

IN THE COURT OF APPEALS OF IOWA

No. 6-167 / 05-1147
Filed April 26, 2006

MBNA AMERICA BANK, N.A.,
Plaintiff-Appellant,

vs.

JON S. TACKLESON and
LESLIE J. TACKLESON,
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan,
Judge.

A bank appeals the district court's dismissal of its action seeking to
confirm an arbitration award. **REVERSED AND REMANDED.**

Charles L. Litow of Litow Law Office, P.C., Cedar Rapids, for appellant.

Jon S. Tackleson and Leslie J. Tackleson, Hiawatha, pro se.

Considered by Huitink, P.J., and Eisenhauer, J., and Schechtman, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206
(2005).

SCHECHTMAN, S.J.***I. Background Facts & Proceedings***

An arbitration award was entered by an arbitrator on March 9, 2005. The arbitration was conducted by the National Arbitration Forum (NAF) under its code of procedure. The award, in favor of MNBA America Bank, N.A., occurred after notice to the defendants based upon its claim for a credit card balance of \$8410.62. A copy of the award was promptly remitted to the defendants by NAF.

An application and motion by the creditor, pursuant to Iowa Code section 679A.11 (2005), was filed after personal service upon each of the defendants as provided by section 679A.15. The defendants did not appear or resist in the arbitration process, nor did either resist, answer, or file any application to vacate, modify or object, pursuant to sections 679A.12 or 679A.13, in district court.

The district court, on June 10, 2005, entered an order dismissing the credit card company's application and motion upon the grounds (1) there was no executed written agreement to submit the claim to arbitration, and (2) it constituted a contract of adhesion.

This appeal was taken by MBNA under section 679A.17(1)(c), which allows an appeal of "[a]n order . . . denying confirmation of an award." The creditor appellant contends it was an error at law to dismiss the action and to fail to confirm the arbitration award, under the circumstances. Again, the defendants have not chosen to appear and resist, nor have they filed a responsive brief.

II. Standard of Review

We review the order denying confirmation of an arbitration award for correction of errors at law. *Humphreys v. Joe Johnston Law Firm, P.C.*, 491 N.W.2d 513, 514 (Iowa 1992).

III. Merits

Iowa Code chapter 679A governs arbitration in Iowa. Arbitration is viewed favorably as an alternative to civil litigation. *Clinton Nat'l Bank v. Kirk Gross Co.*, 559 N.W.2d 282, 283 (Iowa 1997). Our law indulges every reasonable presumption in favor of the legality of arbitration awards. Judicial involvement is extremely limited. *\$99 Down Payment, Inc. v. Garard*, 592 N.W.2d 691, 694 (Iowa 1999). Accordingly, once an arbitration award is entered, either party may apply to the district court to confirm, vacate, or correct the award. *Id.*

Section 679A.11 provides:

Upon application of a party, the district court *shall* confirm an award, unless within the time limits imposed under sections 679A.12 and 679A.13 grounds are urged for vacating, modifying, or correcting the award, in which case the district court shall proceed as provided in sections 679A.12 and 679A.13.

(Emphasis added). The word “shall” in a statute is ordinarily construed as mandatory. *Gibson v. Winterset Cmty. Sch. Dist.*, 258 Iowa 440, 444, 138 N.W.2d 112, 115 (1966).

Thus, the court in *Garard*, 592 N.W.2d at 694, stated:

Iowa Code section 679A.11 clearly imposes a duty upon the district court to confirm an arbitration award upon application of a party unless a timely ground to vacate or correct the award has been filed. This duty is consistent within the limited judicial involvement in the arbitration process, and the presumption of legality afforded the arbitration process. Furthermore, if an

objection to the confirmation is made, the court has a duty to proceed under the vacation or correction statutes. Iowa Code § 679A.11. Thus, the court may deny confirmation of an arbitration award under the statute only if relief is granted under the accompanying vacation and correction statutes.

The defendants did not urge any grounds for vacation, modification, or correction. The application to confirm was in compliance with the personal service provisions of section 679A.15. The order was not entered until more than ninety days after delivery of a copy of the award to the applicant. See Iowa Code §§ 679A.12(3), 679A.13(1).

The district court found that there was no executed written agreement to submit the credit card balance claim to arbitration. Section 679A.1(2) reads:

A provision in a written contract to submit to arbitration a future controversy arising between the parties is valid, enforceable, and irrevocable unless grounds exist at law or in equity for the revocation of the contract. This subsection shall not apply to the following:

- a. A contract of adhesion.
- b. A contract between employers and employees.
- c. Unless otherwise provided in a separate writing executed by all parties to the contract, any claim sounding in tort whether or not involving a breach of contract.

The arbitrator found that “[t]he parties entered into an agreement providing that the matter shall be resolved through binding arbitration” Attached to the motion to confirm was a credit card agreement wherein the applicants agree to those terms and conditions.

The Federal Truth in Lending Act provides that a credit card may not be issued except in response to a request or application by the card holder. 15 U.S.C. § 1642 (1970). The credit card agreement is a contract when the credit card is issued and subsequently used, though prepared by the issuer, without

input from the cardholder. *Gray v. American Express Co.*, 743 F.2d 10, 15 (D.C. Cir. 1984). By its nature, the agreement is a contract without the need for express execution, as the applicant agrees to its terms by his or her application for credit.

The use of credit cards, the “plastic money” of our universe, is prolific. Agreements like the subject credit card agreement are common place. Considering the limited judicial role in the arbitration process, any sua sponte dismissal must be done with restraint. See *Rush v. Sioux City*, 240 N.W.2d 431, 434 (Iowa 1976), *overruled on other grounds by Hoffert v. Luze*, 578 N.W.2d 681 (Iowa 1998).

The district court found the agreement to be a contract of adhesion. This is not a ground for refusing to confirm the arbitration award under sections 679A.12 or 679A.13. Similar to the circumstances in *Garard*, 592 N.W.2d at 695, the grounds raised by the district court were outside those enumerated in the statutes, not raised by any party, and not supported by any evidence.

IV. Disposition

The dismissal by the district court is reversed, and this matter is remanded to the district court to enter judgment in favor of plaintiff against the defendants, and each of them, in the sum of \$8410.62, with appropriate interest. All appellate court costs are assessed to the plaintiffs, as defendants did not affirmatively resist the application to confirm the arbitration award.

REVERSED AND REMANDED.