NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2001-14T1

JADE APPAREL, INC., a New Jersey corporation, and AMERICOAT LIMITED CORP., a New Jersey corporation,

Plaintiffs-Appellants,

v.

UNITED ASSURANCE, INC., a New Jersey Corporation,

Defendant-Respondent,

and

JOSEPH MARINO, individually,

Defendant,

and

CONTINENTAL INDEMNITY COMPANY, an Iowa corporation; APPLIED UNDERWRITERS, INC., a Nebraska corporation; and APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC. a British Virgin Islands corporation,

Defendants-Respondents.

Argued February 1, 2016 – Decided October 13, 2016

Before Judges Simonelli, Carroll and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3317-14.

G. Glennon Troublefield argued the cause for appellants (Carella, Bryne, Cecchi, Olstein, Brody & Agnello, attorneys; Jan Alan Brody and Mr. Troublefield, of counsel and on the brief).

Thomas F. Quinn argued the cause for respondents (Wilson, Elser, Moskowitz, Edelman & Dicker, attorneys; Mr. Quinn, on the brief).

The opinion of the court was delivered by

SUMNERS, JR., J.A.D.

Plaintiffs appeal from the Law Division's order granting defendants' motion to compel arbitration and stay the action. Having considered the parties' arguments in light of the record and the applicable principles of law, we affirm.

I.

The essential facts are not in dispute. Plaintiffs Jade Apparel, Inc. (Jade) and Americoat Limited Corp. (Americoat) are affiliated New Jersey corporations engaged in clothing manufacturing and jointly purchase workers' compensation insurance. They retained the services of United Assurance, Inc. and its employee, Joseph Marino, to serve as their insurance brokers to secure new workers' compensation insurance.

Plaintiffs subsequently accepted a proposal and rate quote covering three years from Applied Underwriters, Inc. (Applied), a New Jersey licensed insurance producer, incorporated in Nebraska.

The insurance coverage was issued by Continental Indemnity Company (Continental). Plaintiffs signed documents titled "Request to Bind Coverages & Services" (the Request to Bind) and "Applied Underwriters Captive Risk Assurance Company, Inc. Participant No. 828128 Reinsurance Participation Agreement" (the Agreement). According to plaintiffs, Marino represented that the coverage would provide them "better workers' compensation insurance" at a "cheaper price." The other signatories to these documents were DA Apparel, Inc., Miracle Fashions, Inc., and Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA), a British Virgin Islands corporation and subsidiary of Applied.

Prior to the expiration of the insurance coverage, plaintiffs signed a one-year extension. Plaintiffs, however, subsequently claimed they were overcharged and refused to make premium payments. When the policies were cancelled, plaintiffs acquired replacement coverage and then sued AUCRA, Continental, Applied (collectively defendants), as well as United Assurance and Marino.

In response to the lawsuit, AUCRA, citing provisions in the Agreement, commenced arbitration proceedings against plaintiffs with two different tribunals. Furthermore, defendants filed a motion to compel arbitration and stay proceedings.

After argument and the submission of supplemental briefs, the motion court issued an oral decision on November 20, 2014, finding that paragraph 13 of the Agreement clearly and unambiguously

required that the parties resolve their dispute in arbitration. Reasoning that the parties were sophisticated business entities, the court found that the arbitration clause expressed the parties' "intent" to refer the determination of arbitrability to the arbitrator. Moreover, relying upon Milan Express Co. v. Applied Underwriters Captive Risk Assur. Co., 590 F. App'x 482 (6th Cir. 2014), the court ordered that it was the arbitrator's responsibility to determine the issue of arbitrability. The court explained:

> On October 23, 2014[,] the Sixth Circuit Court of Appeals, which in this court is [a] very highly regarded [a]ppellate [c]ourt, issued an opinion reversing the decision rendered by the United States District court for the Western District of Tennessee in the matter of Milan Express [Co.] [v.] Applied Underwriters Captive Risk [Assur. Co.], 993 F. Sup[p]. 2d. 846 [(W.D. Tenn.2014)].
> [The] Sixth Circuit held that, "unless the arbitration clause itself is challenged as invalid[,] the question of arbitrability is for the arbitrator not the [c]ourt to decide." . . . And I don't know how many times in a career you see a case that is so on point, almost as they say on all fours, as this one is. So I am guided very - - almost exclusively so by the Sixth Circuit and I agree with [its] determination.

The motion court therefore ordered that plaintiffs' contractual claims, counts eight through fourteen of the amended complaint, be resolved at arbitration and the other claims-malpractice, fraud, negligence, and civil conspiracy-remained with the court but be stayed pending the outcome of the arbitration.

In addition, the court determined that based on the parties' consent, arbitration will be conducted in New Jersey, and counsel "will confer" to select a retired judge to serve as the arbitrator. This appeal followed.

II.

We begin with a review of the applicable legal principles that guide our analysis. Orders compelling or denying arbitration are deemed final and appealable as of right. R. 2:2-3(a); GMAC v. Pittella, 205 N.J. 572, 585-86 (2011). We exercise plenary review of the trial court's decision regarding the applicability and scope of an arbitration agreement. See Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013). The decision on whether parties agreed to arbitrate is a question of law that is reviewed de novo. Ibid. When reviewing an order to compel arbitration, courts must take into account the strong preference both at the federal level and in New Jersey for enforcing arbitration agreements. Ibid.

The protection of the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16, applies whether arbitrability is raised in federal or state court. Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 297 (App. Div. 2013) (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002)). The "central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" Stolt-Nielsen S. A. v.

AnimalFeeds Int'l Corp., 559 U.S. 662, 682, 130 S. Ct. 1758, 1773, 176 L. Ed. 2d 605, 622 (2010) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 479, 109 S. Ct. 1248, 1255-56, 103 L. Ed. 2d 488, 500 (1989)). Nevertheless, the policy favoring arbitration is "not without limits[,]" Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001), "and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 148 (App. Div. 2008) (citing AT&T Techs. v. Commc'n Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648, 655 (1986)).

Thus, two questions arise when evaluating a motion to compel arbitration. The first is whether there is a valid and enforceable agreement to arbitrate disputes. See Martindale, supra, 173 N.J. at 86. The second is whether the particular dispute between the parties is covered within the scope of the agreement. Id. at 92.

Generally, arbitration agreements "should . . . be read liberally to find arbitrability if reasonably possible." Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 257 (App. Div.) certif. denied, 170 N.J. 205 (2001). A court must resolve all doubts related to the scope of an agreement "in favor of arbitration." Id. at 258. Courts operate under a "presumption of

arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Waskevich, supra, 431 N.J. Super. at 298 (quoting EPIX Holdings Corp. v. Marsh & McLennan Co., Inc., 410 N.J. Super. 453, 471 (App. Div. 2009), overruled on other grounds, Hirsh, supra, 215 N.J. at 193)).

While courts are commonly tasked with making the initial determination of whether a particular dispute is arbitrable, parties may delegate that power to an arbitrator. See AT&T Techs., supra, 475 U.S. at 649, 106 S. Ct. at 1418, 89 L. Ed. 2d at 656 (1986); Commerce Bank, N.A. v. DiMaria Constr. Inc., 300 N.J. Super. 9, 14 (App. Div. 1997). But in the determination of whether parties have so delegated this threshold decision to an arbitrator, the general presumption in favor of arbitrability is shifted. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985, 994 (1995). This is because it is less likely that the parties have actually given thought to the question of who decides disputes over arbitrability, so ambiguity or silence on this question will not be interpreted as delegating that power to the arbitrator. Ibid. Instead, there must be "clear and unmistakable evidence" that the

parties agreed to arbitrate arbitrability. Id. at 944, 115 S. Ct. at 1924, 131 L. Ed. 2d at 994 (citations omitted).

Here, plaintiffs contend that the motion court erred in compelling arbitration for Applied and Continental and granting a stay pending arbitration. Alternatively, plaintiffs contend that the arbitration provisions were substantively unconscionable due to their inability to negotiate the harsh and unfair terms. We disagree.

Our Supreme Court's decision in Hirsch is instructive. There, the Court recognized two exceptions allowing non-signatories to compel arbitration. Hirsch, supra, 215 N.J. at 192-93. A non-signatory may compel arbitration against a signatory to an arbitration agreement when: (1) an agency agreement exists between a signatory and the non-signatory against which arbitration is sought, or (2) via equitable estoppel, which does not apply absent proof of detrimental reliance. Ibid. Pertinent to the dispute in question, the Court found that while the arbitration clause language was sufficiently broad to cover any and all disputes related to the business transactions between the plaintiffs and the signatory, it did not embrace any express inclusion of claims involving the other non-signatory defendants. Id. at 195-96 (citation omitted). Thus,

the non-signatories did not have standing to compel arbitration under an agency relationship; one of the non-signatories did sign the contract as an agent of the signatory, but not as an agent of the other defendants. Ibid. Moreover, the signatory shared no corporate ownership with the other defendants. Ibid. Furthermore, there was no evidence in the record that the non-signatories expected to arbitrate their disputes in detrimental reliance on the plaintiffs' conduct. Id. at 196. Accordingly, the defendants' motion to compel arbitration was denied. Ibid.

Applying Hirsch, we conclude there is an agency relationship which requires arbitration of claims involving Applied and Continental. Although Applied and Continental were not direct parties to the Agreement between plaintiffs and AUCRA, they were incorporated therein. The Agreement states:

> Whereas, [AUCRA] has entered into a Reinsurance Treaty . . . with California Insurance Company . . . and, through its pooling arrangement, with other affiliates of Applied [], including, but not limited to Continental[.]
>
> . . . .
>
> 9. In the event the [plaintiffs are] in default of any obligations to [AUCRA] under this Agreement or under any other agreement with an affiliate of [AUCRA], [AUCRA] may take

> all reasonable steps to protect its and its affiliates' interests.
>
> [(Emphasis added).]

This language was sufficiently broad enough to cover the dispute between plaintiffs and the affiliates of AUCRA, all sophisticated business entities, arising from the comprehensive workers' compensation insurance coverage purchased by plaintiffs. Consequently, Applied and Continental had standing to compel arbitration involving plaintiffs' claims against them.

Turning to the arbitration provision in the Agreement, plaintiffs argue that it is not enforceable because there was no "meeting of the minds" that plaintiffs were forgoing their right to litigate a dispute in court, and the agreement was unconscionable. We are unpersuaded.

An agreement to arbitrate "must be the product of mutual assent, as determined under customary principles of contract law." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014), cert. denied, ___ U.S. ___, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015) (citations omitted). Mutual assent requires that the parties understand the terms of their agreement. Ibid. "In evaluating the existence of an agreement to arbitrate, a court 'consider[s] the contractual terms, the surrounding circumstances, and the purpose of the contract.'" Hirsch, supra, 215 N.J. at 188 (quoting Marchak v. Claridge Commons, Inc., 134

N.J. 275, 282 (1993)). Although an arbitration clause need not identify "the specific constitutional or statutory right guaranteeing a citizen access to the courts" that is being waived, it must "at least in some general and sufficiently broad way" convey that parties are giving up their right to bring their claims in court or have a jury resolve their dispute. Atalese, supra, 219 N.J. at 447. An arbitration agreement that fails to "clearly and unambiguously signal" to parties that they are surrendering their right to pursue a judicial remedy renders such an agreement unenforceable. Id. at 448.

Here, there is nothing ambiguous about the Agreement's arbitration clause. Section 13 of the Agreement provides:

> (A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation in order to protect the confidentiality of their relationship and their respective businesses and affairs.
>
> . . . .
>
> (B) All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management or operations of the Company, or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be settled amicably by good faith discussion among all of the parties hereto, and, failing such amicable settlement, finally determined exclusively by binding arbitration in accordance with the procedures provided herein . . . All disputes arising with respect to any

> provision of this Agreement shall be fully subject to the terms of this arbitration clause.
>
> [(Emphasis added).]

Likewise, the arbitration clause in the Request to Bind is clear, applying to "any claims, disputes and/or controversies between the parties involving the Proposal or any part thereof (including but not limited to the Agreements and Policies) shall be resolved . . . exclusively by binding arbitration under the Federal Arbitration Act." Accordingly, the record supports the motion court's finding that the parties entered into agreements intending to resolve disputes through arbitration rather than the court.

Regarding their unconscionability claims, plaintiffs argue that the arbitration clause is substantively unconscionable due to plaintiffs' inability to negotiate its harsh and unfair terms. They also maintain that the Agreement's arbitration requirement is procedurally unconscionable because it is a contract of adhesion. Plaintiffs cite to both Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 189 N.J. 1, 15 (2006), cert. denied, Cnty. Bank v. Muhammad, 549 U.S. 1338, 127 S. Ct. 2032, 167 L.Ed. 2d 763 (2007), and Sparks v. St. Paul Ins. Co., 100 N.J. 325, 335 (1985), to argue that insurance contracts are contracts of adhesion with highly technical and difficult terms to understand, and consequently satisfy the requirement of procedural

unconscionability. Furthermore, plaintiffs maintain that the Agreement was presented to them on a "take-it-or-leave-it basis," while they were undergoing an "economic compulsion" to find a less expensive replacement insurance coverage for their workers' compensation policy.

A contract may be either procedurally or substantively unconscionable. The former arises out of defects in the process by which the contract was formed, and "can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting" at the time of agreement. Delta Funding Corp. v. Harris, 189 N.J. 28, 55 (2006) (quoting Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 564-65 (Ch. Div. 2002)). Substantive unconscionability "simply suggests the exchange of obligations so one-sided as to shock the court's conscience." Ibid. (quoting Sitogum, supra, 352 N.J. Super. at 564-65).

Whether a contract is an unenforceable contract of adhesion is fact sensitive. See Martindale, supra, 173 N.J. at 90. In making that determination, courts must look not only to the standardized nature of the contract, "but also to the subject matter of the contract, the parties' relative bargaining positions, the degree of economic compulsion motivating the

'adhering' party, and the public interests affected by the contract." Martindale, supra, 173 N.J. at 90. (quoting Rudbart v. N. Jersey Dist. Water Supply Comm'n., 127 N.J. 344, 356 cert. denied, 506 U.S. 871, 113 S. Ct. 203, 121 L. Ed. 2d 145 (1992)). A contract of adhesion is "presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except perhaps on a few particulars." Rudbart, supra, 127 N.J. at 353. However, a finding that a particular contract constituted a contract of adhesion, does not render the contract automatically void unless there is a determination that the "unilaterally-fixed terms" should be unenforceable "as a matter of policy." Id. at 354.

We agree with the motion court's determination that the plaintiffs are sophisticated business entities who were not obligated to contract with defendants instead of numerous other insurance companies providing the sought after coverage. Plaintiffs' concerns regarding the requirement that arbitration is to occur in the British Islands is disingenuous, given that the agreement allows the parties to agree to another location, and defendants agreed[1] to arbitrate the matter in New Jersey as plaintiffs apparently desire.

[1] The modification was also in harmony with the Agreement's provision that "[a]ll disputes between the parties relating in any

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We, however, part company with the motion court's acceptance of defendants' offer to have a retired judge arbitrate instead of the Agreement's requirement that the panel of three arbitrators be "active or retired, disinterested officials of insurance or reinsurance companies not under the control or management of either party to this Agreement and will not have personal or financial interests in the result of the arbitration[.]" There is nothing offensive about the contractual provision here designating the pool of possible arbitrators. To enforce the defendants' unilateral change would essentially rewrite the terms of the parties' agreement.[2]

We next address plaintiffs' contention that the court, not the arbitrator, should decide whether the dispute is arbitrable given their challenge to the enforceability of the arbitration clause under Nebraska law. Plaintiffs take issue with the motion court's reliance on Milan which found support in Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). We disagree, finding guidance from both decisions.

(continued)
way to . . . the transactions contemplated herein shall be settled amicably by good faith discussion among all the parties hereto."

[2] We note that the Request to Bind provides for the selection of a single arbitrator in accordance with JAMS.

In Rent-A-Center, the Supreme Court "recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Rent-A-Ctr., supra, 561 U.S. at 70, 130 S. Ct. at 2777, 177 L. Ed. 2d at 411. In Milan, the Sixth Circuit held that the parties' agreement was "sufficiently clear and unambiguously manifested the parties' agreement to submit the question of arbitrability to arbitration." Milan, supra, 590 F. App'x at 485.

In this case, the arbitration clause set forth in the above-noted Section 13 of the Agreement is identical to the arbitration clause in Milan. See id. at 484. The language clearly and unmistakably sets forth the parties' decision to submit all disputes regarding execution, construction, enforceability, and breach of the Agreement to arbitration under the rules of the American Arbitration Association. See First Options of Chicago, Inc., supra, 514 U.S. at 944-45, 115 S. Ct. at 1924, 131 L. Ed. 2d at 994 (1995) (arbitrator decides question of arbitrability where there is "clear and unmistakable" evidence of the parties' intent to do so). We are therefore convinced that it was the parties' intent to submit the question of arbitrability to the arbitrator.

Lastly, given that Nebraska law applies to interpret the parties' agreements, plaintiffs contend that the trial court erred

in finding the arbitration clause is enforceable under Nebraska law. We disagree.

Neb. Rev. Stat. § 25-2602.01 provides, in relevant part, that:

> (b) A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly.
>
> . . . .
>
> (f) Subsection (b) of this section does not apply to:
>
> . . . .
>
> (4) Except as provided in section 44-811, any agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract.
>
> [(Emphasis added).]

Thus, under Nebraska law, an arbitration provision is not enforceable if it is revoked based on equitable grounds, or is part of an insurance policy agreement other than between insurance companies.

Again, we look to Milan for direction. As noted, there, the insurance agreement's arbitration provision was identical to the provision here, and was also governed by Nebraska law. Milan,

supra, 590 F. App'x at 485. The Sixth Circuit acknowledged that the arbitration agreement may be unenforceable under Nebraska law but that the parties expressly agreed to submit the question of enforceability to arbitration and the plaintiff did not claim the arbitration agreement was void based upon fraud or unconscionability. Id. at 486. Here, plaintiffs argue that the arbitration provision is unconscionable. Such equitable claim, however, is resolved by our conclusion above that the provision is not unconscionable. Thus, the parties' dispute must be resolved "by settlement negotiation and binding arbitration not by litigation." Ibid.

Affirmed in part, reversed in part, and remanded for the selection of an arbitration panel as set forth in this opinion.