SECOND DIVISION
June 20, 2017

No. 1-16-0436

SG AMERICAS SECURITIES, LLC and NEWEDGE USA, LLC, Petitioners-Appellees, v. AC SCOUT TRADING, LLC, Respondent-Appellant.	)	Appeal from the Circuit Court of Cook County No. 15 CH 10290 The Honorable Franklin U. Valderrama, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's orders staying the arbitrations of petitioner's claims are reversed.

¶ 2 Respondent filed a claim before the Financial Industry Regulatory Authority (FINRA) against petitioner alleging that petitioner was liable for approximately $27 million in losses for its role in a failed hedging strategy involving tin future trades made on the London Metal Exchange (LME). Petitioner brought this action in the circuit court to stay the FINRA arbitration proceeding. While the petition to stay was pending, respondent initiated a second arbitration before the LME, seeking to arbitrate the same claims as those pending before FINRA. Petitioner filed a supplemental petition in the circuit court to stay arbitration before the LME. The circuit court granted both petitions to stay the arbitrations. Respondent appeals. For the following

reasons, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 In 2007, AC Scout Trading, LLC, a hedge fund subsidy and commodities trading company, and SG Americas Securities, LLC,[1] a commodity futures and securities brokerage firm, executed a Futures Account Agreement (Futures Agreement) whereby SG was authorized to act as a broker for AC Scout with respect to "commodity interests," including commodity futures and options contracts.[2] The Futures Agreement contains an arbitration provision that states in relevant part:

> "Every dispute between Customer and [SG] arising out of or relating to the making or performance of [the Futures] Agreement or any transaction pursuant to [the Futures] Agreement, shall be settled by arbitration in accordance with the rules, then in effect, of the National Futures Association, the contract market upon which the transaction giving rise to the claim was executed, or [FINRA][3] as Customer may elect."

¶ 5 In addition to the arbitration provision, the Futures Agreement also contained choice-of-law and forum-selection clauses, which provided that, in the event of a dispute regarding the making and performance of the Futures Agreement, or any transaction made pursuant to the Futures Agreement, Illinois law would apply, and that the venue for any proceedings would be Chicago, Illinois. Furthermore, the Futures Agreement provided that "any question relating to whether *** a dispute is within the scope of the [arbitration provision] *** shall be determined by a court ***."

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[1]The agreement was originally between AC Scout and Calyon Financial Inc. SG is the successor to Newedge USA, LLC, which was the successor to Calyon.

[2]SG's predecessor, Newedge, was registered with the U.S. Commodity Futures Trading Commission (CFTC), was a member of FINRA and the National Futures Association, and was a member of several major contract markets.

[3]At the time of the contract, the National Association of Securities Dealers was the self-regulatory organization for the securities industry, and is the predecessor to FINRA.

¶ 6 In 2009, AC Scout opened a sub-account with SG, and the sub-account was also governed by the Futures Agreement. AC Scout gave Ebullio Capital Management full, discretionary trading authority over the sub-account. From May 2009 to September 2009, Ebullio used AC Scout's sub-account with SG to trade tin futures contracts on the London Metals Exchange (LME). AC Scout asserts that it was unaware of Ebullio's actual trading strategy, that the LME had warned SG that Ebullio's strategy would fail, and that SG failed to inform AC Scout about the LME's warning. AC Scout further claims that in July 2009, Ebullio executed a trade pursuant to its hedging strategy that resulted in AC Scout sustaining substantial losses.

¶ 7 In May 2015, AC Scout filed a notice of claim and sought arbitration before FINRA, asserting that it incurred losses in tin futures contracts due to SG's (1) misrepresentations, fraud, and omissions (2) breach of FINRA rules, (3) breach of contract, (4) breach of implied covenant of good faith and fair dealing, and (5) negligence and gross negligence.

¶ 8 On July 2, 2015, SG filed a petition pursuant to section 2 of the Illinois Arbitration Act (710 ILCS 5/2) (West 2014)) seeking to stay the arbitration proceedings before FINRA on the grounds that AC Scout's claims were related to commodity futures transactions and not securities transaction or trades related to SG's investment banking activities, and therefore were not arbitrable before FINRA.

¶ 9 While SG's petition was pending in the circuit court, on July 29, 2015, AC Scout filed a Notice to Arbitrate with the LME, seeking to arbitrate the same claims pending before FINRA. SG filed a supplemental petition in the circuit court seeking to stay the arbitration proceedings before the LME on the grounds that the LME was not a "contract market" under the arbitration provision.

¶ 10 After briefing and oral argument, the circuit court entered written orders on January 28, 2016, granting both of SG's petitions to stay. In addressing SG's petition to stay the FINRA arbitration, the circuit court acknowledged that there is a presumption in favor of arbitrability where the parties have agreed to arbitrate, but the circuit court found that based on the language of the Futures Agreement, it was for the circuit court to decide whether the claims were arbitrable "because it pertains to whether the dispute is within the scope of the [arbitration provision]." The circuit court also observed that parties to an arbitration provision are bound to arbitrate only those issues that they have agreed to arbitrate. See *QuickClick Loans, LLC v. Russell*, 407 Ill. App. 3d 46 (2011). The circuit court found that the arbitration provision requires that disputes be "settled by arbitration in accordance with the rules, then in effect" of the arbitral fora, and thus it was appropriate to look to FINRA Rule 12200 to determine whether AC Scout's claims were arbitrable before FINRA. The circuit court observed that FINRA Rule 12200, entitled "Arbitration Under an Arbitration Agreement or the Rules of FINRA," states:

> "Parties must arbitrate a dispute under the Code if:
>
> - Arbitration under the Code is either:
>
> (1) Required by a written agreement, or
>
> (2) Requested by the customer;
> - The dispute is between a customer and a member or associated person of a member; and
> - The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company."

Relying on federal caselaw, the circuit court found that AC Scout did not meet the definition of a "customer" under FINRA Rule 12200 because it did not purchase commodities or services from SG in the course of SG's FINRA-regulated business activities, namely securities and investment banking. See *Goldman Sachs & Co. v. City of Reno*, 747 F.3d 733, 739-41 (9th Cir. 2014). The circuit court further found that commodity futures are not within SG's securities or investment banking activities, and that the futures contracts at issue here were subject to the regulations of the National Futures Association. Therefore, the circuit court found that AC Scout's claims were not arbitrable by FINRA, and granted SG's petition to stay the FINRA arbitration.

¶ 11 In a separate written order, the circuit court addressed SG's supplemental petition to stay the LME arbitration. The circuit court again found that it had authority to decide the issue of arbitrability of AC Scout's claims before the LME. The circuit court rejected AC Scout's arguments that the LME meets the definition of "the contract market upon which the transaction giving rise to the claim was executed," since the term "contract market" is defined as a U.S. commodity futures exchange that has been designated as a contract market by the Commodities Futures Trading Commission (CFTC). The CFTC publishes a list of all contract markets, and the LME is not included on that list. Under the CFTC definitions, the LME is a "foreign board of trade," and was not contemplated by the parties to be included within the arbitration provision. Despite AC Scout's arguments that "contract market" must be given its plain and ordinary meaning, the circuit court found that contract terms should be interpreted in accordance with the custom and usage of those particular terms used in the trade or industry of the parties. *Intersport, Inc. v. NCAA*, 381 Ill. App. 3d 312, 319 (2008). Therefore, the circuit court found that AC Scout's claims were not arbitrable by the LME, and granted SG's supplemental petition to stay the LME arbitration.

¶ 12 On February 19, 2016, AC Scout filed a notice of interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Jan. 1, 2016). On February 25, 2016, SG filed a motion in the circuit court seeking an order confirming that the two January 28, 2016, orders were final orders. On February 29, 2016, SG filed a motion in this court to dismiss AC Scout's appeal, arguing that the notice of appeal was defective because it was filed as an interlocutory appeal rather than an appeal from final orders, and the notice of appeal was premature because of the pending postjudgment motion in the circuit court. AC Scout filed a response to the motion, and on March 2, 2016, we entered an order taking the motion with the case. According to AC Scout's reply brief filed on March 8, 2016, SG withdrew the postjudgment motion in the circuit court.

¶ 13 JURISDICTION

¶ 14 We first address SG's motion to dismiss the appeal, since it bears directly on our jurisdiction. The parties disagree on whether the orders granting SG's motions were interlocutory orders or final orders. SG argues that the January 28, 2016, orders were final and appealable, and thus governed by Supreme Court Rule 303(a), since they disposed of all issues pending before the circuit court and left nothing to be decided. Ill. S. Ct. Rule 303(a) (eff. Jan.1, 2015). See *Universal Underwriters Insurance Co. v. Judge & James, Ltd.*, 372 Ill. App. 3d 372, 380-81 (2007). SG argues that the notice of appeal inaccurately characterized the orders as injunctive, which unfairly reduced the time in which to file its appellee's brief to seven days. Furthermore, SG argues that because it filed a timely-filed postjudgment motion in the circuit court, AC Scout's notice of appeal was premature and ineffective until the entry of an order disposing of the postjudgment motion. See Ill. S. Ct. R. 303(a)(2) (eff. Jan. 1, 2015).

¶ 15 AC Scout responds that the orders were injunctive in nature, and thus immediately appealable pursuant to Supreme Court Rule 307(a)(1) (eff. Jan. 1, 2016). See *Robert A. Besner &*

Co. v. Lit America, Inc., 214 Ill. App. 3d 619, 622-23 (1991) ("Orders to compel or stay arbitration are considered as interlocutory orders because they are injunctive in nature."). AC Scout further argues that invoking the wrong jurisdictional rule does not deprive us of jurisdiction since there is at least one rule that provides us with jurisdiction over the appeal. *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 31. Finally, AC Scout argues that SG's postjudgment motion does not require dismissal of its appeal, and that the motion was not "directed at the judgment," and thus not a proper postjudgment motion.

¶ 16 We agree with AC Scout that we have jurisdiction over this appeal, and we deny SG's motion to dismiss. Both parties present valid arguments regarding the nature of the January 28, 2016, orders. On the one hand, the orders granted all of the relief requested by SG because both orders resolved all of the issues raised in the motions to stay the arbitrations. On the other hand, the orders granted SG the injunctive relief it sought in the form of a stay. Under the circumstances here, the orders were injunctive in nature because they stayed the FINRA and LME arbitrations (see *Robert A. Besner*, 214 Ill. App. 3d at 622-23), and thus we have jurisdiction pursuant to Rule 307(a)(1). Regardless, SG's arguments for dismissal lack merit because a timely-filed notice of appeal invokes our jurisdiction even if the notice of appeal cites the wrong rule (*O'Banner*, 173 Ill. 2d at 210), and the filing of a postjudgment motion does not invalidate a previously-filed timely notice of appeal, although the notice of appeal only becomes effective once the circuit court disposes of the postjudgment motion (Ill. S. Ct. R. 303(a)(2)). And, while SG claims that by filing a notice of appeal pursuant to Rule 307(a)(1), AC Scout limited the time for filing an appellee's brief, SG could have requested additional time, but instead timely filed its brief, which suggests that it suffered no prejudice. We see no basis for dismissing AC Scout's appeal, and therefore deny SG's motion to dismiss.

¶ 17 ANALYSIS

¶ 18 On appeal, AC Scout argues that the circuit court erred in granting SG's petition to stay the FINRA arbitration by (1) failing to apply the presumption of arbitrability, (2) applying FINRA Rule 12200, (3) finding that AC Scout was not SG's customer for the purposes of FINRA Rule 12200, and (4) finding that futures contracts are not included in SG's FINRA-regulated business activities. AC Scout also argues that the circuit court erred in granting SG's supplemental petition to stay the LME arbitration by (1) failing to apply the presumption of arbitrability, (2) finding that the LME does not qualify as a "contract market" under the arbitration provision, and (3) improperly limiting AC Scout to a single arbitral forum.

¶ 19 SG's motions to stay raise legal questions regarding the interpretation and construction of the Futures Agreement and the arbitration provision, and therefore our review is *de novo*. *Brown v. Delfre*, 2012 IL App (2d) 111086, ¶ 11.

¶ 20 AC Scout first argues that the circuit court erred as a matter of law by failing to apply the presumption of arbitrability which applies when parties dispute the scope of an arbitration provision. AC Scout contends that the circuit court incorrectly framed the issue as whether the parties had an agreement to arbitrate AC Scout's claims. AC Scout argues that there was no dispute that the parties had an agreement to arbitrate, and therefore the circuit court committed reversible error by refusing to apply the presumption of arbitrability.

¶ 21 SG does not dispute the existence or validity of the arbitration provision. Instead, it argues that the presumption of arbitrability was rebutted by the terms of the arbitration provision, which expressly incorporated the rules of the artribal fora. SG contends that FINRA Rule 12200 requires that a dispute be between a FINRA member (SG) and a customer arise in connection with the business activities of the FINRA member. SG argues that AC Scout was not a

"customer" under federal law because the futures trades on the LME were not within SG's FINRA-regulated securities or investment banking activities.

¶ 22 The presumption of arbitrability applies when the parties disagree over whether a particular dispute falls within an arbitration provision. The United States Supreme Court has held that:

> "[W]here [a] contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate [a] 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. Doubts should be resolved in favor of coverage.' " *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) (quoting *United States Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

¶ 23 The circuit court acknowledged the existence of the presumption of arbitrability, but relied on *Board of Governors of State Colleges & Universities v. Illinois Educational Labor Relations Board*, 170 Ill. App. 3d 463, 471 (1988) to find that "a party cannot be forced to arbitrate a matter which he has not agreed is subject to arbitration." The circuit court then held that the presumption of arbitrability does not apply here since the parties do not agree on whether AC Scout's claims are arbitrable before FINRA or the LME. The circuit court proceeded to examine whether the dispute falls within the scope of the arbitration provision without any presumption in favor of arbitration.

¶ 24 In *Board of Governors*, we addressed whether there was an agreement to arbitrate grievances related to discharges of union employees. The collective bargaining agreement (CBA) between the parties provided for such arbitration, but the CBA also expressly incorporated

certain civil service rules that provided an alternative forum for determining whether cause existed, since discharge could only be for cause. *Board of Governors*, 170 Ill. App. 3d at 470. We resolved the issue by examining the plain language of the CBA and found that the civil service rules applied "only except as otherwise provided" in the CBA. *Id.* at 471. Our finding was supported by the presumption of arbitrability, since "[i]n cases of doubt, courts should decide in favor of arbitration." *Id.* Furthermore, "in order to exclude a matter from the grievance arbitration process, the [CBA] must specifically state the matter is not grievable." *Id.* We then noted that "a party cannot be forced to arbitrate a matter which he has not agreed is subject to arbitration." *Id.*

¶ 25 We agree with AC Scout that the circuit court erred in not applying the presumption of arbitrability. Here, the plain language of the arbitration provision states that "[*e*]*very dispute* between Customer and [SG] arising out of or relating to *** any transaction pursuant to [the Futures Agreement], *shall be settled by arbitration* in accordance with the rules, then in effect, of the [arbitral fora] *** as Customer may elect." (Emphases added.) The plain language of the arbitration provision clearly and unequivocally states that all disputes related to transactions shall be settled by arbitration. This is a broad agreement with no identified exceptions. SG makes no argument that AC Scout's claims are not the type of claims the parties agreed to arbitrate, but instead argues the claims may not be arbitrated in the particular forum selected by AC Scout: FINRA. Whether the claims are arbitrable in a particular forum is a distinct question from whether the parties had an agreement to arbitrate. We find that the parties had an arbitration provision that encompasses AC Scout's claims. Therefore, the circuit court should have applied the presumption of arbitrability.

¶ 26 SG argues that the presumption was rebutted because the arbitration provision expressly

incorporated the rules of FINRA, the arbitral forum. We disagree.

¶ 27 Arbitration contracts are interpreted in the same manner and according to the same rules as are all other contracts. *State Farm Fire & Casualty Co. v. Watts Regulator Co.*, 2016 IL App (2d) 160275, ¶ 27 (citing *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 669 (1983)). "The primary objective in construing a contract is to give effect to the intent of the parties." *Gallagher v. Lenart,* 226 Ill. 2d 208, 232 (2007). "A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent." *Id.* "The intent of the parties is not to be gathered from detached portions of a contract or from any clause or provision standing by itself." *Id.* (citing *Martindell v. Lake Shore National Bank,* 15 Ill. 2d 272, 283 (1958)). In order to overcome the presumption of arbitrability, SG must demonstrate with "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies*, 475 U.S. at 650.

¶ 28 SG argues that the rules of the arbitral fora were incorporated into the parties' arbitration provision, which states: "[e]very dispute between Customer and [SG] arising out of or relating to *** any transaction pursuant to [the Futures Agreement], shall be settled by arbitration *in accordance with the rules, then in effect, of the [arbitral fora]* *** as Customer may elect." (Emphasis added.) A plain reading of the arbitration provision suggests that "in accordance with the rules" relates to the phrase "shall be settled by arbitration," meaning that all disputes are to be settled by arbitration, and that the arbitration will be conducted in accordance with the rules of the arbitral forum. We see nothing in this language that evinces a clear intent to incorporate the rules of the arbitration fora into the arbitration provision as substantive conditions expanding or limiting the arbitrability of any particular claim in any particular forum. This is especially true

where, given the presumption of arbitrability, "positive assurance" is needed in order to find the dispute is not arbitrable under parties' agreement, and doubts should be resolved in favor of arbitration. *AT&T Technologies*, 475 U.S. at 650. SG, as the drafter of the Futures Agreement, could have set forth specific restrictions on which types of claims were arbitrable in each of the three listed arbitral fora, but they did not. Therefore, under the plain terms of the arbitration provision, AC Scout was free to elect any fora identified in the arbitration provision, provided that its claim arose out of a transaction pursuant to the Futures Agreement. Therefore, the circuit court erred in granting SG's petition to stay the FINRA arbitration.

¶ 29 We also reject SG's argument that FINRA is limited to hearing disputes that satisfy Rule 12200. The Second Circuit Court of Appeals has repeatedly held that FINRA's arbitration rules may be overridden by specific contractual terms. *Credit Suisse Securities (USA) LLC v. Tracy*, 812 F.3d 249, 254 (2d Cir. 2016) (citing *In re American Express Financial Advisors Securities Litigation*, 672 F.3d 113, 132 (2d Cir. 2011) (finding that "different or additional contractual arrangements for arbitration can supersede the rights conferred on [a] customer by virtue of [a] broker's membership in a self-regulating organization such as [FINRA].")) SG cites several cases in which courts have examined whether a party seeking arbitration before FINRA meets the definition of "customer" for the purposes of FINRA Rule 12200, but none of those cases involve a situation where the parties had an express agreement to arbitrate and they agree that there are three possible fora where the arbitration may be held, including FINRA, as is the case here. See, *e.g.*, *Citigroup Global Markets Inc. v. Abbar*, 761 F.3d 268, 274 (2d Cir. 2014) (finding that FINRA arbitration was only available in the absence of a written arbitration provision if Abbar met the definition of a "customer" for purposes of FINRA Rule 12200); see also *Morgan Keegan & Co., Inc. v. Silverman*, 706 F.3d 562, 567 (4th Cir. 2013) (same). Here,

the circuit court did not have the authority under this agreement to decide whether FINRA would be a proper forum to arbitrate. Therefore, we find that the parties specifically agreed to arbitrate disputes before FINRA. If petitioner has a jurisdictional objection to FINRA hearing this claim, it is for FINRA to decide whether it will arbitrate AC Scout's claims,[4] and the circuit court should not have considered FINRA Rule 12200 and determined that AC Scout could not bring it claim before FINRA, as clearly provided for under the parties' agreement.

¶ 30 Next, AC Scout argues that the circuit court erred in granting SG's supplemental petition to stay the LME arbitration. AC Scout argues that its claims are arbitrable before the LME because the LME qualifies as a "contract market" for the purposes of the Arbitration provision.

¶ 31 SG argues that AC Scout's claims are not arbitrable at the LME because "contract market" as used in the arbitration provision is limited to a U.S. commodity futures exchange that has been designated as a contract market by the CFTC. SG argues that the "Applicable Rules and Regulations" provision of Futures Agreement incorporated by reference the CFTC's regulations which define a contract market.

¶ 32 The "Applicable Rules and Regulations" provision of the Futures Agreement states:

> "The Account and each transaction therein shall be subject to the terms of this Agreement and to (a) all applicable laws and the regulations, rules and orders (collectively "regulations") of all regulatory and self-regulatory organizations having jurisdiction and (b) the constitution, by-laws, rules, regulations, orders, resolutions, interpretations and customs and usages (collectively "rules") of the market and any associated clearing organization or clearing house (each an "exchange") on or subject to

[4]Furthermore, FINRA Rule 12203 provides that "[t]he Director may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purpose of FINRA, and the intent of the Code, the subject matter of the dispute is inappropriate ***."

the rules of which transaction is executed and/or cleared."

¶ 33 Again, the plain language of this provision does not expressly incorporate the CFTC's definition of "contract market," such that the parties intended to be bound by it for the purposes of the arbitration provision. Despite SG's arguments regarding the technical and legal definition of a "contract market," there is no dispute that AC Scout's claims arose out of transactions made pursuant to the Futures Agreement, that those transactions took place on the LME, that the parties broadly agreed to arbitrate all of their disputes, and that "the contract market upon which the transaction giving rise to the claim was executed" was an arbitral forum that AC Scout could elect. SG makes no argument that the futures traded from the sub-account on the LME was not permitted, or that the parties did not intend for the Futures Agreement and arbitration provision to apply to disputes arising from transactions conducted from the sub-account. Simply put, we see nothing in the Futures Agreement that can reasonably be read as limiting AC Scout's ability to arbitrate its disputes on the LME. Again, if there are grounds for SG to argue that LME cannot or should not arbitrate this dispute, it can bring those arguments to the LME and the LME will presumably rule on that issue. Otherwise, the arbitration provision that the parties agreed to calls for three arbitral fora, and if one of those fora is inappropriate, the forum will so decide. Therefore, we find that the circuit court erred in granting SG's supplemental petition to stay the LME arbitration.

¶ 34 CONCLUSION

¶ 35 The circuit court erred in granting SG's petition to stay arbitration before FINRA, and also erred in granting SG's supplemental petition to stay arbitration before the LME. The circuit court should have applied the presumption in favor of arbitration in order to give effect to the

agreement of the parties, which provided for arbitration of all claims arising out of transactions pursuant to the Futures Agreement, without limitation, in one of three arbitral fora.

¶ 36 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County, and remand to the circuit court for further proceedings consistent with this order.

¶ 37 Reversed and remanded.