Circuit Court for Baltimore City
Case No. 24-C-18-005123

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3333

September Term, 2018

MAYOR AND CITY COUNCIL OF BALTIMORE

v.

TRANSDEV NORTH AMERICA, ET AL.

Fader, C.J.,
Friedman,
Gould,

JJ.

Opinion by Fader, C.J.

Filed: March 3, 2020

We are asked to determine whether the Circuit Court for Baltimore City erred in compelling arbitration of a dispute between the Mayor and City Council of Baltimore (the "City"), the appellant, and Transdev Services ("Transdev"), the appellee.[1] The City and Transdev contracted for Transdev to operate the Charm City Circulator bus service in Baltimore. The City later alleged that Transdev overbilled it by millions of dollars and filed a lawsuit alleging breach of contract. Transdev denied any overbilling, asserted that the City had breached by underpaying it, and sought to compel arbitration. The City argues that it cannot be compelled to arbitrate because the arbitration provision in the parties' contract is unenforceable and, in any event, does not apply to the City's claims. The circuit court disagreed, as do we. Accordingly, we will affirm.

BACKGROUND

The Arbitration Provision

The arbitration provision at the center of this dispute, Article XXXII of the parties' contract, provides:

> XXXII. **DISPUTES**
>
> Any dispute concerning a question of fact or law arising under or related to this Agreement that is not disposed of by agreement shall be submitted by [Transdev] in writing to the City. Thereafter, the Parties shall have forty-five (45) days to reach an agreed resolution of the dispute. In the event no agreement is reached, the decision of the City shall be the final decision,

[1] At the time of contracting, Transdev was known as Veolia Transportation Services. For simplicity, we refer to the company as Transdev throughout this opinion and substitute "Transdev" for "Veolia" when quoting the parties' contract.

Transdev's parent company, Transdev North America, was not a party to the contract but is the first-named defendant in this lawsuit. The distinction between the two entities is not important for purposes of resolving the issues presented in this appeal. Therefore, again for simplicity, we refer to the defendants collectively as Transdev.

> unless, within forty-five (45) days the matter is referred to arbitration. Either party may submit the matter to arbitration by doing so in writing within the forty-five (45) day period above specified. . . . The decision of the arbitrator shall be final and binding and the cost of the arbitration shall be borne by the losing party. Not withstanding [sic] any disagreement, [Transdev] shall proceed during the pendency of any appeal with the services in accordance with the City's decision.

The Dispute

In 2009, the City entered into a contract with Transdev to operate a free shuttle bus service ("the Circulator") in Baltimore City. The contract provided that Transdev would be compensated for each "Revenue Service Hour," which the contract defined as "any sixty minute increment of time a vehicle is available for passenger transport within the pre-established schedules approved by the City." The definition of Revenue Service Hour specifically "exclude[ed] deadhead time, any meal breaks, service breaks, mechanical breakdowns and time a vehicle is down due to a preventable accident."

In early 2018, a consultant reported to the City that Transdev had overbilled the City by more than $2 million over the previous two years by invoicing the City for hours in which the Circulator was scheduled to operate, rather than Revenue Service Hours in which the buses actually operated. In a series of written correspondence that is not contained in the record, but which the parties have described: (1) in March 2018, the City contacted Transdev about the discrepancy; (2) in April, Transdev acknowledged that it had invoiced the City based on scheduled hours, but asserted that it did so properly based on an oral modification to the contract agreed to by unidentified City representatives; (3) in June, the City Purchasing Agent rejected Transdev's justification, asserted that the contract could not be amended orally, and stated that Transdev had overbilled the City by more than $2

million; and (4) in August, the City Purchasing Agent demanded that Transdev compensate the City for the overbilling by paying $2,212,412.74 within 30 calendar days.

On August 17, 2018, in a letter that is in the record, Transdev acknowledged that it had been invoicing the City for scheduled hours rather than Revenue Service Hours since 2010. However, Transdev insisted that the alleged oral modification permitted this practice. Indeed, Transdev contended that it was the City that actually had breached the contract by "refus[ing] to pay $4,591,048 that is currently due and owed to Transdev under the Contract." Transdev stated that it would "take all necessary action to preserve its rights both at law and in equity, including, but not limited to, filing a lawsuit."

The Procedural History

On September 12, 2018, the City beat Transdev to the punch by initiating this lawsuit. The City's complaint alleged that Transdev had breached the contract by overbilling it by at least $16 million since 2010. On October 1, Transdev filed a demand for arbitration with the American Arbitration Association. The City then petitioned the circuit court to stay arbitration and Transdev responded by moving to compel arbitration and to dismiss the City's complaint. After a hearing, the circuit court held that the arbitration clause of the parties' contract was mutually binding and that it applied to "any dispute" arising under the agreement. Accordingly, the court granted Transdev's motion, denied the City's petition, dismissed the complaint, and ordered the parties to "proceed to arbitration." The City timely appealed.

DISCUSSION

Because "[a]rbitration . . . is a matter of consent, not coercion," *Volt Info. Scis. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989), to confer jurisdiction upon the arbitrators, courts must decide the "threshold issue" of "whether or not the parties ever reached [ ] an agreement" to arbitrate, *Balt. County Fraternal Order of Police Lodge No. 4 v. Balt. County*, 429 Md. 533, 549 (2012) ("*Fraternal Order of Police*") (quoting *Stephen L. Messersmith, Inc. v. Barclay Townhouse Assocs.*, 313 Md. 652, 660 (1988) ("*Messersmith*")); *see also Allstate Ins. v. Stinebaugh*, 374 Md. 631, 645 (2003) ("[A]bsent an arbitration agreement between the parties, an arbitration panel cannot validly assert jurisdiction to decide a dispute between them." (quoting *Messersmith*, 313 Md. at 658)). Thus, "when . . . the parties are in dispute as to whether the arbitration provision is enforceable, the resolution of that issue is for the court." *Bloch v. Bloch*, 115 Md. App. 368, 374-75 (1997). "The trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, which we review *de novo*." *Walther v. Sovereign Bank*, 386 Md. 412, 422 (2005). The court's interpretation of the arbitration agreement, "including the determination of whether [the] contract is ambiguous, is a question of law," which we likewise "review *de novo*." *Ocean Petrol. Co. v. Yanek*, 416 Md. 74, 86 (2010) (quoting *Clancy v. King*, 405 Md. 541, 556-57 (2008)).

I. THE ARBITRATION PROVISION IS MUTUAL, ENFORCEABLE, AND NOT CATEGORICALLY INAPPLICABLE TO THE PARTIES' DISPUTE.

A. We Review Arbitration Agreements to Determine Whether There Is an Agreement to Arbitrate the Dispute at Issue.

"When confronted with a petition to compel or to stay arbitration, trial courts are to consider 'but one thing—is there in existence an agreement to arbitrate the dispute sought to be arbitrated?'" *Gannett Fleming, Inc. v. Corman Constr.*, 243 Md. App. 376, 390 (2019) (quoting *Stauffer Constr. Co. v. Bd. of Educ.*, 54 Md. App. 658, 665 (1983)). In answering that question, a court must rely "on contract principles since arbitration is a matter of contract." *Walther*, 386 Md. at 425 (quoting *Cheek v. United Healthcare of Mid-Atl.*, 378 Md. 139, 147 (2003)). The "fundamental principle of contract interpretation is to ascertain and effectuate the intention of the parties." *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 290 (1996), *aff'd*, 346 Md. 122 (1997). We view that intention objectively, meaning that we consider not "what the parties may have subjectively intended . . . at the time of formation," *Cochran v. Norkunas*, 398 Md. 1, 16 (2007), but rather "what a reasonable person in the position of the parties would have thought [the contract] meant," *id.* at 17 (quoting *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985)). So long as "the clear language of [the] contract is unambiguous," we must "give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used." *John L. Mattingly Constr. Co. v. Hartford Underwriters Ins.*, 415 Md. 313, 326 (2010) ("*Mattingly*") (quoting *Sy-Lene of Wash., Inc. v. Starwood Urban Retail II, LLC*, 376 Md. 157, 167 (2003)). Relevant context "includes not only the text of the entire contract but also the contract's character, purpose, and 'the

facts and circumstances of the parties at the time of execution.'" *Yanek*, 416 Md. at 88 (quoting *Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 388 (1985)).

"When interpreting an arbitration clause, as when interpreting any contract provision, the agreement must be considered as a whole." *NSC Contractors, Inc. v. Borders*, 317 Md. 394, 403 (1989); *see Laurel Race Course v. Regal Constr. Co.*, 274 Md. 142, 153 (1975) ("[T]he intention of the parties to an agreement must be garnered from the terms considered as a whole, and not from the clauses considered separately."). "[I]f reasonably possible, effect must be given to each clause," *Cochran*, 398 Md. at 17 (quoting *Sagner v. Glenangus Farms*, 234 Md. 156, 167 (1964)), and we must not "cast[] out or disregard[] a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed," *Yanek*, 416 Md. at 90 (quoting *Clancy*, 405 Md. at 557). We must "avoid interpreting contracts so as to nullify their express terms." *Yanek*, 416 Md. at 90 (quoting *Calomiris v. Woods*, 353 Md. 425, 441 (1999)).

If the contract is ambiguous—that is, "if, to a reasonable person, the language used is susceptible of more than one meaning or is of doubtful meaning," *Cochran*, 398 Md. at 17—then we "must consider any extrinsic evidence which sheds light on the intentions of the parties at the time of the execution of the contract." *Mattingly*, 415 Md. at 327 (quoting *Sy-Lene of Wash.*, 376 Md. at 167-68). Such evidence may include "the negotiations of the parties, the circumstances surrounding execution of the contract, the parties' own construction of the contract[,] and the conduct of the parties." *Della Ratta, Inc. v. Am. Better Cmty. Devs.*, 38 Md. App. 119, 130 (1977). Any "extrinsic evidence admitted must help interpret the ambiguous language and not be used to contradict other, unambiguous

language in the contract." *Calomiris*, 353 Md. at 441. "The court may construe an ambiguous contract if there is no factual dispute," but "[i]f the extrinsic evidence presents disputed factual issues, construction of the ambiguous contract is for" the fact-finder.[2] *Pac. Indem. Co.*, 302 Md. at 389; *see Della Ratta*, 38 Md. App. at 130.

B. The Arbitration Provision Is Supported by Mutual Consideration.

The City contends that the arbitration provision is unenforceable because it "lacks mutual consideration." *See Gannett Fleming*, 243 Md. App. at 392 ("[A] promise to submit disputes to arbitration may be unenforceable for lack of consideration." (citing *Cheek*, 378 Md. at 147)). Specifically, the City interprets Article XXXII to "contemplate[] arbitration only of *Transdev's* claims." Transdev responds that Article XXXII, by its plain terms, "covers '[a]ny dispute' and allows '[e]ither party' to compel arbitration." (emphasis removed). The circuit court agreed with Transdev, and so do we.

We begin our analysis, as always, with the contract language. The first sentence of Article XXXII provides: "Any dispute concerning a question of fact or law arising under or related to this Agreement that is not disposed of by agreement shall be submitted by [Transdev] in writing to the City." The second sentence provides that after Transdev has submitted a dispute for resolution, the parties have "forty-five (45) days to reach an agreed resolution of the dispute." If they do not reach an agreement, then "the decision of the City

[2] In the context of arbitration, the fact-finder is the arbitrator, rather than a jury. Thus, "when the language of the arbitration clause is unclear as to whether the subject matter of the dispute falls within the scope of the arbitration agreement, . . . the question of substantive arbitrability initially should be left to the decision of the arbitrator, not the courts." *Gold Coast Mall v. Larmar Corp.*, 298 Md. 96, 105 (1983).

shall be the final decision, unless, within forty-five (45) days the matter is referred to arbitration." Notably, "[e]ither party may submit the matter to arbitration by doing so in writing within the forty-five (45) day period above specified," and the arbitrator's decision is "final and binding." Thus, with respect to the universe of disputes that are covered—a topic we address below—both parties have the right to demand arbitration, both are required to participate if demanded by the other, and both agree to be bound by the arbitrator's ruling. In short, the agreement binds both parties equally to arbitrate covered disputes.

In arguing to the contrary, the City relies heavily on *Cheek v. United Healthcare of the Mid-Atlantic*, 378 Md. 139, for the proposition that "a court cannot compel arbitration under Maryland law unless the governing contract contains a 'mutual promise to arbitrate.'" In *Cheek*, however, one party to the arbitration agreement had "reserve[d] the right to alter, amend, modify, or revoke the [arbitration] [p]olicy at its sole and absolute discretion at any time with or without notice." *Id.* at 148-49. The Court thus held that the party's "promise to arbitrate [was] illusory" and that the agreement was therefore unenforceable. *Id.* at 144; *see also Questar Builders v. CB Flooring*, 410 Md. 241, 272 (2009) ("[I]llusory contracts are unenforceable."); *Holloman v. Circuit City Stores*, 391 Md. 580, 590 (2006) ("Unless [an] obligation is binding, . . . the requisite consideration does not exist to support a legally enforceable agreement and it is considered illusory."). Here, by contrast, neither party has reserved the right to modify or revoke the arbitration provision in general or its applicability to that party in particular. *See Holloman*, 391 Md. at 592 (holding that a provision that could be modified or terminated by one party after 30

days' notice was enforceable because that party "d[id] not have unfettered discretion to alter or rescind the arbitration agreement without notice or consent").

Similarly inapposite are the federal cases on which the City relies. For example, in *Dan Ryan Builders v. Nelson*, 682 F.3d 327, 327 (4th Cir. 2012), the provision at issue purportedly bound both parties to arbitration, but then gave one the option to file a lawsuit instead. And in both *Noohi v. Toll Bros.*, 708 F.3d 599, 609-11 (4th Cir. 2013), and *Caire v. Conifer Value Based Care*, 982 F. Supp. 2d 582, 591 (D. Md. 2013), the disputes provisions were binding only on one party. In each of those cases, as in *Cheek*, the issue was mutuality with respect to the *obligation* to arbitrate, not mutuality with respect to the *scope* of the disputes subject to arbitration. Here, by contrast, the City's challenge relates to the scope of the disputes covered, and in particular, whether that scope includes disputes initiated by the City rather than by Transdev. Indeed, the City actually concedes that Article XXXII binds the City, as well as Transdev, to arbitrate disputes that fall within the scope of the provision.

Notably, Maryland courts have never "require[d] an exactly even exchange of identical rights and obligations between the two contracting parties before a contract will be deemed valid." *Walther*, 386 Md. at 433. That applies to arbitration provisions as well as to other contractual obligations. For example, in *Walther*, the Court of Appeals held enforceable an agreement that required the borrower to pursue arbitration but "allow[ed] [the lender] to litigate certain specific claims instead." *Id.* at 431-33. The Court held that "identical mutuality" was not required. *Id.* at 432-33.

Here, the parties' rights and obligations under Article XXXII are asymmetric, but nonetheless supported by mutual consideration. The City enjoys a privileged position under the clause in that its decision is made final with respect to any covered dispute unless that dispute is submitted to arbitration. But both parties are entitled to submit any covered dispute to arbitration (though, for obvious reasons, the incentive will nearly always be for Transdev to do so), both parties may be compelled to participate in an arbitration initiated by the other, and both are bound by the outcome of any such arbitration. Unlike *Cheek* and its progeny, therefore, both parties receive a benefit from the provision and the agreement to arbitrate covered disputes is mutually binding. The City's promise to arbitrate is thus not illusory, and Article XXXII is not void for lack of mutual consideration.[3]

[3] Although neither party raises the issue, and we need not resolve it in light of our holding that the arbitration agreement is mutually binding, we note that *Cheek*'s requirement that separate, mutual consideration be present within the arbitration clause itself may be subject to challenge based on the Supreme Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011). In *Concepcion*, the Supreme Court held that arbitration provisions may be invalidated by generally applicable state law contract defenses, "but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* Indeed, the Court has long held that the Federal Arbitration Act "preclude[s] States from singling out arbitration provisions for suspect status" and "requir[es] instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Following *Concepcion*, the United States Court of Appeals for the Fourth Circuit considered the ongoing viability of *Cheek* in *Noohi*, 708 F.3d 599. Although the court recognized that, "[i]n a basic sense, the *Cheek* rule does single out an arbitration provision in a larger contract," it nonetheless declined to disturb it, based primarily on federalism principles. *Id.* at 612. At least one other federal court seems to have taken a different approach. *See THI of N.M. at Hobbs Ctr. v. Patton*, 741 F.3d 1162, 1170 (10th Cir. 2014) (holding that a New Mexico rule requiring strict mutuality of promises to arbitrate was preempted by the FAA (citing *Concepcion*, 563 U.S. at 339)). That issue may yet need to be resolved by our Court of Appeals in an appropriate case.

C. The Arbitration Provision Does Not Clearly Exclude the Parties' Dispute.

To compel arbitration, it is not enough to conclude that Article XXXII is supported by mutual consideration. We must also determine whether the parties agreed to arbitrate "the dispute sought to be arbitrated." *Gannett Fleming*, 243 Md. App. at 390. The Court of Appeals has held that ambiguities regarding the scope of substantive arbitrability generally "should be left to the decision of the arbitrator, not the courts." *Gold Coast Mall v. Larmar Corp.*, 298 Md. 96, 105 (1983). "If it is apparent . . . that the issue sought to be arbitrated lies beyond the scope of the arbitration clause," however, then "the opposing party should not be compelled to arbitration, since there is no agreement to arbitrate." *Id.* at 104. Here, the City contends that the entire category of "City disputes" is excluded from the scope of Article XXXII and, therefore, the City cannot be compelled to arbitration. Because we disagree with the City's categorical assertion, we will affirm the circuit court's decision to compel arbitration. Any remaining issues relating to the interpretation of Article XXXII are for the arbitrator to resolve.

We return once again to the text of Article XXXII. The first sentence identifies the scope of covered disputes in very broad terms: "[a]ny dispute concerning a question of fact or law arising under or related to this Agreement that is not disposed of by agreement." It is difficult to imagine a broader statement of the scope of covered disputes. The same sentence then requires Transdev to submit any such dispute in writing to the City, which, per the next sentence, triggers a 45-day period "to reach an agreed resolution of the dispute." If that process is unsuccessful, then the City's decision on any dispute becomes

"the final decision, unless, within forty-five (45) days the matter is referred to arbitration" by "[e]ither party."

The Court of Appeals has characterized a provision "calling for the arbitration of any and all disputes arising out of the contract" as "a broad arbitration clause," *see Gold Coast Mall*, 298 Md. at 104, and also has held that "where the parties use a broad, all encompassing clause," courts should "presume[] they intended all matters to be arbitrated," *Crown Oil & Wax Co. of Del. v. Glen Constr. Co. of Va.*, 320 Md. 546, 558 (1990). In other words, when the arbitration provision is worded broadly, "[d]oubts should be resolved in favor of coverage." *Gannett Fleming*, 243 Md. App. at 401 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). Only when a broad arbitration provision "'expressly and specifically exclude[s]' the dispute" is the presumption in favor of arbitrability rebutted. *See Stinebaugh*, 374 Md. at 643 (quoting *Gold Coast Mall*, 298 Md. at 104).

Attempting to rebut that presumption, the City argues that Article XXXII could have been drafted even more broadly. The City cites form arbitration provisions made available by (1) the American Arbitration Association: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration . . . ." AAA, *AAA-ICDR® Clause Drafting*, https://www.adr.org/Clauses (last accessed Feb. 21, 2020); and (2) JAMS: "Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration . . . ." JAMS, *Alternative Dispute Resolution (ADR) Clauses*,

https://www.jamsadr.com/clauses/#Standard (last accessed Feb. 21, 2020). But those provisions do not differ from Article XXXII with respect to the scope of disputes that are subject to arbitration. As to scope, they are equally broad. Instead, they differ with respect to the default state of affairs if neither party invokes arbitration. Article XXXII establishes as the default resolution of any dispute that the City's position prevails, *unless* Transdev initiates the dispute resolution process and either party then elects to pursue arbitration. The AAA and JAMS provisions, by contrast, provide no such default, and mandate arbitration to provide a resolution.

One matter on which both parties and we are in full agreement is that Article XXXII is poorly drafted. But, despite its poor construction, the provision clearly encompasses "[a]ny dispute concerning a question of fact or law arising under or related to this Agreement." As such, "it is a broad arbitration clause." *Fraternal Order of Police*, 429 Md. at 555 (quoting *Gold Coast Mall*, 298 Md. at 104). The City's argument to the contrary is premised on Article XXXII's requirement that a covered dispute "shall be submitted by [Transdev] in writing to the City." The City reads that as a limitation that removes all disputes initiated by the City from the scope of covered disputes, leaving only disputes initiated by Transdev. Although the City contends that is the unambiguous "plain language" interpretation of the sentence, it is anything but. To the contrary, adopting the

City's interpretation would require us to suspend standard rules of grammar and sentence structure or rewrite the provision, which we will not do.[4]

At most, the City has identified a potential ambiguity in the sentence by pointing out the seeming oddity of a provision that requires Transdev to submit *any* dispute to the City, regardless of which party first raises the matter. How, the City asks, could the parties have intended to make Transdev responsible for giving the City notice of the City's claim? We think that the answer is revealed when the requirement is understood in context. Specifically, the agreement establishes that the City will have the final word on any contract issue unless and until Transdev initiates the dispute resolution process. *See* Article XXXII. In other words, if Transdev wants to preserve the possibility of having an independent arbiter resolve any dispute, rather than live with the City's decision, Transdev must provide the required notice. In light of that provision, "a reasonable person in the position of the parties," *Cochran*, 398 Md. at 17, would naturally anticipate that Transdev would be the party initiating the dispute resolution mechanism, regardless of whether it was advancing its own claim or defending against a claim made by the City.

[4] The circuit court expressed this point well, reasoning that if the construction of the provision advocated by the City were correct,

> Then the sentence should have said, "Any dispute by [Transdev] concerning a question of law or fact arising from and underneath this agreement that is not disposed of shall be submitted by [Transdev] in writing to the City." It doesn't say that. It says ["]any dispute concerning a question of fact arising under or related to this agreement that is not disposed of by agreement shall."]

We also observe that the City's interpretation of Article XXXII as addressing only "Transdev's disputes" relies on a strained and unnatural construction of the word "dispute." In ordinary English, disputes occur *between* or *with* parties, but they do not *belong* to one of them. *See, e.g., Yanek*, 416 Md. at 86 (courts "ascribe to the contract's language its 'customary, ordinary, and accepted meaning'" (quoting *Fister v. Allstate Life Ins.*, 366 Md. 201, 210 (2001))). Although each party can have its own claims, it is not generally possible for a single party to own a dispute. Stated simply, a dispute that is not shared is not a dispute at all. Here, the dispute concerns the proper means of calculating Transdev's compensation under the agreement. Under the City's view, Transdev overbilled it and owes it money; under Transdev's view, the City underpaid it (and continues to do so) and owes it money. That dispute is quintessentially bilateral, and the fact that the City may have raised the issue first bears no logical connection to whether it should be the subject of arbitration. It is, of course, our "duty . . . to construe a contract in such a way as to accomplish the intention of the parties, rather than to overthrow it by any strained construction." *Rogan v. Balt. & Ohio R.R.*, 188 Md. 44, 54-55 (1947).

The City's preferred reading of Article XXXII presents one additional complication worthy of mention. Were we to adopt that reading, we would need to conclude that the parties chose to establish a reasonably elaborate mechanism to resolve all disputes that might be raised by one party, while intending by their silence to exclude from that mechanism all disputes that might be raised by the other party. Especially in a section bearing the generic heading "DISPUTES," that seems to be a stretch. But it is an even greater stretch to conclude that the parties then decided not to provide any mechanism to

resolve disputes that might be raised by the second party, or even to acknowledge the possibility that such other disputes might exist. Such an interpretation strikes us as sufficiently unlikely to qualify as illogical.

Although inartfully drafted, when viewed in light of the agreement as a whole and as much context as the parties have provided,[5] we do not think Article XXXII is ambiguous.

[5] As context for the parties' agreement, Transdev has pointed us to three separate form agreements published on the City's website, of which we may take judicial notice under Rule 5-201. *Chesek v. Jones*, 406 Md. 446, 456 n.8 (2008). All three form agreements contain similar dispute resolution provisions. As an example, the City's form "Non-Construction Consultant Agreement," provides:

> The City shall in all cases, determine the amount or quantity, quality, and acceptability of the work and materials which are to be paid under this Agreement; shall decide all questions in relation to said work and the performance thereof, and; shall, in all cases, decide questions which may arise relative to the fulfillment of this Agreement or to the obligations of the Consultant thereunder. To prevent disputes and litigation where the Consultant is not satisfied with the decision of the City, the Consultant shall submit the claim to the head of the City agency (or his/her designee), who will decide any dispute between the Consultant and the City, and the head of the City agency's determination, decision and/or estimate shall be a condition precedent to the right of the Consultant to receive any monies under this Agreement, and is subject to review on the record by a court of competent jurisdiction.

Balt. City Law Dep't, *Standardized Non-Construction Consultant Agreement* ¶ 18.1 (2017), *available at* http://law.baltimorecity.gov/sites/default/files/New%20Standardized%20Non%20Construction%20Consultant%20Agreement.docx (last accessed Feb. 21, 2020). The disputes provisions in the other agreements follow the same basic structure, except that one of them does not mention judicial review. *See* Balt. City Law Dep't, *Standardized Right of Entry Agreement (Contractor)* ¶ 4.11 (2019), *available at* https://law.baltimorecity.gov/files/right-entry-agreement-contractor-32919docx (last accessed Feb. 21, 2020); Balt. City Law Dep't, *Standardized Provider Agreement* ¶ 18.1 (2017), *available at* http://law.baltimorecity.gov/sites/default/files/New%20Pilot%20Project%20-%20Standard%20Agreement.docx (last accessed Feb. 21, 2020).

We interpret that provision to cover what it says it covers: "[a]ny dispute concerning a question of fact or law arising under or related to this Agreement that is not disposed of by agreement." In any event, to the extent that the provision is ambiguous as applied to any particular dispute, "the task of defining [its] scope . . . is shifted to the arbitrator." *Gannett Fleming*, 243 Md. App. at 402 n.11 (citing *Gold Coast Mall*, 298 Md. at 107). Thus, apart from the timeliness of Transdev's demand for arbitration, which we address below, any remaining questions regarding whether this particular dispute is subject to arbitration are for the arbitrator to resolve. *See Gold Coast Mall*, 298 Md. at 105 ("[W]hen the language of the arbitration clause is unclear as to whether the subject matter of the dispute falls within the scope of the arbitration agreement, . . . the question of substantive arbitrability initially should be left to the decision of the arbitrator, not the courts."). The circuit court was correct to compel arbitration.

II. THE CITY WAIVED ITS OBJECTION TO THE TIMELINESS OF TRANSDEV'S DEMAND FOR ARBITRATION.

The City argues that Transdev cannot compel arbitration for the additional reason that it "did not demand arbitration until well after forty-five days after the dispute arose."

Those agreements bolster our interpretation of Article XXXII because, like Article XXXII, they broadly cover all disputes that may arise under the agreement; give the City the power to resolve all disputes unless the dispute resolution process is initiated; and require the contractor to begin the dispute resolution process by submitting any disagreement with an initial decision to a City official. As with Article XXXII, the contractor's obligation to submit disputes to the City appears to reflect that the City's decision is final if unchallenged, and does not imply any limitation on the scope of disputes covered by the provision.

We turn again to the relevant contract language, which provides that after Transdev has submitted a dispute in writing to the City:

> the Parties shall have forty-five (45) days to reach an agreed resolution of the dispute. In the event no agreement is reached, the decision of the City shall be the final decision, unless, within forty-five (45) days the matter is referred to arbitration. Either party may submit the matter to arbitration by doing so in writing within the forty-five (45) day period above specified.

The City asserts that Transdev "waive[d] its right to arbitration" by "fail[ing] to make a demand for arbitration within the time limits spelled out in the text of the agreement." *See Gannett Fleming*, 243 Md. App. at 394 (discussing *Frederick Contractors v. Bel Pre Med. Ctr.*, 274 Md. 307 (1975)). Transdev responds that the City waived that argument because it "never raised the issue of timeliness before the Circuit Court." Alternatively, Transdev contends that it did, in fact, file for arbitration within the 45-day period permitted by Article XXXII because it filed its arbitration demand exactly 45 days after it first submitted the dispute in writing to the City by way of its August 18, 2018 letter. We agree that the City waived its timeliness objection. Accordingly, we need not reach Transdev's alternative argument.

The parties' "consent to the personal jurisdiction of the [arbitrator]" is "implicit in [the] agreement[] to arbitrate," *see Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982), such that "absent an arbitration agreement between the parties, an arbitration panel cannot validly assert jurisdiction to decide a dispute between them," *Stinebaugh*, 374 Md. at 645 (quoting *Messersmith*, 313 Md. at 658). "[B]ecause the existence of an agreement to arbitrate is conditioned on the making of a timely demand," however, "in the absence of a timely demand, there is no agreement to

arbitrate," and therefore, no basis upon which the arbitrator may exercise jurisdiction. *Stinebaugh*, 374 Md. at 646 (quoting *Town of Chesapeake Beach v. Pessoa Constr. Co.*, 330 Md. 744, 748 (1993)). That is why the Court of Appeals "consistently [has] held that timeliness of the demand for arbitration is for the courts and not the arbitrators." *Stinebaugh*, 374 Md. at 646 (quoting *Pessoa Constr. Co.*, 330 Md. at 747-48).

Nevertheless, "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Lewis v. State*, 229 Md. App. 86, 103 (2016) (quoting *Ins. Corp. of Ireland*, 456 U.S. at 703), *aff'd*, 452 Md. 663 (2017); *see also Burnside v. Wong*, 412 Md. 180, 195 (2010) ("The defense of lack of personal jurisdiction . . . is waived unless raised in a mandatory preliminary motion."). Here, the City did not argue to the circuit court that Transdev's demand for arbitration was untimely. The City contends that it preserved the issue nevertheless because it told the circuit court that "Transdev failed to submit any dispute in writing to the City for resolution." According to the City, that argument "necessarily subsumes an argument that the company failed to demand arbitration within the necessary time period." But an argument that Transdev did not submit a dispute at all plainly differs from an argument that the dispute was submitted, but that the arbitration demand was untimely. The City has not pointed us to anything in its submissions or argument below that raised the latter issue.

As we recently noted, "a trial court's finding that a party has waived his right to arbitrate a dispute" often is "fact-bound." *Gannett Fleming*, 243 Md. App. at 391. Because "[a] finding of such a waiver is highly factual," *Freedman v. Comcast Corp.*, 190 Md. App. 179, 198 (2010) (quoting *Abramson v. Wildman*, 184 Md. App. 189, 200 (2009)), "the trial

court's findings will not be disturbed on appeal unless [they are] clearly erroneous," *Gannett Fleming*, 243 Md. App. at 391. Here, the court did not make any findings regarding *when* (as opposed to *whether*) Transdev "submitted [the dispute] . . . in writing to the City," but only because the City did not raise that dispute with the circuit court. We do not think that the City's general challenge to Transdev's compliance with Article XXXII "suffic[ed] to alert the trial court to, and thus preserve," that specific issue.[6] *See In re A.B.*, 230 Md. App. 528, 536 (2016).

CONCLUSION

When the City and Transdev entered into their contract, they agreed to arbitrate "[a]ny dispute concerning a question of fact or law arising under or related to this Agreement" at the demand of "[e]ither party." We conclude that provision is mutually binding and enforceable. Because Transdev exercised its option to demand arbitration, the circuit court correctly compelled arbitration.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

[6] The City's waiver is underscored by the absence from the record of any of the parties' communications preceding Transdev's August 17, 2018 letter. If the City had intended to challenge the timeliness of Transdev's arbitration demand, then surely it would have presented to the circuit court the correspondence that it now contends started the 45-day clock earlier than August 17, 2018.