication by a court of law. Id. at 443. In some fashion, the agreement must communicate that.

Although not binding on us, an issue similar to the one in Kleine arose in another jurisdiction where the Court was unwilling to permit a judge to select – or, like here, unilaterally allow one party to do so after the fact – an arbitration forum when the one selected by the parties in their arbitration agreement became unavailable. In Covenant Health & Rehabilitation of Picayune v. Moulds, 14 So. 3d 695, 706 (Miss. 2009), the arbitration clause provided that the parties would arbitrate any dispute following "[AAA] and its rules and procedures." AAA then became unavailable. Ibid. The Mississippi Supreme Court refused to "select a forum not anticipated by either of the

parties." Id. at 707. Similar to Kleine, the Court invalidated the arbitration clause. Id. at 706. To do otherwise would be re-writing the arbitration agreement, as the judge attempted to do here.

B.

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 – deprived the parties from knowing what rights replaced their right to judicial adjudication. Again, we do not impose any special language that parties must use in an arbitration agreement. Imposing such an obligation would violate Kindred Nursing, Atalese, and the other cases that preclude subjecting arbitration agreements to more burdensome requirements than other contractual agreements.

For an example of how to generally communicate this important missing information, we cite Oasis Health & Rehabilitation of Yazoo City, LLC, v. Smith, 42 F. Supp. 3d 821 (S.D. Miss. 2014). In Smith, the parties picked an arbitral institution that, unbeknownst to them, was non-existent. But in their agreement, they identified a general process for selecting an arbitration forum if the institution they selected became unavailable. Id. at 824. In Smith, the parties agreed to

> participate in formal . . . Arbitration to be conducted by ADR Associates, LLC through its Dispute

> Resolution Process for Consumer Healthcare Disputes ("ADR Associates Rules"), which are incorporated herein b[y] reference, and as more fully set forth below. If ADR Associates, LLC is unable or unwilling to conduct the ADR process at the time of the dispute, the parties shall mutually agree upon an alternative organization that is regularly engaged in providing ADR services to conduct the . . . Arbitration. If the [p]arties cannot agree on a[n] . . . arbitrator, each party shall select one . . . arbitrator and they together shall choose a third . . . arbitrator who shall conduct the ADR Process.
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> [Ibid.]

In enforcing the arbitration agreement, the court noted that the parties "explicitly contemplate[d] that the[y] . . . might not agree [on an arbitral institution] and prescribe[d] an agreed method for selection in that event . . . ." Id. at 826. That is, they reached a "meeting of the minds" as to what rights replaced the right to a jury trial.

Like Smith, and without requiring specific language, an arbitration agreement might generally reflect a desire for the participation of a neutral arbitrator, who would participate with a panel of arbitrators selected by the parties to the arbitration. In such an instance, the arbitration agreement might permit each party to pick an arbitrator and then those arbitrators would select the neutral arbitrator. Or the parties might agree to some other process, so long as they express in some fashion what that process is. To have a "meeting

of the minds," the parties must mutually understand what rights replace those that they gave up.

In a contract in which one gives up a right – a jury trial for example – expecting to resolve a dispute in a some other forum, one must know about that other forum. Without that knowledge, they are unable to understand the ramifications of the agreement. If the parties do not identify an arbitral institution (such as AAA or JAMS), then they should identify the process for selecting an alternate forum. Without doing that, they have no realistic idea about the rights that replaced judicial adjudication because not all arbitration forums, mechanisms, or settings are alike.

Reversed and remanded to the trial court for further proceedings. We do not retain jurisdiction.