STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1915

Waymouth Farms, Inc.,
Respondent,

vs.

Olam Americas, Inc.,
Appellant,

BK Sterling Corporation,
Respondent,

Chad Rubin,
Respondent.

Filed June 30, 2009
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CV-08-17771

Jeffrey W. Lambert, Jeffrey W. Lambert, P.A., 1000 Twelve Oaks Center Drive, Suite 101, Wayzata, MN 55391 (for respondent-Waymouth Farms, Inc.)

Michael G. Taylor, Arthur G. Boylan, Aleava R. Sayre, Leonard, Street and Deinard, P.A., 150 South Fifth Street, Suite 2300, Minneapolis, MN 55402 (for appellant)

Mark L. Vavreck, Scrimshire, Martineau, Gonko & Vavreck, 401 North Third Street, Suite 600, Minneapolis, MN 55402 (for respondent-BK Sterling Corporation)

Chad Rubin, 1120 Trenton Circle North, Plymouth, MN 55441 (pro se respondent)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's order denying appellant's motion to compel arbitration, arguing that the district court erred by concluding that the parties' contracts do not contain valid arbitration provisions. Because we conclude that the arbitration provisions are not binding on the parties, we affirm.

FACTS

This case involves two contracts in which appellant Olam Americas, Inc. (Olam) agreed to sell six loads of cashews to respondent Waymouth Farms, Inc. (Waymouth). There are two one-page contracts between the parties. Both contracts include the following arbitration provision: "ANY CONTROVERSY OR CLAIM ARISING OUT OF THIS CONTRACT MAY BE SETTLED IN BINDING ARBITRATION BY THE ASSOCIATION OF FOOD INDUSTRIES, INC OF NEW YORK IN ACCORDANCE WITH ITS RULES." There are also two "Sales Confirmation" sheets from a broker, BK Sterling Corporation, that state, "Any controversy or claim arising out of this contract shall be settled by arbitration by the Association of Food Industries in New York in accordance with its rules."

In January 2008, the parties' relationship deteriorated. Waymouth sued Olam and Sterling, alleging conversion and unjust enrichment. Olam filed an answer and a counter-claim alleging breach of contract. Olam also filed a motion to compel arbitration. The

district court denied Olam's motion, reasoning that because the parties did not have a meeting of the minds regarding mandatory arbitration, the arbitration provisions are unenforceable. This appeal follows.

D E C I S I O N

"A written agreement to submit any existing controversy to arbitration . . . is valid, enforceable, and irrevocable. . . ." Minn. Stat. § 572.08 (2008). On a motion to compel arbitration "if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied." Minn. Stat. § 572.09(a) (2008). This court reviews the district court's decisions regarding arbitrability de novo. *Minn. Teamsters Pub. & Law Enforcement Employees' Union, Local 320 v. County of St. Louis*, 611 N.W.2d 355, 358 (Minn. App. 2000).

"[T]he issue of arbitrability, when raised in judicial proceedings to compel or stay arbitrability, is to be determined by ascertaining the intention of the parties from the language of the arbitration agreement itself." *State v. Berthiaume*, 259 N.W.2d 904, 909 (Minn. 1977) (construing collective bargaining agreement). Generally, questions about the enforceability of an arbitration provision are resolved in one of the following ways: (1) if there is a clear and enforceable agreement to arbitrate a dispute, the court must order arbitration; (2) if it is reasonably debatable whether or not a dispute is within the scope of an arbitration provision, it must be referred to an arbitrator to determine if it is covered by the provision; or (3) if there is no agreement to arbitrate or the dispute is outside of the scope of the arbitration provision, the court may protect a party from being

compelled to arbitrate. *Atcas v. Credit Clearing Corp. of Am.*, 292 Minn. 334, 340-41, 197 N.W.2d 448, 452 (1972), o*verruled on other grounds by Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 351 (Minn. 2003); *Cmty. Partners Designs, Inc. v. City of Lonsdale*, 697 N.W.2d 629, 632 (Minn. App. 2005). When considering whether a claim is subject to arbitration, we are mindful of the fact that arbitration has long held favored status under Minnesota law. *See Ramsey County v. AFSCME, Council 9, Local 8*, 309 N.W.2d 785, 790 (Minn. 1981).

The district court denied Olam's motion to compel arbitration based on its conclusion that the parties did not have a meeting of the minds as to whether the arbitration provisions in the parties' contracts were to be mandatory. Olam argues that the district court erred because the contracts contain arbitration provisions and the provisions must be interpreted as mandating arbitration so as to give them legal effect. We disagree.

Principles of contract law apply to arbitration agreements. *Lucas v. Am. Family Mut. Ins. Co.*, 403 N.W.2d 646, 648 (Minn. 1987). A contract does not exist unless the parties have agreed "with reasonable certainty about the same thing and on the same terms." *Peters v. Mut. Benefit Life Ins. Co.*, 420 N.W.2d 908, 914 (Minn. App. 1988). In the present case, the language "this contract may be settled in binding arbitration" does not express a shared intent that "may" means "shall." Thus, the contractual language does not indicate a meeting of the minds regarding mandatory arbitration. *See Berthiaume*, 259 N.W.2d at 909 (explaining that "arbitrability . . . is to be determined by

ascertaining the intention of the parties from the language of the arbitration agreement itself").

Olam cites *Am. Italian Pasta Co. v. Austin Co.* for the proposition that there "would be no reason for the arbitration language . . . if the parties intended [arbitration] to be permissive." 914 F.2d 1103, 1104 (8th Cir. 1990). But *Am. Italian Pasta Co.* is not binding on this court, and Olam has provided no precedential authority that compels a similar conclusion in the present case.

Olam also cites *Am. Italian Pasta Co.*, 914 F.2d at 1104, and *Cmty. Partners Designs, Inc.*, 697 N.W.2d at 632, for the proposition that permissive language in arbitration agreements is interpreted as mandatory. But the relevant language in those cases is distinguishable from the contractual language here. For example, the relevant language in *Cmty. Partners Designs, Inc.* was "[a]rbitration . . . shall be the choice of either party." 697 N.W.2d at 632. As stated by this court, "this means that either party can demand arbitration." *Id.* at 633. "Shall be the choice" is readily distinguishable from "may be settled," the language at issue here. "May" is traditionally permissive. *See* Minn. Stat. § 645.44, subd. 15 (2008) (providing that the use of the word "may" in Minnesota statutes is "permissive").

Olam further contends that any ambiguity can be resolved by considering the mandatory language in the sales-confirmation sheets. We disagree. "[A]rbitrability . . . is to be determined by ascertaining the intention of the parties *from the language of the arbitration agreement itself*." *Berthiaume*, 259 N.W.2d at 909 (emphasis added). The district court concluded, "the fax cover sheets purporting to be a Sales Confirmation are

from the broker of the transaction and are not between the two parties to the contracts." *See Lakeview Terrace Homeowners Ass'n v. Le Rivage, Inc.*, 498 N.W.2d 68, 73 (Minn. App. 1993) (stating that "[w]hile it is a long-standing rule that several instruments made at the same time, relating to the same subject, may be construed together with reference to each other, . . . this rule does not govern" where different parties contracted within different instruments).

Olam contends that the arbitration provision in the sales-confirmation sheets requires the parties to resolve any claims within the scope of the arbitration provision in binding arbitration, "to the extent [the language] is controlling." Olam also contends that the arbitration provision in the sales-confirmation sheets is part of the parties' contracts and that any other determination is "contrary to law and fact." But Olam offers no argument in support of either contention. Instead, Olam's legal argument focuses on its assertion that we should interpret the term "may" in the parties' contracts as mandatory instead of permissive. Because Olam failed to adequately brief the issues of whether the arbitration provision in the sales-confirmation sheets is controlling and whether the provision is part of the parties' contracts, Olam has waived these issues on appeal. *State Dep't of Labor & Indus. by the Special Comp. Fund v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issue in absence of adequate briefing).

But even if we were to consider the arbitration provision in the sales-confirmation cover sheets, it supports our conclusion that there was not a meeting of the minds. The sales-confirmation sheets use the mandatory word "shall" whereas the parties' contracts use the permissive word "may." Rather than elucidate the intent of the parties, the

contradictory language further indicates that there was not a meeting of the minds regarding mandatory arbitration. Waymouth cannot be compelled to arbitrate because the parties did not agree to "the same thing and on the same terms." *Peters*, 420 N.W.2d at 914.

Olam contends that when the issue of arbitrability is debatable, the district court must grant the motion to compel arbitration so that the issue can be resolved by an arbitrator in the first instance. Olam fails to recognize the difference between a dispute regarding the existence of a valid arbitration agreement and a dispute regarding whether a claim falls within the scope of a valid arbitration agreement. *See Amdahl v. Green Giant Co.*, 497 N.W.2d 319, 322 (Minn. App. 1993) (establishing that "[w]hen considering a motion to compel arbitration, the court's inquiry is limited to (1) whether a valid arbitration agreement exists, and (2) whether the dispute falls within the scope of the arbitration agreement"). The issue of whether the parties agreed to arbitrate is to be determined by the district court and "[s]uch an issue . . . shall be forthwith and summarily tried" if so raised. Minn. Stat. § 572.09(a)-(b). Conversely, "[i]f the intention of the parties is reasonably debatable as to the *scope* of the arbitration clause, the issue of arbitrability is to be initially determined by the arbitrators." *Local No. 1119, Am. Fed'n State, County, & Mun. Employees, AFL-CIO v. Mesabi Reg'l Med. Ctr.*, 463 N.W.2d 290, 295 (Minn. App. 1990) (emphasis added) (quotation omitted).

The district court determined that a valid mandatory arbitration agreement does not exist and therefore did not reach the issue of whether the parties' claims fall within

the scope of the arbitration provisions. We conclude that the district court's analysis was correct, and we affirm the district court's order denying Olam's motion to compel arbitration.

Affirmed.

Dated: _____

_____
The Honorable Michelle A. Larkin