STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0786

MoneyGram Payment Systems, Inc.,
Respondent,

vs.

Citigroup, Inc., et al.,
Appellants.

Filed February 11, 2013
Reversed and remanded
Connolly, Judge

Hennepin County District Court
File No. 27-CV-11-21348

Carolyn G. Anderson, Brian C. Gudmundson, June P. Hoidal, Zimmerman Reed, P.L.L.P., Minneapolis, Minnesota; and

Joseph D. Daley (pro hac vice), Robbins Geller Rudman & Dowd LLP, San Diego, California (for respondent)

Courtney E. Ward-Reichard, Peter Gray, Anna Hickman, Nilan Johnson Lewis P.A., Minneapolis, Minnesota; and

Jessica S. Carey (pro hac vice), Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, New York (for appellants)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellants challenge a district court order denying their motion to compel arbitration of respondent's claims against them. Because we conclude that respondent's claims, arising out of the purchase of securities from appellants, fall within the scope of the arbitration provision in the parties' client-services agreement, we reverse and remand for the district court to issue an order compelling arbitration.

FACTS

Respondent MoneyGram Payment Systems Inc. is a global-payment-services provider primarily involved in issuing money orders and checks to consumers and institutional clients. While money orders and checks are being processed, respondent invests its clients' funds. In connection with these investments, respondent manages a multi-billion dollar investment portfolio that includes complex mortgage-related securities such as residential mortgage-backed securities (RMBSs) and collateralized debt obligations (CDOs).

Appellants Citigroup Inc. (Citigroup), Citigroup Global Markets Inc. (CGMI), and Citigroup Global Markets Limited (CGML) are separate legal entities. Citigroup is a Delaware holding company that provides a range of global diversified financial services. CGMI, headquartered in New York, and CGML, headquartered in London, are broker-dealer subsidiaries of Citigroup that underwrite and market mortgage-related securities transactions, including RMBSs and CDOs.

Between 2005 and 2007, respondent purchased nine CDOs and nine RMBSs from appellants for over $180 million. Respondent alleges that these purchases were made through its account with Smith Barney, which was then a division of appellant CGMI.[1] Appellant sold these securities to respondent through its representatives, either by e-mail or over the telephone.

On February 7, 2008, after the purchase of all the securities at issue in this case, respondent and Smith Barney entered into a client service agreement (CSA), which set forth the "terms and conditions by which [respondent MoneyGram would be entitled to] receive certain electronic services, including electronic access to [respondent's] securities account[s] through [smithbarney.com]." The introductory paragraph of the CSA stated that "[t]his Agreement does not cover transactions that you may enter through [Smith Barney's] *proprietary online order entry . . . or other systems*." (Emphasis added). On the first page of the CSA, in bold-face type above respondent's signature, is an affirmation stating: "By signing this Application, I acknowledge that I have received the smithbarney.com Client Service Agreement (Form 5582), which contains a pre-dispute arbitration clause in paragraph 22, on page 5."

The "AGREEMENT TO ARBITRATE" in paragraph 22 of the CSA contained "a predispute arbitration clause" that stated:

> I agree that *all claims or controversies*, whether such claims or controversies arose *prior, on or subsequent to the date hereof*, between me and [Smith Barney] and/or any of its present or former officers, directors, or employees concerning or arising from (i) *any account* maintained by me with [Smith Barney] individually or jointly with others in any capacity;

[1] In 2009, Citigroup sold a 51% interest in Smith Barney to Morgan Stanley.

> (ii) *any transaction* involving [Smith Barney] or any predecessor firms by merger, acquisition or other business combination and me, *whether or not such transaction occurred in such account or accounts*; or (iii) the construction, performance or breach of this or any other agreement between us, any duty arising from the business of [Smith Barney] or otherwise, shall be determined by arbitration before, and only before, any self-regulatory organization or exchange of which [Smith Barney] is a member.

(Emphasis added).

The CDOs and RMBSs that respondent purchased from appellants between 2005 and 2007 collapsed in value during the financial crisis. In 2011, respondent sued appellants for fraud, aiding and abetting fraud, and negligent misrepresentation in connection with appellants' sale of the nine CDOs and nine RMBSs. The merits of respondent's claims have not been adjudicated because, in January 2012, appellants moved to compel arbitration and stay the action, relying upon the arbitration clause in the CSA the parties signed in 2008.

The district court denied appellants' motion finding that, while paragraph 22 of the CSA was "a clear and unequivocal agreement to arbitrate disputes," the first paragraph of the CSA limited the substantive reach of the CSA to transactions conducted through the smithbarney.com website. Because the district court found that this first paragraph of the CSA "conflict[ed] with the arbitration clause in paragraph 22," it concluded that the parties had not "reached an express and unequivocal agreement that constitutes a clear intent to waive their rights to litigate the disputes at issue in this case." This appeal follows.

D E C I S I O N

Appellants argue that the district court erred in denying appellants' motion to compel arbitration. Specifically, appellants argue that there is no conflict between the introductory and arbitration paragraphs of the CSA, and that, even if there were a conflict, that conflict should be resolved in favor of arbitration. We review the denial of a motion to compel arbitration de novo. *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 349 (Minn. 2003). Pursuant to the CSA, this court must abide by the parties' choice of law and apply New York law in resolving this dispute.[2]

The party opposing arbitration has the burden of proving that the dispute is not within the scope of the arbitration agreement. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92, 121 S. Ct. 513, 522 (2000). Any doubts regarding the arbitrability of the dispute should be resolved in favor of arbitration. *State v. Philip Morris, Inc.*, 813 N.Y.S.2d 71, 75 (N.Y. App. Div. 2006). But, as with any contract, the agreement to arbitrate must be interpreted according to the terms of the contract. *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E.2d 1298, 1302 (N.Y. 1995). The reviewing court must determine: "(1) Did the parties enter into a contractually valid arbitration agreement? and (2) If so, does the parties' dispute fall within the scope of the arbitration agreement?" *Cap Gemini Ernst & Young, U.S., LLC v. Nackel*, 346 F.3d 360, 365 (2d Cir. 2003).

[2] New York law is generally consistent with federal arbitration law interpreting the Federal Arbitration Act (FAA). *Smith Barney, Harris Upham & Co. v. Luckie*, 647 N.E.2d 1308, 1315 (N.Y. 1995) (noting that "the FAA was modeled after New York's arbitration law").

The district court held, and respondent does not dispute, that the CSA contains a valid arbitration agreement. In discussing the CSA's arbitration clause, the district court noted that, "[b]y itself, this provision is a clear and unequivocal agreement to arbitrate disputes." We agree. Paragraph 22 of the CSA is a valid arbitration agreement, detailing that all claims and controversies, including those prior to the execution of the CSA, concerning or arising from any Smith Barney account, any transaction involving Smith Barney or related business entities, must be resolved through arbitration.

On appeal, appellants challenge the district court's holding that the dispute between the parties does not fall within the scope of the arbitration agreement. The district court held that "the exclusions in the coverage provisions create a conflict in the contract," which, together with the "lack of evidential clarity as to whether the transactions at issue are governed by the exclusions," prevented a finding that the parties had agreed to arbitrate their dispute regarding the purchase of the RMBSs and CDOs.

"The announced policy of [New York] favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties." *Nationwide Gen. Ins. Co. v. Investors Ins. Co. of America*, 332 N.E.2d 333, 335 (1975). Accordingly, courts "construe arbitration clauses as broadly as possible, resolving any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." *Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998) (quotations and citation omitted).

The arbitration clause contained in the CSA is very broad and requires arbitration of disputes concerning or arising out of "the construction, performance or breach of this or any other agreement between [the parties]." Language in an arbitration agreement

covering "any claim or controversy arising out of or relating to the agreement, is the paradigm of a broad clause." *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995) (quotations omitted).

Despite this broad language in the arbitration agreement, the district court found that the agreement does not cover the dispute at issue here because the "exclusions in the coverage provisions" contained in the CSA's introductory paragraph conflicted with the broad arbitration agreement. The district court focused on the opening paragraph of the CSA, which stated that the parties' agreement "does not cover transactions that [respondent may have entered] through [Smith Barney's] proprietary online order entry . . . or *other systems*." (Emphasis added). The district court found that, because respondent ordered the CDOs and RMBSs over the phone or by e-mail, and not through the smithbarney.com website, the orders were made pursuant to "other systems," and concluded that the dispute fell outside of the scope of the arbitration agreement. We disagree.

The district court's interpretation of "or other systems" would lead to an absurd result, because the arbitration provision would never apply: every order would be made either through the proprietary online order entry or through an "other system," such as the systems the district court believed were used here. *See Duane Reade, Inc. v. Cardtronics, LP*, 863 N.Y.S.2d 14, 16 (N.Y. App. Div. 2008) ("[O]ur goal must be to accord the words of the contract their fair and reasonable meaning.") (quotation omitted); *Matter of Lipper Holdings v. Trident Holdings*, 766 N.Y.S.2d 561, 562 (N.Y. App. Div. 2003) ("A contract should not be interpreted to produce a result that is absurd").

Moreover, "the existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said *with positive assurance that the arbitration clause is not susceptible of an interpretation that [it] covers the asserted dispute*." *Oldroyd*, 134 F.3d at 76 (quoting *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997)) (emphasis in *Oldroyd*). We cannot make such a statement with "positive assurance" here. The broad language of the arbitration agreement specifies that the arbitration agreement covers "*all* claims or controversies" that arose "prior, on or subsequent to" the date of the agreement, between respondent and Smith Barney from "*any account* maintained by [respondent] with [Smith Barney]" or "*any transaction* involving [Smith Barney]." (Emphasis added). Because the dispute between the parties is a "controversy" that arose "prior" to the date of the agreement between respondent and Smith Barney from an "account" or "transaction involving [Smith Barney]," the dispute falls within the scope of the arbitration agreement. *See Nationwide*, 332 N.E.2d at 335 (holding that, when there is a broad arbitration agreement, courts focus only on an "initial screening process" to determine whether the parties have agreed that the subject matter under dispute should be submitted to arbitration and if so, "the court's inquiry is ended"). This result is in accord with other decisions that have upheld an arbitration requirement based on this same contractual language. *See Bd. of Trustees v. Citigroup Global Mkts. Inc.*, 622 F.3d 1335, 1338-43 (11th Cir. 2010) (enforcing an arbitration agreement with nearly identical language to the agreement at issue here); *Braintree Labs., Inc. v. Citigroup Global Mkts. Inc.*, 671 F. Supp. 2d. 202, 205-06 (D. Mass. 2009) (same); *Patnik v. Citicorp Bank Trust FSB*, 412 F. Supp. 2d 753, 759 (N.D. Ohio 2005) (same).

Finally, appellants argue that respondent should be equitably estopped from resisting arbitration of its claims against Citigroup and CGML because respondent argued to the district court that, if its claims against CGMI were arbitrable but its claims against Citigroup and CGML were not, CGMI should be compelled to litigate because respondent's claims against the three defendants were "inextricably intertwined" and should be resolved in the same forum. But this issue is not properly before us, because the district court denied appellants' motion to compel arbitration and did not reach or consider whether respondent should be compelled to arbitrate its disputes with all three entities if it is compelled to arbitrate its dispute with CGMI. This court therefore has no decision on this issue to review. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented [to] and considered by the [district] court in deciding the matter before it.") (quotation omitted).

Because the dispute between the parties falls within the scope of the arbitration agreement in the CSA, we reverse and remand for the district court to issue an order compelling arbitration.

Reversed and remanded.