

## **Arbitration and Mediation**

The New Jersey Supreme Court has recognized the need for, and benefits of, Alternative Dispute Resolution (“ADR”) programs as a means of encouraging dispositions of litigation, both before and after a complaint is filed, in an expeditious, less costly and convenient manner. Both arbitration and mediation are recognized and encouraged by court rules and case law development. The Supreme Court has established a court ordered mediation program under Rule 1:40 whereby civil cases are sent to a mediator on the court roster of approved mediators, following required education and certification, to conduct a confidential mediation prior to more formal court proceedings in the adversarial context. The mediator is required to give the parties one free hour of time for preparation and one free hour during the mediation as a means of serving the parties. A mediation can resolve the case only if the parties agree to the disposition.

An arbitration resolves the matter based on presentation of the parties and decision by the arbitrator. There are court rules, R.4:21A, regarding mandatory and voluntary arbitration of certain types of cases with de novo review by the courts thereafter, if desired.

### **I. Arbitration:**

*Kernahan v Home Warranty Administrator of Florida, Inc.*, N.J. (January 10, 2019): Arbitration provision in consumer home service agreement not enforceable because the form agreement, referring to “mediation” and otherwise confusing and obscure as a whole, does not clearly convey to a reasonable person that the dispute would be resolved by arbitration and not by a trial in court, and therefore does not embody the “mutuality” necessary to enforce an arbitration agreement.

Roach v BM Motoring, LLC., 228 N.J. 163 (2017) (policy favoring arbitrability, but defendant cannot enforce agreement to arbitrate when contractual fees owed to American Arbitration Association are not paid).

Morgan v Sanford Morgan Institute, 225 N.J. 289 (2016): Parties may delegate the issue of arbitrability to an arbitrator but must do so clearly; there is a presumption that the courts determine the issue of arbitrability. Moreover, the enrollment agreement in this case did not clearly and sufficiently advise plaintiff that she was giving up the right to seek relief in a court of law. Both “the arbitration provision and purported delegation clause” were inadequate to enforce the arbitration agreement.

Atalese v U.S. Legal Servs. Group, 219 N.J. 430 (2014): To be enforceable, an arbitration agreement “must be sufficiently clear to a reasonable consumer,” and must clearly and unambiguously advise consumers that they are giving up their right to seek relief in a judicial forum.

Hirsch v Amper Fin. Servs., LLC., 215 N.J. 174 (2013) (party cannot generally be compelled to arbitrate without contractual obligation to arbitrate; mere “intertwinement of parties and claims” and doctrine of equitable estoppel do not permit joinder in arbitration of non-signatory of arbitration agreement).

Muhammad v County Bank of Rehoboth Beach, Delaware, 189 N.J. 1 (2006) (finding waiver of class action arbitration in consumer contract loan agreement unenforceable; unenforceable provision severed and arbitration otherwise enforced).

Hojnowski v Vans Skate Park, 187 N.J. 323 (2006) (“favoring the settlement” by arbitration as a matter of policy, parent may bind minor to arbitrate).

Martindale v Sandvik, Inc, 173 N.J. 76 (2002) (enforcing obligation in employment application to arbitrate family leave and LAD claims because all substantive rights were preserved in arbitration).

Garfinkel v Morristown Obstetrics and Gynecology Associates. P.A., 168 N.J. 124 (2001): The employment agreement was held to be ambiguous and did not provide a clear enough waiver of plaintiff doctor's statutory rights under the Law Against Discrimination and right to jury trial, permitting him to litigate his employment and common law rights together in the Law Division of Superior Court.

Barcon Assocs. v Tri-Asphalt Corp., 86 N.J. 179 (1981): Arbitration "favored" as "a speedy, inexpensive, expeditious" method of "resolving commercial disputes." However, arbitrator must maintain "high standards of honesty, fairness and impartiality," in the absence of which the award shall be vacated under the arbitration statute. The arbitrator must give full disclosure of any interest or potential for impartiality.

Fawzy v Fawzy, 199 NJ 456 (2009) permits parents to choose arbitration as "the forum in which their disputes over child custody and rearing will be resolved" and detailed the prerequisites for an enforceable arbitration agreement; Fawzy also holds that the award is subject to judicial review beyond limited statutory review if "a party establishes that the arbitrator's award threatens to harm a child," 199 NJ at 461-62. To permit the possibility of that review, the Court required "a record of all documentary evidence adduced during the arbitration proceedings be kept; that the testimony be recorded, and that the arbitrator issue findings of fact and conclusions of law in respect of the award of custody and parenting time." 199 NJ 462.

(Note that agreements affecting interstate commerce are governed by the Federal Arbitration Act under which a State cannot provide or permit more burdensome contractual requirements than for any other type of agreement).

## II. Mediation:

Willingboro Mall, Ltd. v 240/242 Franklin Avenue, LLC., 215 N.J. 242 (2013): agreements reached at a mediation are not enforceable unless reduced to writing and signed by the parties; because that holding was prospective, the

confidentiality of the mediation was held to have been waived in this case by the Respondent's failure to assert the mediation privilege in response to the motion to enforce the verbal agreement; as a result the settlement was enforced.

State v Williams, 184 N.J. 432 (2005) On balance in this case based on proffer and the fact his testimony "was not sufficiently probative," mediator, appointed to conduct proceedings pursuant to Rule 1:40, could not be compelled to testify in criminal proceeding even when the testimony regarding what was said by a party to the mediation would have supported the claim of self-defense.