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PROPOSED NEW JERSEY LAW TAKES AIM AT MANDATORY ARBITRATION

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Assembly Bill A-3064, which the New Jersey Assembly passed on October 20, 2016, will come up for consideration in the Senate this year. If the Senate passes and the Governor signs A-3064, no company that wants to do business with the State may include a provision in *any* of its contracts, not just those with the State, requiring mandatory arbitration of any legal dispute.

Mandatory Arbitration Clauses in New Jersey. Many parties favor mandatory arbitration clauses because they provide certainty that disputes will be handled outside the court system, in what can be a quicker and less expensive method of resolving claims. In addition, the parties can select arbitrators who are experts in the field of the dispute (arbitrators do not have to be attorneys or former judges, but can be engineers, architects or other professionals), which can expedite the progression of a case.

The New Jersey Supreme Court in *Atalese v. U.S. Legal Services Group*, 219 N.J. 430 (2014), cert. denied, 135 S. Ct. 2804 (2015) has held that a waiver of rights provision in an arbitration agreement “must be clearly and unmistakably established.” Other cases have followed *Atalese* and it is now well-established that in New Jersey, not only must an agreement to arbitrate be set forth in plain understandable terms, but a waiver of the right to a jury trial must be unambiguous as well.

As long as the contract lays out what the parties are agreeing to and what they are giving up, the parties to the contract will be governed by an effective mandatory arbitration clause.

Assembly Bill A-3064. Bill A-3064, as presently worded provides:

“A State agency shall not enter into a contract or agreement with a business entity that requires any person or public entity, as a condition of doing business with that business entity, to give up any right or remedy provided by the laws of this State.”

The Act would not apply to any contracts in effect on its effective date, and non-mandatory arbitration provisions would not be affected. However, the Bill would create a significant disincentive to the continued use of mandatory arbitration clauses. Indeed, it has been reported that one of the sponsors of A-3064, Assemblyman Paul Moriarty, believes that mandatory arbitration should be discouraged and that prohibiting the State from contracting with businesses that include mandatory arbitration clauses in their contracts will accomplish this goal.

There are three concerns that the authors of the Bill may not have considered. First, in many fields of business, participants have for years relied upon mandatory arbitration to resolve disputes, e.g., broker/dealer and investor/adviser disputes,

international commercial transactions, employment contracts and construction contracts. Doing away with mandatory arbitration will introduce a level of uncertainty and potentially lead to protracted litigation that will increase the cost of doing business. Second, arbitration is, in most instances, less time consuming and less expensive than litigation. Forcing parties to litigate disputes will impose costs on businesses that likely will be passed on to their customers and, ultimately, to the consumer. Third, discouraging mandatory arbitration will increase the burdens on the New Jersey courts, which are ill-suited to handle the increase given that they do not have a full complement of judges.

There is one final consideration. Companies that do not want to give up their right to the predictability of mandatory arbitration may simply choose not to do business with New Jersey. Those that do may raise the prices they charge the State to offset the increased cost of doing business, leaving New Jersey taxpayers holding the bill. ♦

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