*Chapter 3*

**Alternative and Online Dispute Resolution**

# *Case 3.1*

Tex.App.–Houston [1 Dist.],2012.

Cleveland Const., Inc. v. Levco Const., Inc.

359 S.W.3d 843

Court of Appeals of Texas,

Houston (1st Dist.).

**CLEVELAND CONSTRUCTION, INC., Appellant,**

**v.**

**LEVCO CONSTRUCTION, INC., Appellee.**

No. 01–11–00530–CV.

Jan. 26, 2012.

**OPINION**

[EVELYN V. KEYES](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0149375801&FindType=h), Justice.

Appellant, Cleveland Construction, Inc. (“CCI”), appeals the trial court's denial of its motion to compel arbitration. In two issues, CCI argues that the trial court erroneously denied its motion to compel arbitration because (1) the Federal Arbitration Act (“FAA”) applies, the arbitration provision is valid, and the claim is within the scope of the arbitration provision, and (2) the law favors arbitration and the FAA preempts conflicting state law.

We reverse and remand.

**Background**

Whole Foods Market, Inc. (“Whole Foods”) hired CCI to serve as general contractor to construct a store in Houston, Texas (“the Project”). The contract between Whole Foods and CCI (“the Whole Foods Contract”) allowed CCI to hire subcontractors.

CCI contracted with appellee, Levco Construction, Inc. (“Levco”), as a subcontractor, to perform certain tasks related to the construction, including excavating, grading, digging for laying utilities, paving, and preparing the foundation (“the Construction Contract”). The Construction Contract contained the following arbitration provision:

*Article 30. DISPUTE RESOLUTION*

....

30.3 Any controversy or claims of CCI against Subcontractor [Levco] or Subcontractor against CCI shall, at the option of CCI, be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made. Any such arbitration shall be held in Lake County, Ohio. Any award arising out of such arbitration may be entered by any court having jurisdiction....

Levco also obtained a surety bond (“the Bond”) from Intervener, Insurors Indemnity Company (“the Surety”). Both the Whole Foods Contract and the Bond issued by the Surety provided that disputes were to be resolved in a court in the county in which the Project was built, Harris County, Texas. Specifically, the Bond provided, in part:

§ 4 When the Owner [CCI] has satisfied the conditions of Section 3 [requiring notice of Contractor Default and other conditions precedent triggering the Surety's obligations under the Bond], the Surety shall promptly and at the Surety's expense take one of the following actions:

§ 4.1 Arrange for the Contractor [Levco], with consent of the Owner, to perform and complete the Construction Contract; or

§ 4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; or

§ 4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract ... and to pay to the Owner the amount of damages as described in Section 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from the Contractor's default; or

§ 4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor with reasonable promptness under the circumstance....

....

§ 6 After the Owner has terminated the Contractor's right to complete the Construction Contract, and if the Surety elects to act under Section 4.1, 4.2, or 4.3 above, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract....

....

§ 9 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first....

After Levco had partially performed under the Construction Contract, disputes arose between CCI and Levco concerning the Project, and on, January 17, 2011, CCI sent a letter to Levco informing it that “CCI elects to terminate its Agreement with Levco Construction.” The work was subsequently completed by Levco under the provisions of the Bond.

On April 14, 2011, Levco filed suit against CCI and Whole Foods in Texas state court. According to its pleadings, Levco discovered upon beginning the work that CCI and Whole Foods had failed to obtain all necessary construction permits and that the building design and plans were not complete, so Levco was required to make numerous changes. Levco made multiple requests to change the scope of the contracted-for work to include the new work, including requests for additional time and compensation. Levco alleges that CCI and Whole Foods refused to consent to the changes Levco sought. Levco also alleges that CCI maintained unreasonable deadlines, interfered with Levco's work under the Construction Contract, failed to pay Levco for work it had completed from July 2010 to April 2011, and wrongfully terminated the contract in January 2011. Thus, Levco was unable to pay its subcontractors, resulting in liens being filed against the Project.

Levco alleges that CCI eventually reinstated Levco as a subcontractor pursuant to section 4.1 of the Bond, but CCI “continued to refuse to reinstate the [Construction Contract] itself.” Levco claims that because CCI refused to reinstate the Construction Contract between them it was left in the position of “working essentially as a subcontractor for the [S]urety” under the terms of the Bond. Specifically, Levco alleges that, in its role as the issuer of the Bond, the Surety mandated that Levco be allowed to continue to work on the Project, as provided in section 4.1 of the Bond, and made an agreement with CCI regarding payment of Levco and Levco's subcontractors, as provided in section 6 of the Bond. Levco alleges that the Surety and CCI agreed that the Surety would pay Levco's subcontractors money owed them in exchange for CCI releasing the corresponding payments it owed Levco once the subcontractors released their liens on the Project. Levco states that the Surety complied with this agreement and paid Levco's subcontractors, but that CCI did not comply and release the money it owed Levco or Levco's subcontractors. Nor did CCI reinstate the Construction Contract it had terminated. Levco contends that CCI and Whole Foods are “now improperly withholding more than $500,000 in funds owed to Levco.”

Levco claims that CCI breached its agreement with Levco; that CCI and Whole Foods breached their duties to perform with care in accordance with the terms of the Construction Contract (as provided in both the Construction Contract and section 6 of the Bond) and the Whole Foods Contract and to cooperate in performance of the contracts; that CCI and Whole Foods owe it damages under theories of quantum meruit, unjust enrichment, and promissory estoppel; that CCI and Whole Foods violated [Property Code section 28.001](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000184&DocName=TXPOS28.001&FindType=L); and that CCI misapplied trust funds received from Whole Foods for payment of obligations under the Construction Contract and the Bond.

In addition, Levco sought a declaratory judgment that the arbitration clause in the Construction Contract is invalid and does not require arbitration because it is illusory, or, alternatively, that the provision in the Construction Contract requiring arbitration in Ohio is void because it contravenes Texas law in that “it purports to require a subcontractor to a contract involving the improvement or real property in Texas to submit to arbitration in a state other than Texas.” Finally, Levco sought attorney's fees pursuant to [Civil Practice and Remedies Code section 37.009](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000170&DocName=TXCPS37.009&FindType=L) and chapter 38 and [Property Code section 28.005](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000184&DocName=TXPOS28.005&FindType=L), and it sought a temporary restraining order or temporary injunction prohibiting CCI and Whole Foods from releasing any funds related to the Project.

On April 14, the trial court granted Levco's temporary restraining order until April 29, 2011, and it set a hearing on Levco's request for a temporary injunction for April 29.

CCI filed an arbitration demand with the American Arbitration Association, alleging, under “nature of the dispute,”

Respondent [Levco] is a subcontractor to Claimant [CCI] on the construction of a Whole Foods Market located in Houston, Texas (“Project”). Levco breached the subcontract and was terminated by CCI. Levco was bonded on the Project and the surety, Insurer's Indemnity Company utilized its option to have Levco complete the work on the Project; however, further breaches have occurred [and] CCI has been damaged by Levco's breach in [an] amount not yet fully determined but in [an] amount that CCI does not anticipate will exceed $150,000.

CCI requested that Lake County, Ohio be the arbitration locale.

On April 26, 2011, Levco filed an emergency motion to stay the arbitration proceeding.

On May 11, 2011, CCI answered Levco's suit with a general denial and asserted the affirmative defenses that a valid contract precluded Levco's quantum meruit claims, that CCI had paid Levco under the Construction Contract, that Levco failed to meet all conditions precedent to payment under the Construction Contract, that CCI was entitled to the defenses of “excuse” and “justification,” and that Levco lacked standing to assert its claims against CCI, had failed to state a claim for which relief can be granted, and was the first to breach the Construction Contract.

CCI alleged that Levco defaulted under the Construction Contract within a month after beginning the Project and that CCI issued notices of default on multiple dates following. CCI attached several of these notices to its answer. It also alleged that “Levco was upside down on the Project from the beginning and failed to pay its vendors and suppliers in a timely manner” and that “Levco's financial mismanagement caused numerous, unnecessary liens on the Project.” CCI also attached several notices from “lower tier” subcontractors claiming they had not been paid by Levco. This led CCI to terminate Levco from the Project in January 2011 and to notify the Surety of Levco's breach.

CCI alleged that the Surety elected its option under the terms of the Bond to arrange “for Levco to perform and complete its obligations under the Contract.” CCI argues that “[b]y selecting this option, [the Surety] undertook Levco's obligations under the Contract and CCI was to reciprocally perform its obligations directly to [the Surety] ... and, as required by the Performance Bond, any money currently owed by CCI must be paid to [the Surety], not Levco.” CCI also alleged that it agreed to 26 of the 31 change orders submitted by Levco and that it offered to pay the Surety the outstanding pay applications if Levco would execute a release, which Levco refused to do.

CCI also responded to Levco's application for a temporary injunction and moved to compel arbitration and to stay the trial court proceedings, or alternatively, to dismiss the trial court proceedings.

In its motion to compel arbitration, also filed on May 11, CCI argued that the arbitration clause between it and Levco was valid, that it was not illusory or in contravention of Texas state law, and that the dispute at issue fell within the scope of the agreement. CCI also argued that the FAA preempts Levco's claim based on [Business and Commerce Code section 272.001](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000168&DocName=TXBCS272.001&FindType=L). Levco responded that the arbitration clause was invalid and illusory and that it failed to survive termination of the Construction Contract.

On May 26, 2011, the Surety filed a plea in intervention, arguing that “mandatory jurisdiction and venue with respect to the claims and causes of action asserted by Intervenor against [CCI] herein properly lie in this Court pursuant to the express provisions of § 9” of the Bond. It likewise alleged that, after CCI terminated the Contract between itself and Levco, CCI called upon it, as Surety, to complete Levco's obligations pursuant to the Bond. The Surety alleged that it elected to utilize Levco to continue performance of the subcontract work with the Surety itself advancing Levco's payroll and certain of its overhead expenses, as provided in section 4.1 of the Bond. In exchange, CCI agreed to pay to the Surety “all remaining monies due and owing or to become due and owing under the Levco Subcontract Agreement,” in accordance with section 6 of the Bond.

The Surety alleged that CCI subsequently breached this agreement by failing to make those payments. It alleged that it had expended $983,790.49 and that “under the express provisions of Levco's General Indemnity Agreement and pursuant to [its] common law rights to indemnity and equitable subrogation, [the Surety] has a superior lien upon and is entitled to payment directly from CCI on any and all contract sums or compensatory damages adjudged by this Court to be due and owing ... to Levco and/or [the Surety].”

On May 27, 2011, the trial court granted Levco's emergency motion to stay the arbitration proceeding initiated by CCI. This appeal followed.

**Analysis**

CCI argues that the trial court erred in denying its motion to compel arbitration because the FAA applies, the arbitration provision in the Construction Contract is valid, and the claims in the case are within the scope of the arbitration provision. It also argues that the FAA preempts any conflicting state law. Levco, however, argues that the arbitration provision in the Construction Contract is illusory and, therefore, unenforceable as a matter of law; that the Construction Contract was terminated and the arbitration provision does not contain a survival clause that would allow it to survive termination of the contract; and that [Business and Commerce Code section 272.001](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000168&DocName=TXBCS272.001&FindType=L) is not preempted by the FAA because it restricts venue, rather than restricting a party's right to arbitrate.

**A. Jurisdiction**

We first address our jurisdiction to review the trial court's order staying the arbitration proceedings. [Civil Practice and Remedies Code section 51.016](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000170&DocName=TXCPS51.016&FindType=L) provides:

In a matter subject to the Federal Arbitration Act ([9 U.S.C. Section 1 et seq.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS1&FindType=L)), a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by [9 U.S.C. Section 16](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS16&FindType=L).

[TEX. CIV. PRAC. & REM.CODE ANN. § 51.016](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000170&DocName=TXCPS51.016&FindType=L) (Vernon Supp. 2011). [Section 16](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS16&FindType=L) of the FAA, “Appeals,” provides:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title [stay of trial proceedings where issue therein is referable to arbitration],

(B) denying a petition under section 4 of this title to order arbitration to proceed, [or]

(C) denying an application under section 206 of this title to compel arbitration....

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

[9 U.S.C. § 16 (2006)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS16&FindType=L).

[[1]](#Document1zzF12026939094) Thus, an interlocutory appeal is permitted in this case only if it would be permitted under the same circumstances under [section 16](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS16&FindType=L) of the FAA in federal court. *See* [*CMH Homes v. Perez,* 340 S.W.3d 444, 448–49 (Tex.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2025372823&ReferencePosition=448). The United States Supreme Court has held that the FAA “generally permits immediate appeal of orders hostile to arbitration.” [*Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 86, 121 S.Ct. 513, 519, 148 L.Ed.2d 373 (2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=2000639653&ReferencePosition=519). Several circuit courts have held that the FAA permits interlocutory review of an order staying arbitration. [*Arciniaga v. Gen. Motors Corp.,* 460 F.3d 231, 234 (2nd Cir.2006)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2009685077&ReferencePosition=234) (holding FAA subsection 16(a)(2) permits interlocutory review of stay of arbitration); [*KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.,* 184 F.3d 42, 47 (1st Cir.1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1999165853&ReferencePosition=47) (holding that order staying pending arbitration was immediately appealable as injunction under both [28 U.S.C. § 1292(a)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1292&FindType=L&ReferencePositionType=T&ReferencePosition=SP_7b9b000044381) and FAA [section 16(a)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS16&FindType=L&ReferencePositionType=T&ReferencePosition=SP_d86d0000be040)); [*Se. Res. Recovery Facility Auth. v. Montenay Int'l Corp.,* 973 F.2d 711, 712 (9th Cir.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1992146759&ReferencePosition=712) (holding it had jurisdiction over district court's order staying arbitration pursuant to [section 16(a)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS16&FindType=L&ReferencePositionType=T&ReferencePosition=SP_d86d0000be040) allowing appeal from an order enjoining arbitration). Furthermore, the Fifth Circuit has held that an order granting a stay of arbitration is appealable pursuant to [28 U.S.C. § 1292(a)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1292&FindType=L&ReferencePositionType=T&ReferencePosition=SP_7b9b000044381), governing appeals of interlocutory orders involving injunctions generally. *See* [*Tai Ping Ins. Co. v. M/V Warschau,* 731 F.2d 1141, 1143 (5th Cir.1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1984120392&ReferencePosition=1143).

**B. Standard of Review**

Prior to September 1, 2009, an order denying a motion to compel arbitration under the FAA was reviewed in a mandamus proceeding using an abuse of discretion standard. [*In re Merrill Lynch & Co.,* 315 S.W.3d 888, 890–91 & n. 3 (Tex.2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2022384709&ReferencePosition=890) (orig. proceeding); [*Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272–73 (Tex.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1992198291&ReferencePosition=272) (orig. proceeding). The Texas Supreme Court held that the abuse of discretion standard, as applied to such orders, required reviewing courts to defer to the trial court's factual determinations if they are supported by the evidence and to review the trial court's legal determinations de novo. [*In re Labatt Food Serv., L.P.,* 279 S.W.3d 640, 643 (Tex.2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2018139446&ReferencePosition=643) (orig. proceeding). This is the same standard by which we review interlocutory appeals of orders denying motions to compel arbitration under the Texas Arbitration Act (“TAA”). *See* [*McReynolds v. Elston,* 222 S.W.3d 731, 739 (Tex.App.-Houston [14th Dist.] 2007, no pet.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2011975559&ReferencePosition=739) (holding, under TAA, “we review factual conclusions under a legal sufficiency or ‘no evidence’ standard and legal conclusions de novo”); *see also* [*In re Trammell,* 246 S.W.3d 815, 820 (Tex.App.-Dallas 2008, no pet.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2015343522&ReferencePosition=820) (orig. proceeding) (holding same).

[Civil Practice and Remedies Code section 51.016](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000170&DocName=TXCPS51.016&FindType=L) now permits an order denying a motion to compel arbitration under the FAA to be reviewed via interlocutory appeal. [TEX. CIV. PRAC. & REM.CODE ANN. § 51.016](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000170&DocName=TXCPS51.016&FindType=L). Neither this Court nor the Texas Supreme Court has addressed the appropriate standard of review for such interlocutory appeals. However, various courts of appeals have considered this issue and held that interlocutory appeals of orders denying motions to compel arbitration should be reviewed under the abuse of discretion standard, in which we defer to the trial court's factual determinations and review questions of law de novo. *See* [*Garcia v. Huerta,* 340 S.W.3d 864, 868–69 (Tex.App.-San Antonio 2011, pet. filed)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2024900026&ReferencePosition=868); [*SEB, Inc. v. Campbell,* No. 03–10–00375–CV, 2011 WL 749292, at \*2 (Tex.App.-Austin Mar. 2, 2011, no pet.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2024722231) (mem. op.); [*Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.,* 327 S.W.3d 859, 862–63 (Tex.App.-Dallas 2010, no pet.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2023637310&ReferencePosition=862); *see also* [*Torster v. Panda Energy Mgmt., LP,* No. 07–10–0442–CV, 2011 WL 780522, at \*2 (Tex.App.-Amarillo Mar. 7, 2011, pet. filed)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2024736830) (mem. op) (citing [*Sidley, Austin, Brown & Wood*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2023637310) in holding that whether trial court erred in denying motion to compel arbitration “depends on whether it abused its discretion”).

[[2]](#Document1zzF22026939094) Thus, in reviewing an order denying a motion to compel arbitration under the FAA, we give deference to the trial court's factual determinations that are supported by evidence and we review de novo its legal conclusions.

[[3]](#Document1zzF32026939094)[[4]](#Document1zzF42026939094) A party seeking to compel arbitration under the FAA must establish that there is a valid arbitration agreement and that the claims raised fall within that agreement's scope. [*In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 737 (Tex.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2006636812&ReferencePosition=737) (orig. proceeding); [*J.M. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 227 (Tex.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2004043787&ReferencePosition=227). If the trial court finds a valid agreement, the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcing arbitration. [*J.M. Davidson,* 128 S.W.3d at 227.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2004043787&ReferencePosition=227) The trial court's determination as to the validity of an arbitration agreement is a legal determination that we review de novo. [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2004043787)

[[5]](#Document1zzF52026939094)[[6]](#Document1zzF62026939094)[[7]](#Document1zzF72026939094) Under the FAA, ordinary principles of state contract law determine whether there is a valid agreement to arbitrate. [*Kellogg Brown & Root,* 166 S.W.3d at 738.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2006636812&ReferencePosition=738) Although there is a strong presumption favoring arbitration, that presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. [*J.M. Davidson,* 128 S.W.3d at 227.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2004043787&ReferencePosition=227) Because arbitration is contractual in nature, the FAA generally does not require parties to arbitrate when they have not agreed to do so. [*Kellogg Brown & Root,* 166 S.W.3d at 738](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2006636812&ReferencePosition=738) (quoting [*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 478–79, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=1989032283&ReferencePosition=1255)).

**C. Determination of Existence of Valid Agreement to Arbitrate**

CCI argues that the arbitration clause in the Construction Contract is a valid and binding agreement to arbitrate. Levco, however, argues that it is illusory and unenforceable as a matter of law. Levco also argues that, even if the agreement to arbitrate in the Construction Contract is not illusory, the arbitration agreement in the Construction Contract does not contain a survival clause that would allow it to survive termination of the contract.[FN1](#Document1zzB00112026939094)

[FN1.](#Document1zzF00112026939094) Levco's appellate brief mentions in passing that the dispute resolution provision in the Bond conflicts with the terms of the Construction Contract. However, it cites no authority and provides no legal analysis on this issue. Therefore, to the extent Levco is attempting to argue that the terms of the Bond prevent arbitration of its dispute with CCI over the claims arising from the Construction Contract, that issue is waived for lack of briefing. *See* TEX.R.APP. P. 38.1(i) (requiring that appellate “brief must contain a clear and concise argument for the contention made, with appropriate citations to authorities” for party to assert issue on appeal); [*Brown v. Hearthwood II Owners Ass'n.,* 201 S.W.3d 153, 161 (Tex.App.-Houston [14th Dist.] 2006, pet. denied)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2009252684&ReferencePosition=161) (holding argument can be waived for failure to adequately brief).

Levco also argues that the Surety is a necessary party to any arbitration proceeding. However, the Surety is not before this Court as a party to the appeal, nor was it a party to the motion to stay arbitration in the trial court. Thus, we are not called upon to consider the Surety's obligations or rights regarding arbitration.

[[8]](#Document1zzF82026939094)[[9]](#Document1zzF92026939094)[[10]](#Document1zzF102026939094) In determining the validity of agreements to arbitrate that are subject to the FAA, we generally apply ordinary state contract law principles. [*In re Palm Harbor Homes, Inc.,* 195 S.W.3d 672, 676 (Tex.2006)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2009321224&ReferencePosition=676) (orig. proceeding). The elements of a valid contract are (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. [*Prime Prods., Inc. v. S.S.I. Plastics, Inc.,* 97 S.W.3d 631, 636 (Tex.App.-Houston [1st Dist.] 2002, pet. denied)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2003077867&ReferencePosition=636). “Under generally accepted principles of contract interpretation, all writings that pertain to the same transaction will be considered together, even if they were executed at different times and do not expressly refer to one another.” [*DeWitt Cnty. Elec. Coop., Inc. v. Parks,* 1 S.W.3d 96, 102 (Tex.1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=1999157581&ReferencePosition=102); [*IP Petroleum Co. v. Wevanco Energy, L.L.C.,* 116 S.W.3d 888, 889 (Tex.App.-Houston [1st Dist.] 2003, pet. denied)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2003633330&ReferencePosition=889) (“Instruments pertaining to the same transaction may be read together to ascertain the parties' intent, even if the parties executed the instruments at different times.”) (citing [*Fort Worth Indep. Sch. Dist. v. City of Fort Worth,* 22 S.W.3d 831, 840 (Tex.2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2000306538&ReferencePosition=840)); *see also* [*DeClaire v. G & B McIntosh Family Ltd. P'Ship,* 260 S.W.3d 34, 44 (Tex.App.-Houston [1st Dist.] 2008, no pet.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2015968139&ReferencePosition=44) (holding that contract can be effective if signed by only one party if other party accepts by his acts, conduct, or acquiescence in the terms of the contract).

CCI presented the Construction Contract, which provides, in part:

Any controversy or claims of CCI against Subcontractor [Levco] or Subcontractor against CCI shall, at the option of CCI, be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made. Any such arbitration shall be held in Lake County, Ohio.

CCI argues that this is a valid arbitration agreement. However, Levco argues, both here and in the trial court, that the arbitration agreement in the Construction Contract is not valid because it is illusory.[FN2](#Document1zzB00222026939094)

[FN2.](#Document1zzF00222026939094) CCI argues that we cannot consider Levco's arguments concerning termination of the agreement and subsequent performance under the terms of the Bond because it was not expressly presented to the trial court. This argument is unpersuasive. When, as here, no findings of fact and conclusions of law are filed by the trial court, we must affirm the trial court's order if any legal theory supports it. [*Rachal v. Reitz,* 347 S.W.3d 305, 308 (Tex.App.-Dallas 2011, pet. filed)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2025759164&ReferencePosition=308). Levco, CCI, and the Surety all informed the trial court of the January 2011 termination by CCI and of the subsequent arrangements under the terms of the Bond, so the trial court was aware of this information.

**D. Analysis of Levco's Claims that Abritration Provision is Illusory**

[[11]](#Document1zzF112026939094)[[12]](#Document1zzF122026939094)[[13]](#Document1zzF132026939094) “A promise is illusory if it does not bind the promisor, such as when the promisor retains the option to discontinue performance.” [*In re 24R, Inc.,* 324 S.W.3d 564, 567 (Tex.2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2023450431&ReferencePosition=567) (orig. proceeding) (per curiam); *see also* [*J.M. Davidson,* 128 S.W.3d at 235](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2004043787&ReferencePosition=235) (Schneider, J., dissenting) (“[I]f the terms of a promise make performance optional, the promise is illusory and cannot constitute valid consideration.”). Arbitration agreements must be supported by consideration, or mutuality of obligation, to be enforceable. [*Palm Harbor Homes,* 195 S.W.3d at 676;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2009321224&ReferencePosition=676) [*Dorfman v. Max Int'l, LLC,* No. 05–10–00776–CV, 2011 WL 1680070, at \*2 (Tex.App.-Dallas May 5, 2011, no pet.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2025232086) (mem. op.).

[[14]](#Document1zzF142026939094) In the context of stand-alone arbitration agreements, binding promises are required on both sides as they are the only consideration rendered to create a contract. [*In re AdvancePCS Health L.P.,* 172 S.W.3d 603, 607 (Tex.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2006469229&ReferencePosition=607) (orig. proceeding) (per curiam); [*Dorfman,* 2011 WL 1680070, at \*2.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=999&FindType=Y&SerialNum=2025232086) When, however, an arbitration clause is part of an underlying contract, the rest of the parties' agreement provides the consideration. [*AdvancePCS Health,* 172 S.W.3d at 607;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2006469229&ReferencePosition=607) *see* [*Palm Harbor Homes,* 195 S.W.3d at 676–77](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2009321224&ReferencePosition=676).

Here, the plain language of the arbitration provision does not mutually bind the parties because arbitration is “at the option of CCI.” However, this arbitration provision does not stand alone—it is part of an underlying contract. Thus, consideration, or the presence of mutual obligation, is provided by the underlying contract. *See* [*AdvancePCS Health,* 172 S.W.3d at 607](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2006469229&ReferencePosition=607).

Levco seems to argue that the underlying contract does not provide any consideration for the arbitration provision because it, too, permits CCI to terminate, suspend, or modify its terms at its sole discretion, without notice. Levco's reliance on those provisions of the Construction Contract is misplaced. The modification provision's plain language does not state that CCI is the only party that can modify the agreement—it provides only that any modifications must be signed by CCI's representative to be effective. Furthermore, while the Construction Contract provides that termination or suspension will be “at the sole option and convenience to CCI,” the contract also provides that CCI must pay for work and materials already purchased at the time it gives notice of such termination or suspension. Thus, the parties are bound by mutual obligations and the agreement is not illusory.

**E. Analysis of Levco's Termination and Savings Clause Argument**

Levco also argues that CCI is complaining of work primarily completed after CCI terminated the Construction Contract and that the dispute resolution clause in the Construction Contract cannot survive the termination because it did not contain a savings clause.

[[15]](#Document1zzF152026939094) “[A]n arbitration agreement contained within a contract survives the termination or repudiation of the contract as a whole.” [*Henry v. Gonzalez,* 18 S.W.3d 684, 690 (Tex.App.-San Antonio 2000, pet. dism'd)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2000041532&ReferencePosition=690) (relying, in context of TAA, on line of reasoning that agreement to arbitrate contained in written contract is separable from entire contract); *see also* [*In re Koch Indus., Inc.,* 49 S.W.3d 439, 445 (Tex.App.-San Antonio 2001, orig. proceeding)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2001321926&ReferencePosition=445) (holding same in context of FAA). Thus, a savings clause was not required for the arbitration provision in the Construction Contract to survive any termination by CCI.

[[16]](#Document1zzF162026939094) To the extent that Levco is attempting to argue that the dispute between the parties does not fall within the scope of the arbitration provision in the Construction Contract because some of the dispute between itself and CCI arose from work that was completed after CCI terminated the Construction Contract, this is also unavailing. The terms of the Bond expressly incorporate the terms of the Construction Contract. Section 4.1, the provision invoked by the Surety, allows it to “[a]rrange from the Contractor [Levco] ... to perform and complete the Construction Contract.” Section 6 of the Bond further states that if the Surety elects to act under section 4.1, “the responsibilities of the Surety to the Owner [CCI] shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract.” Thus, the terms of the Bond expressly provided for Levco to complete the work under the terms of the Construction Contract even after CCI's termination of the contract.

We conclude that CCI proved, as a matter of law, the existence of a valid arbitration agreement and that the claims between it and Levco fall within the scope of that agreement. Thus, CCI is entitled to arbitrate these claims, and the trial court abused its discretion in refusing to enforce the arbitration proceedings. *See, e.g.,* [*Jack B. Anglin Co.,* 842 S.W.2d at 272–73](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1992198291&ReferencePosition=272) (recognizing, prior to enactment of [Civil Practice and Remedies Code section 51.016](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000170&DocName=TXCPS51.016&FindType=L), appropriateness of mandamus relief “[w]hen a Texas court enforces or refuses to enforce an arbitration agreement pursuant to the [FAA]” because that party “would be deprived of the benefits of the arbitration clause it contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated”); *see also* [*In re Bruce Terminix Co.,* 988 S.W.2d 702, 704 (Tex.1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1998120346&ReferencePosition=704) (orig. proceeding) (holding there is no adequate remedy by appeal for denial of right to arbitration “because the very purpose of arbitration is to avoid the time and expense of a trial and appeal”).

**FAA Preemption of State Law Venue Provision**

Finally, Levco argues that we should “affirm the trial court's denial of [CCI's] Motion to Compel because the [Texas Business and Commerce Code section 272.001](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000168&DocName=TXBCS272.001&FindType=L) prohibits compelling Levco to arbitration in Lake County, Ohio and is not preempted by the [FAA].” It argues that the arbitration must take place in Harris County.

[Business and Commerce Code section 272.001](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000168&DocName=TXBCS272.001&FindType=L) provides:

If a contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by the party obligated by the contract to perform the construction or repair.

[TEX. BUS. & COM.CODE ANN. § 272.001(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000168&DocName=TXBCS272.001&FindType=L&ReferencePositionType=T&ReferencePosition=SP_a83b000018c76) (Vernon 2006). Levco argues in its appellate brief that it “exercised its option to void the requirement in the Contract to arbitrate in Lake County, Ohio” and, “[a]s a result, the trial court properly denied [CCI's] motion to compel arbitration in Lake County, Ohio.” It further argues that if this Court narrowly construes the word “provision” to mean only the choice of venue rather than the arbitration clause as a whole, this statute would not fall under the FAA's preemption provision.

[[17]](#Document1zzF172026939094)[[18]](#Document1zzF182026939094)[[19]](#Document1zzF192026939094) The FAA preempts all otherwise applicable inconsistent state laws, including any inconsistent provisions of the TAA, under the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI; *see* [*Allied–Bruce Terminix Co. v. Dobson,* 513 U.S. 265, 272, 115 S.Ct. 834, 838, 130 L.Ed.2d 753 (1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=1995030814&ReferencePosition=838). The FAA declares written provisions for arbitration “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” [9 U.S.C. § 2 (2006)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS2&FindType=L); [*OPE Int'l LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443, 446 (5th Cir.2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2001602711&ReferencePosition=446). “In enacting [§ 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS2&FindType=L) of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” [*OPE Int'l,* 258 F.3d at 446](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2001602711&ReferencePosition=446) (quoting [*Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1984104100) and [*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=1983109286&ReferencePosition=941) (“[Section 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS2&FindType=L) is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”)).

In [*OPE International,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001602711) the Fifth Circuit held that a Louisiana provision invalidating arbitration of certain disputes out-of-state was preempted by the FAA, on the ground that the statute “condition[ed] the enforceability of arbitration agreements on selection of a Louisiana forum; a requirement not applicable to contracts generally.” [*Id.* at 447;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001602711) *see also* [*Commerce Park at DFW Freeport v. Mardian Constr. Co.,* 729 F.2d 334, 337 (5th Cir.1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1984115051&ReferencePosition=337) (holding that FAA preempted provisions in Texas Deceptive Trade Practices Act that required parties to submit to judicial forum).

We hold that the same reasoning applies here. Applying [section 272.001](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000168&DocName=TXBCS272.001&FindType=L) as Levco asks us to do here would prevent us from enforcing a term of the parties' arbitration agreement—the venue—on a ground that is not recognized by the FAA or by general state-law contract principles. *See* [*OPE Int'l,* 258 F.3d at 447;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2001602711&ReferencePosition=447) *see also* [*KKW Enters., Inc.,* 184 F.3d at 50](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1999165853&ReferencePosition=50) (“The venue in which arbitration is to take place is a ‘term’ of the parties' arbitration agreement.”). We hold that the FAA preempts application of this provision under the facts of this case.

Levco argues that this case is distinguishable from [*OPE International*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001602711) because the Louisiana provision in [*OPE International*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001602711) “declare [d] null and void and unenforceable” any non-Louisiana venue provision, while [section 272.001](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000168&DocName=TXBCS272.001&FindType=L) declares such provisions only “voidable.” However, by allowing a party to subsequently declare void a previously bargained-for provision, application of [section 272.001](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000168&DocName=TXBCS272.001&FindType=L) would undermine the declared federal policy of rigorous enforcement of arbitration agreements. *See* [*Perry v. Thomas,* 482 U.S. 483, 490, 107 S.Ct. 2520, 2526, 96 L.Ed.2d 426 (1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=1987074413&ReferencePosition=2526) (analyzing [section 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS2&FindType=L) and holding that it embodies Congress' intent to provide for enforcement of arbitration agreements within full reach of the Commerce Clause” and that “[i]t's general applicability reflects that the preeminent concern of Congress ... was to enforce private agreements into which parties had entered”).

**Conclusion**

We reverse the order of the trial court and remand the case for further proceedings consistent with this opinion.

***Case 3.2***

512 F.3d 807, 85 U.S.P.Q.2d 1481

United States Court of Appeals,Sixth Circuit.

**NCR CORPORATION, Plaintiff-Appellant,**

**v.**

**KORALAASSOCIATES LTD., Defendant-Appellee.**

No. 06-3685.

Argued: Feb. 1, 2007.

Decided and Filed: Jan. 16, 2008.

[ALICE M. BATCHELDER](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0208247301&FindType=h), Circuit Judge.

Plaintiff NCR Corporation (“NCR”) appeals**\*811** the order of the district court [FN1](#Document1zzB00112014735628) compelling NCR and defendant Korala Associates Ltd. (“KAL”) to arbitrate NCR's claims against KAL, pursuant to [9 U.S.C. § 206](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS206&FindType=L), [FN2](#Document1zzB00222014735628) part of Chapter 2 of the Federal Arbitration Act, *see*[9 U.S.C. § 201, *et seq.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS201&FindType=L)*,* which implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [June 10, 1958, 21 U.S.T. 2517](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0006792&FindType=Y&SerialNum=1970094521), 330 U.N.T.S. 38.

[FN1.](#Document1zzF00112014735628) The parties agreed to allow a United State Magistrate Judge to conduct any and all proceedings in this matter and enter the order of judgment, in accordance with [28 U.S.C. § 636(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS636&FindType=L&ReferencePositionType=T&ReferencePosition=SP_4b24000003ba5) and [Rule 73(b) of the Federal Rules of Civil Procedure](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR73&FindType=L).

[FN2.](#Document1zzF00222014735628)[Section 206](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS206&FindType=L) applies in this action because KAL is a foreign corporation, organized under the laws of the United Kingdom and located in Scotland.

**I. BACKGROUND**

NCR is one of the largest providers of Automatic Teller Machines (“ATM”) equipment, integrated hardware and software systems, and related maintenance and support services in the world. NCR's ATMs use either the Windows operating system or the OS/2 operating system. NCR installs its APTRA XFS software (“APTRA XFS”) on those ATMs using the Windows operating system and its S4i software (“S4i”) on those ATMs using the OS/2 operating system. NCR owns a registered copyright for its APTRA XFS software and had applied, on an expedited basis, to register a copyright for APTRA XFS's precursor software. NCR had also applied, on an expedited basis, to register copyrights for two versions of the S4i software.

Over 300,000 NCR ATMs are installed world-wide, and at the time NCR filed its Amended Complaint, approximately 150,000 of these ATMs required the installation of an upgraded software system so that the machines would be Triple-DES [FN3](#Document1zzB00332014735628) compliant. NCR has developed a Triple-DES system upgrade to install on its ATMs. KAL, likewise, has developed a Triple-DES system upgrade, which can be installed on NCR ATMs. NCR asserts that KAL could not have developed its NCR-compatible system upgrade without illegally copying and analyzing NCR's APTRA XFS and S4i software.

[FN3.](#Document1zzF00332014735628) Triple-DES is an encryption standard designed to make ATM transactions more secure.

On December 15, 1998, KAL and NCR entered into a Software License Agreement (“1998 Agreement”) in which KAL agreed to develop and license to NCR three specific software components for NCR's ATMs-Device Controls, Self Service Controls, and Service Providers-which together form software known as Kalypso. KAL also agreed to “develop additional elements of Kalypso from time to time” under the terms of the Agreement. In order to facilitate KAL's development of NCR-friendly software, “NCR agreed to loan to KAL certain computer hardware and/or software items that were necessary to enable KAL to adapt and support the Kalypso Components.” To that end, NCR loaned to KAL an NCR ATM which contained NCR's copyrighted APTRA XFS software.

In addition to this particular ATM, NCR alleged that KAL obtained and accessed other NCR ATMs on which APTRA XFS or S4i was installed from NCR bank licensees or from dealers of used or refurbished NCR ATMs. Any software still installed on these ATMs could not have been operated without authorization from NCR.

NCR alleged that KAL, without permission, “obtained access to, made unauthorized**\*812** use of, and engaged in unauthorized copying” of the APTRA XFS and/or S4i software on NCR ATMs, including the ATM loaned to KAL. According to NCR, by unlawfully accessing and copying the APTRA XFS and S4i software, KAL was able to develop its Triple-DES upgrade-Kalignite Upgrade Solutions-which can be installed on NCR ATMs.

In 2004, NCR brought suit against KAL seeking damages and injunctive relief. In Counts I and II of its Amended Complaint, NCR alleged KAL's direct copyright infringement of NCR's APTRA XFS and S4i software. In Counts III and IV, NCR alleged KAL's contributory copyright infringement of the APTRA XFS and S4i software, asserting that KAL induced NCR licensees to breach confidentiality restrictions contained within NCR's licensing agreements by providing KAL access to the APTRA XFS and S4i software. In Count V, NCR alleged KAL's tortious interference with contract, asserting that KAL acted intentionally to induce NCR licensees to breach the confidentiality restrictions contained within NCR's licensing agreements by providing KAL access to the APTRA XFS and S4i software. In Count VI, NCR alleged that KAL illegally imported the infringing Kalignite Upgrade Solutions into the United States. And in Count VII, NCR alleged that KAL engaged in unethical business practices or common law unfair competition.

KAL moved to (1) dismiss NCR's Amended Complaint under [Rule 12(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L) and [12(b)(6) of the Federal Rules of Civil Procedure, (2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L) to compel the arbitration of all of NCR's claims pursuant to [9 U.S.C. § 206](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS206&FindType=L) and in compliance with the arbitration clause contained within the 1998 Agreement, and (3) to dismiss the matter under the doctrine of *forum non conveniens.* The district court first denied KAL's motion to dismiss under [Rule 12(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L), finding that it had subject matter jurisdiction under both diversity and federal question jurisdiction. But the district court granted KAL's motion to compel arbitration and dismissed NCR's complaint without prejudice. The court did not address KAL's motion to dismiss under [Rule 12(b)(6)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L) or on the basis of *forum non conveniens.* NCR timely appealed the order compelling arbitration.

**II. ANALYSIS**

[[1]](#Document1zzF12014735628)[[2]](#Document1zzF22014735628) We review *de novo* a district court's decision regarding the arbitrability of a particular dispute. [*Walker v. Ryan's Family Steak Houses, Inc.,* 400 F.3d 370, 385 (6th Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2006328782&ReferencePosition=385). “Before compelling an unwilling party to arbitrate, the court must engage in a limited review to determine whether the dispute is arbitrable; meaning that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement.” [*Javitch v. First Union Sec., Inc.,* 315 F.3d 619, 624 (6th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003072588&ReferencePosition=624) (citing [*AT & T Techs. v. Commc'ns Workers of Am.,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1986117815)).

The arbitration clause contained within the 1998 Agreement provides that:

22.2 Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitrator shall be appointed upon the mutual agreement of both parties failing which both parties will agree to be subject to any arbitrator that shall be chosen by the President of the Law Society.

The parties do not dispute that a valid agreement to arbitrate exists; rather the issue of contention is whether NCR's **\*813** claims fall within the substantive scope of the agreement.

[[3]](#Document1zzF32014735628)[[4]](#Document1zzF42014735628)[[5]](#Document1zzF52014735628) “As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” [*Masco Corp. v. Zurich Am. Ins. Co.,* 382 F.3d 624, 627 (6th Cir.2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2004963548&ReferencePosition=627) (quoting [*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1983109286)). Despite this strong presumption in favor of arbitration, “arbitration is a matter of contract between the parties, and one cannot be required to submit to arbitration a dispute which it has not agreed to submit to arbitration.” [*Simon v. Pfizer Inc.,* 398 F.3d 765, 775 (6th Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2006253552&ReferencePosition=775) (quoting [*United Steelworkers, Local No. 1617 v. Gen. Fireproofing Co.,* 464 F.2d 726, 729 (6th Cir.1972)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1972111335&ReferencePosition=729)).

When faced with a broad arbitration clause, such as one covering *any* dispute arising out of an agreement, a court should follow the presumption of arbitration and resolve doubts in favor of arbitration. Indeed, in such a case, only an express provision excluding a specific dispute, or the most forceful evidence of a purpose to exclude the claim from arbitration, will remove the dispute from consideration by the arbitrators.

[*Solvay Pharms., Inc. v. Duramed Pharms., Inc.,* 442 F.3d 471, 482 n. 10 (6th Cir.2006)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2008732399&ReferencePosition=482) (internal punctuation and citations omitted).

Here the parties dispute not only the scope of the arbitration clause, but the standard by which to determine whether a particular claim is arbitrable. The district court, relying on language contained within [*Fazio v. Lehman Bros., Inc.,* 340 F.3d 386 (6th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&SerialNum=2003558358), concluded that the arbitration clause's language-“any controversy or claim arising out of or relating to this contract”-“encompasses all claims which *touch upon matters* covered by the agreement.”(emphasis added). The court held that every allegation in NCR's Amended Complaint “relates to some part of the Agreement and will require examination and interpretation of the Agreement or an exhibit to the Agreement.”

NCR argues that it was legal error for the court to apply the “touches upon matters” standard, while KAL argues that “touches upon matters” is the proper standard for this Circuit. We agree with NCR. While the [*Fazio*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2003558358) court stated that “[e]ven real torts can be covered by arbitration clauses ‘if the allegations underlying the claims “touch matters” covered by the [agreement],’ ”[340 F.3d at 395](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003558358&ReferencePosition=395) (quoting [*Genesco, Inc. v. T. Kakiuchi & Co.,* 815 F.2d 840, 846 (2d Cir.1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1987042499&ReferencePosition=846)), that court did not apply this standard to determine if the plaintiff's claims fell within the scope of the arbitration clause. Instead, the standard the court enunciated and applied was whether “an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.” [*Id.* at 395.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2003558358)

The Supreme Court has also referenced this “touch matters” language. In [*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1985133734), the Court stated that “insofar as the allegations underlying the statutory claims *touch matters* covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability.” [473 U.S. at 625 n. 13, 105 S.Ct. 3346](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1985133734) (emphasis added). This Court, however, has explained that the “touch matters” language in [*Mitsubishi Motors*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1985133734) should be considered in light of its narrow context:

The issue the [*Mitsubishi*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1985133734) Court addressed was whether the arbitration clause “should be read narrowly to exclude the statutory claims,”[*id.,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1985133734) which **\*814** were part of the respondent's counterclaim and included claims under the antitrust laws. [*Id.* at 619-20, 105 S.Ct. 3346.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1985133734) The “enumerated articles” were provisions of a distribution agreement to which the arbitration provision specifically referred. [*Id.* at 617, 105 S.Ct. 3346.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1985133734) [Defendant], in its brief, apparently treats the Court's statement as announcing the standard that a controversy is arbitrable if it “touches matters covered by” the arbitration clause. [Defendant] reads this passing comment out of context, and we do not believe the words have the broad impact [Defendant] would give them.

[*Alticor, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 411 F.3d 669, 673 (6th Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2006792230&ReferencePosition=673). And more recently, we reiterated the standard we apply to determine whether a particular claim or dispute falls within the scope of an arbitration agreement: “if an action can be maintained without reference to the contract or relationship at issue, the action is likely outside the scope of the arbitration agreement-along with the presumption in favor of arbitrability and the intent of the parties.” [*Nestle Waters N. Am., Inc. v. Bollman,* 505 F.3d 498, 505 (6th Cir.2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2013615722&ReferencePosition=505) (citing [Fazio, 340 F.3d at 395).](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003558358&ReferencePosition=395)

[[6]](#Document1zzF62014735628) Under this Court's precedent, the following standard emerges for determining which of NCR's claims must be resolved in arbitration: while we must bear in mind the presumption of arbitrability, the cornerstone of our inquiry rests upon whether we can resolve the instant case without reference to the agreement containing the arbitration clause. *See* [*Nestle Waters,* 505 F.3d at 505.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2013615722&ReferencePosition=505) If such a reference is not necessary to the resolution of a particular claim, then compelled arbitration is inappropriate, unless the intent of the parties indicates otherwise. [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2013615722) We now apply this standard to NCR's claims.

**A. Copyright Infringement**

[[7]](#Document1zzF72014735628)[[8]](#Document1zzF82014735628)[[9]](#Document1zzF92014735628) “Liability for direct [copyright] infringement arises from the violation of any one of the exclusive rights of a copyright owner. The owner of copyright ... has the exclusive right to, and to authorize others to, reproduce, distribute, perform, display, and prepare derivative works from the copyrighted [work].” [*Bridgeport Music, Inc. v. Rhyme Syndicate Music,* 376 F.3d 615, 621 (6th Cir.2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2004739302&ReferencePosition=621) (internal citations omitted). “To succeed in a copyright infringement action, a plaintiff must establish that he or she owns the copyrighted creation, and that the defendant copied it.” [*Kohus v. Mariol,* 328 F.3d 848, 853 (6th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003359955&ReferencePosition=853). But “where there is no direct evidence of copying, a plaintiff may establish ‘an inference of copying by showing (1) access to the allegedly-infringed work by the defendant [ ] and (2) a substantial similarity between the two works at issue.’ ”[*Id.* at 853-54](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2003359955) (quoting [*Ellis v. Diffie,* 177 F.3d 503, 506 (6th Cir.1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1999122861&ReferencePosition=506)).

**1. APTRA XFS (Count I)**

[[10]](#Document1zzF102014735628) NCR could not maintain a copyright infringement claim against KAL without referencing the 1998 Agreement. While a court would not need to reference the 1998 Agreement to determine if NCR owns a copyright for APTRA XFS, a court would need to reference the Agreement to determine what, if any, authorization NCR provided to KAL with respect to the APTRA XFS software contained on the ATM that NCR loaned to KAL under the 1998 Agreement. In its Amended Complaint, NCR alleged that “in each such instance [of operating and accessing APTRA XFS software on an NCR ATM], KAL's copying [of the software] was not licensed or otherwise authorized by NCR or any other party.” To determine whether KAL lawfully copied APTRA XFS, by for instance **\*815** obtaining a license or NCR's authorization, a court must examine and possibly construe or interpret the terms of the 1998 Agreement and its exhibits.

NCR argues that in its Amended Complaint it also alleged that KAL had access to the APTRA XFS software through NCR's licensees and refurbished ATMs, matters whose resolution would not require examination of the 1998 Agreement. Enforcement of the arbitration agreement here might, NCR argues, result in piecemeal litigation. *See, e.g.,* [*Bratt Enters., Inc. v. Noble Int'l Ltd.,* 338 F.3d 609, 613 (6th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003528810&ReferencePosition=613). We do not believe, however, that we must parse out NCR's claims in such detail. It is sufficient that a court would have to reference the 1998 Agreement for part of NCR's direct infringement claim. Under these circumstances, we find that the copyright infringement claim as to APTRA XFS falls within the scope of the arbitration agreement.

**2. S4i (Count II)**

[[11]](#Document1zzF112014735628) We reach a different conclusion, however, with respect to NCR's claim that KAL directly infringed the S4i software copyright. No reference to the 1998 Agreement is necessary to determine whether (1) NCR owns a copyright in the S4i software or (2) KAL was licensed or authorized to access and/or copy the S4i software. While the 1998 Agreement is not limited to KAL's developing software only for ATMs running APTRA XFS software, neither the Agreement itself nor the circumstances surrounding its implementation implicate the S4i software.

KAL argues that any claim relating to the S4i software is in fact arbitrable. KAL points to several items in the Amended Complaint to support its argument. First, NCR agreed that KAL would develop and license components of its Kalypso software for all of NCR's ATMs-not just those containing APTRA XFS software. Second, NCR agreed to loan KAL computer hardware and/or software items that were necessary to enable KAL to adapt and support the Kalypso Components, and the Agreement does not limit the loaned equipment to just those ATMs containing APTRA XFS software. Third, NCR does not allege that KAL engaged in any different course of conduct in order to infringe NCR's copyright in the S4i software. Fourth, KAL points out that NCR alleged that “KAL engaged in unauthorized copying of the APTRA XFS *and/or S4i software* when KAL operated NCR ATMs (*whether obtained from NCR pursuant to the Agreement,* from an NCR licensee, or from a second-hand ATM dealer).” (emphasis added).

In contrast to the APTRA XFS software, however, the S4i software has no obvious link to the 1998 Agreement and finding such a link would require us to draw too many inferences that are simply not warranted. We, therefore, conclude that the parties' 1998 Agreement did not contemplate arbitrating disputes relating to the S4i software.

KAL next argues that even if the S4i software was not installed on the ATM that NCR loaned to KAL under the 1998 Agreement, the claims are closely related and we should therefore compel NCR to arbitrate the S4i claims as well. In [*Simon v. Pfizer Inc.,* 398 F.3d 765 (6th Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&SerialNum=2006253552), we determined that:

[w]here one claim is specifically covered by an arbitration agreement, and a second claim is not, the arbitrability of the second is governed by the extent to which the second claim is substantially identical to the first. On the one hand, a party cannot avoid arbitration simply by renaming its claims so that they appear facially outside the scope of the arbitration agreement. In order **\*816** to determine whether such renaming has occurred, a court must examine the underlying facts-when an otherwise arbitrable claim has simply been renamed or recast it will share the same factual basis as the arbitrable claim. However, a claim that is truly outside of an arbitration agreement likewise cannot be forced into arbitration, even though there may be factual allegations in common. In particular, the determination that a claim requires reference to an arbitrable issue or factual dispute is not determinative.

[398 F.3d at 776](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2006253552&ReferencePosition=776) (internal punctuation and citations omitted). We conclude that while the APTRAS XFS and S4i claims are similar, the claims are not identical. NCR's claims relating to S4i are “truly outside” the arbitration clause even though there are factual allegations common to both types of software.

**B. Contributory Copyright Infringement**

[[12]](#Document1zzF122014735628)[[13]](#Document1zzF132014735628)[[14]](#Document1zzF142014735628)[[15]](#Document1zzF152014735628) Liability for contributory infringement derives from the defendant's relationship to the direct infringement. Contributory infringement occurs when one, *with knowledge of the infringing activity,* induces, causes, or materially contributes to the *infringing conduct of another.*

[*Bridgeport Music, Inc. v. WB Music Corp.,* 508 F.3d 394, 398 (6th Cir.2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2014150329&ReferencePosition=398) (internal punctuation and citations omitted) (emphasis added). That is, “a plaintiff must allege: (1) direct copyright infringement [by] a third-party; (2) knowledge by the defendant that the third-party was directly infringing; and (3) [defendant's] material contribution to the infringement.” [*Parker v. Google, Inc.,* 242 Fed.Appx. 833, 837 (3d Cir.2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=6538&FindType=Y&ReferencePositionType=S&SerialNum=2012679523&ReferencePosition=837). And “[w]ith respect to the element of knowledge, contributory liability requires that the secondary infringer ‘know or have reason to know’ of the direct infringement.” [*Encore Entm't v. KIDdesigns, Inc.,* 2005 WL 2249897, \*15, 2005 U.S. Dist. LEXIS 44386, \*49 (M.D.Tenn. Sept. 14, 2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2007310420) (quoting [*A & M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1020 (9th Cir.2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2001141036&ReferencePosition=1020)). “Secondary liability may be imposed on a defendant who does nothing more than encourage or induce another to engage in copyright infringement,”[*Warner Bros. Entertainment, Inc. v. Ideal World Direct,* 516 F.Supp.2d 261, 268 (S.D.N.Y.2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2013306111&ReferencePosition=268), because secondary liability is predicated on “the common law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor.” [*Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.,* 443 F.2d 1159, 1162 (2d Cir.1971)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1971110796&ReferencePosition=1162) (internal punctuation and citation omitted).

**1. APTRA XFS (Count III)**

[[16]](#Document1zzF162014735628) NCR could maintain a contributory copyright infringement claim without referencing the 1998 Agreement. To maintain this claim, NCR must establish that its licensees infringed its copyright in the APTRA XFS software when they provided KAL access to the software. NCR must also establish KAL's knowledge of the licensee's infringing activity and KAL's material contribution to the licensees' infringement.

In its Amended Complaint, NCR asserted that its licensing agreements “contain restrictions prohibiting third-party access to the licensed ATMs as well as the software that is resident on that ATM” and that “KAL was aware of such license agreements, as well as the third-party restrictions contained therein.” NCR also alleged that because KAL had entered into the 1998 Agreement, “which contained strict provisions on confidentiality restrictions and authorized use, KAL was well aware of the confidentiality restrictions **\*817** and use limitations employed by NCR with respect to its ATM system software. Thus, KAL knew or should have known that no NCR licensee could authorize KAL to use the APTRA XFS or S4i software installed on an NCR bank ATM, especially not for the purpose of developing a system software upgrade to directly compete with that of NCR.”

Taking these allegations together, KAL argues that NCR's contributory infringement claim is “based upon KAL's alleged knowledge of third-party use restrictions, which NCR specifically alleges KAL obtained through the [1998] Agreement,” and, therefore, a court must reference the 1998 Agreement in order to determine the merits of this claim. We disagree. At best, NCR's Amended Complaint alleges that KAL was likely on notice of the confidentiality and use restrictions contained within NCR's licensing agreements because of similar provisions contained within the 1998 Agreement. And while KAL's knowledge of the confidentiality provisions within the 1998 Agreement may implicate what KAL “would have reason to know” about the contents of the licensees' agreements, we nevertheless conclude that NCR could maintain this claim without referencing the 1998 Agreement. First, while the 1998 Agreement may be implicated here, a court would not need to examine, construe or interpret the terms of the 1998 Agreement-as it likely would for the direct infringement claim-to determine whether KAL had knowledge of the licensees' infringing activity. Rather, a court could determine that KAL was aware of the alleged infringing activity by referencing some other source of knowledge. Second, a court would not need to reference the 1998 Agreement to determine whether KAL materially contributed to the licensees' infringement. Under the circumstances here, we cannot conclude that NCR agreed to arbitrate this claim. This claim is therefore not arbitrable.

**2. S4i (Count IV)**

For the same reasons that the contributory copyright infringement claim with regard to the APTRA XFS software is not arbitrable, this claim is not arbitrable.

**C. Tortious Interference with Contract (Count V)**

[[17]](#Document1zzF172014735628)[[18]](#Document1zzF182014735628) To establish tortious interference with contract, NCR must show “(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) the lack of justification, and (5) resulting damages.” [*Fred Siegel Co., L.P.A. v. Arter & Hadden,* 85 Ohio St.3d 171, 707 N.E.2d 853, 858 (1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=578&FindType=Y&ReferencePositionType=S&SerialNum=1999076259&ReferencePosition=858).

NCR alleged that KAL was aware that NCR's licensing agreements “contain restrictions prohibiting third-party access to the licensed ATM as well as the software that is resident on that ATM” and that “notwithstanding such knowledge, KAL acted intentionally to induce NCR licensees to breach said confidentiality restrictions by providing KAL access to the licensed ATMs, as well as the APTRA XFS and S4i software, and other software resident thereon.”

KAL argues that NCR could not maintain this claim without reference to the 1998 Agreement because KAL's knowledge of the licensing agreements and their terms comes from its knowledge of the confidentiality and use restrictions contained within the 1998 Agreement. We disagree. NCR would not need to reference the 1998 Agreement to establish the elements of this cause of action, that is, that a particular licensee had a licensing agreement with NCR, that KAL knew of the existence of that agreement, that KAL acted to procure the breach of that agreement,**\*818** whether KAL was justified in its actions, and the damages arising from the breach by the licensee. Because NCR can establish the elements of this cause of action without referencing the 1998 Agreement, this claim is not arbitrable.

**D. Illegal Importation of Infringing Copies (Count VI)**

NCR asserts that KAL developed its Kalignite Upgrade Solutions by infringing NCR's copyrights in APTRA XFS and S4i and then imported Kalignite Upgrade Solutions, the infringing product, into the United States.

**1. APTRA XFS (Count VI in part)**

Because this claim turns on whether KAL is liable for infringing NCR's copyright in the APTRA XFS software, this claim is arbitrable for the same reasons that NCR's direct infringement claim is arbitrable.

**2. S4i (Count VI in part)**

Because the issue of whether KAL infringed a copyright in the S4i software is dispositive of this claim, this claim is not arbitrable for the same reasons that NCR's direct infringement claim is not arbitrable.

**E. Common Law Unfair Competition (Count VII)**

[[19]](#Document1zzF192014735628)[[20]](#Document1zzF202014735628) Lastly, NCR alleges that KAL is liable for common law unfair competition because KAL has engaged in unethical business practices. “Unfair competition ordinarily consists of representations by one person, for the purpose of deceiving the public, that his or her goods are those of another. It may also extend to unfair commercial practices such as malicious litigation, circulation of false rumors, or publication of statements, all designed to harm the business of another.” [*Landskroner v. Landskroner,* 154 Ohio App.3d 471, 797 N.E.2d 1002, 1017 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=578&FindType=Y&ReferencePositionType=S&SerialNum=2003632845&ReferencePosition=1017) (internal punctuation and citations omitted).

[[21]](#Document1zzF212014735628) “[W]hen an otherwise arbitrable claim has simply been renamed or recast it will share the same factual basis as the arbitrable claim.” [*Simon,* 398 F.3d at 776.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2006253552&ReferencePosition=776) While NCR styles its seventh count against KAL as a “common law unfair competition claim,” the language of the Amended Complaint makes clear that NCR is merely asserting claims arising under its agreement with KAL through a common law rubric. For instance, NCR alleges, in part, that KAL “disregard[ed] confidentiality provisions in its own Agreement with NCR” and “misappropriat[ed] trade secrets and other proprietary information of NCR.” These allegations relate directly to the confidentiality provisions and Mutual Non-Disclosure Agreement incorporated into the 1998 Agreement, and their resolution will require a court to examine and interpret the terms of the 1998 Agreement. We therefore conclude that the claim is arbitrable.

**III. CONCLUSION**[FN4](#Document1zzB00442014735628)

[FN4.](#Document1zzF00442014735628) Although the parties on appeal presented argument as to [Rule 12(b)(6)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L) and *forum non conveniens,* we decline to reach the merits of these issues for the first time on appeal.

For the foregoing reasons, we **AFFIRM** the judgment of the district court as to NCR's claims relating to the direct infringement of the APTRA XFS software (Counts I and VI insofar as Count VI relates to APTRA XFS) and the claim of common law unfair competition (Count VII). NCR must arbitrate these claims. We **REVERSE** and **REMAND** for further proceedings not inconsistent with this opinion as to all of NCR's claims relating to the S4i software (Counts II, IV, and VI **\*819** insofar as Count VI relates to S4i), the contributory infringement claim relating to the APTRA XFS software (Count III), and the claim of tortious interference (Count V). NCR may pursue these claims in federal court.

***Case 3.3***

Cal.App. 1 Dist.,2010.

Lhotka v. Geographic Expeditions, Inc.

181 Cal.App.4th 816, 104 Cal.Rptr.3d 844, 10 Cal. Daily Op. Serv. 1434, 2010 Daily Journal D.A.R. 1689 Court of Appeal, First District, Division 3, California.

**Elena LHOTKA, Individually and as Executor, etc., et al., Plaintiffs and Respondents,**

**v.**

**GEOGRAPHIC EXPEDITIONS, INC., Defendant and Appellant.**

**No. A123725.**

Jan. 29, 2010.

Review Denied Apr. 14, 2010.

[SIGGINS](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0167676901&FindType=h), J.

Geographic Expeditions, Inc. (GeoEx) appeals from an order denying its motion to compel arbitration of a wrongful death action brought by the survivors of one of its clients who died on a Mount Kilimanjaro hiking expedition. GeoEx contends the trial court erred when it ruled that the agreement to arbitrate contained in GeoEx's release form was unconscionable. Alternatively, GeoEx contends that if the court correctly concluded the arbitration clause was unconscionable, the court abused its discretion in striking the clause in its entirety rather than severing the objectionable provisions and enforcing the remainder. We find neither point is persuasive, and therefore affirm the order.

**BACKGROUND**

Jason Lhotka was 37 years old when he died of an altitude-related illness while on a GeoEx expedition up Mount Kilimanjaro with his mother, plaintiff Sandra Menefee.[FN1](#Document1zzB00112021240083) GeoEx's limitation of liability and release form, which both Lhotka and Menefee signed as a requirement of participating in the expedition, provided that each of them released GeoEx from all liability in connection with the trek and waived any claims for liability “to the maximum extent permitted by law.” The release also required that the parties would submit any disputes between themselves first to mediation and then to binding arbitration. It reads: “I understand that all Trip Applications are subject to acceptance by GeoEx in San Francisco, California, USA. I agree that in the unlikely event a dispute of any kind arises between me and GeoEx, the following conditions will apply: (a) the dispute will be submitted to a neutral third-party mediator in San Francisco, California, with both parties splitting equally the cost of such mediator. If the dispute cannot be resolved through mediation, then (b) the dispute will be submitted for binding arbitration to the American Arbitration Association in San Francisco, California; (c) the dispute will be governed by California law; and (d) the maximum amount of recovery to which I will be entitled under any and all circumstances will be the sum of the land and air cost of my trip with GeoEx. I agree that this is a fair and reasonable limitation on the damages, of any sort whatsoever, that I may suffer. [¶] I agree to fully indemnify GeoEx for all of its costs (including attorneys' fees) if I commence an action or claim against GeoEx based upon claims I have previously released or waived by signing this release.” Menefee paid $16,831 for herself and Lhotka to go on the trip.

[FN1.](#Document1zzF00112021240083) The other plaintiffs and respondents are Elena Lhotka, individually and as executor of the estate, and Nicholas Lhotka by his guardian ad litem (also Elena Lhotka).

A letter from GeoEx president James Sano that accompanied the limitation of liability and release explained that the form was mandatory and that, on this point, “our lawyers, insurance carriers and medical consultants give us no discretion. A signed, unmodified release form is required before any traveler may join one of our trips. [¶] Ultimately, we believe that you should choose your travel company based on its track record, not what you are asked to sign.... My review of other travel companies' release forms suggests that our forms are not a whole lot different from theirs.”

After her son's death, Menefee sued GeoEx for wrongful death and alleged various theories of liability including fraud, gross negligence and recklessness, and intentional infliction of emotional distress. GeoEx moved to compel arbitration.

The trial court found the arbitration provision was unconscionable under [*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703) [(*Armendariz* ),](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2000487703) and on that basis denied the motion. It ruled: “The agreement at issue is both procedurally and substantively unconscionable.... The Sano letter establishes that the agreement was presented as a Take It Or Leave It proposition and was also represented to be consistent with industry practice. As a consequence[,] if the plaintiff and decedent wished to go on this trip, they could do so only on these terms. Unconscionability also permeates the substantive terms of the agreement to arbitrate. The problematic terms are the limitation on damages, the indemnity of GeoEx, the requirement that GeoEx costs and attorneys' fees be paid if suit is filed related to certain claims, splitting the costs of mediation, the absence of an agreement on the cost of arbitration and the lack of mutuality as to each of these terms. As a consequence, this is not a case where the court may strike a single clause and compel arbitration.”

This appeal timely followed.

**DISCUSSION**

The questions posed here are: (1) whether the agreement to arbitrate is unconscionable and, therefore, unenforceable; and (2) if so, whether the court properly declined to enforce the entire arbitration clause rather than sever unconscionable provisions. We answer both questions in the affirmative.

**I. *Standard of Review***

[[1]](#Document1zzF12021240083)[[2]](#Document1zzF22021240083)[[3]](#Document1zzF32021240083)[[4]](#Document1zzF42021240083) On appeal from the denial of a motion to compel arbitration, “[u]nconscionability findings are reviewed de novo if they are based on declarations that raise ‘no meaningful factual disputes.’ [Citation.] However, where an unconscionability determination ‘is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence.’ [Citation.] The ruling on severance is reviewed for abuse of discretion.” [(*Murphy v. Check ‘N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144, 67 Cal.Rptr.3d 120;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2013708476) [*Armendariz, supra,* 24 Cal.4th at p. 122, 99 Cal.Rptr.2d 745, 6 P.3d 669.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703) In keeping with California's strong public policy in favor of arbitration, any doubts regarding the validity of an arbitration agreement are resolved in favor of arbitration. [(*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686, 99 Cal.Rptr.2d 809;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=2000512170) see [*Armendariz, supra,* at p. 97, 99 Cal.Rptr.2d 745, 6 P.3d 669.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703)

**II. *Unconscionability***

[[5]](#Document1zzF52021240083)[[6]](#Document1zzF62021240083)[[7]](#Document1zzF72021240083)[[8]](#Document1zzF82021240083) We turn first to GeoEx's contention that the court erred when it found the arbitration agreement unconscionable. Although the issue arises here in a relatively novel setting, the basic legal framework is well established. “ ‘[U]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’ [Citation.] Phrased another way, unconscionability has both a ‘procedural’ and a ‘substantive’ element.” [(*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1982138618) “ ‘The procedural element requires oppression or surprise. [Citation.] Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. [Citation.] The substantive element concerns whether a contractual provision reallocates risks in an objectively unreasonable or unexpected manner.’ [Citation.] Under this approach, both the procedural and substantive elements must be met before a contract or term will be deemed unconscionable. Both, however, need not be present to the same degree. A sliding scale is applied so that ‘the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.’ ”   [(*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317, 27 Cal.Rptr.3d 797,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2006544792) quoting [*Armendariz, supra,* 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703) [*A & M Produce Co., supra,* at p. 486, 186 Cal.Rptr. 114.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1982138618) This notion of a “sliding scale,” as will be seen, figures centrally in the analysis of the agreement at issue here.

A. *Procedural Unconscionability*

[[9]](#Document1zzF92021240083) GeoEx argues the arbitration agreement involved neither the oppression nor surprise aspects of procedural unconscionability. GeoEx argues the agreement was not oppressive because plaintiffs made no showing of an “industry-wide requirement that travel clients must accept an agreement's terms without modification” and “they fail[ed] even to attempt to negotiate” with GeoEx. We disagree. GeoEx's argument cannot reasonably be squared with its own statements advising participants that they must sign an *unmodified* release form to participate in the expedition; that GeoEx's “lawyers, insurance carriers and medical consultants give [it] no discretion” on that point; and *that other travel companies were no different.*[FN2](#Document1zzB00222021240083) In other words, GeoEx led the plaintiffs to understand not only that its terms and conditions were non-negotiable, but that plaintiffs would encounter the same requirements with any other travel company. This is a sufficient basis for us to conclude the plaintiffs lacked bargaining power.

[FN2.](#Document1zzF00222021240083) This is the clear import of Sano's letter and, in any event, it is also the trial court's interpretation, which we accept because it is supported by substantial evidence. [(*Murphy v. Check ‘N Go of California, Inc., supra,* 156 Cal.App.4th at p. 144, 67 Cal.Rptr.3d 120.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2013708476)

GeoEx also contends its terms were not oppressive, apparently as a matter of law, because Menefee and Lhotka could have simply decided not to trek up Mount Kilimanjaro. It argues that contracts for recreational activities can *never* be unconscionably oppressive because, unlike agreements for necessities such as medical care or employment, a consumer of recreational activities *always* has the option of foregoing the activity. The argument has some initial resonance, but on closer inspection we reject it as unsound.

[[10]](#Document1zzF102021240083) While the nonessential nature of recreational activities is a factor to be taken into account in assessing whether a contract is oppressive, it is not necessarily the dispositive factor. [*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=2002253822) is informative. The defendant, a credit card company, argued the plaintiff could not establish procedural unconscionability because there were “market alternatives” to its product-i.e., the plaintiff had the option of taking his business to a different bank. The court disagreed, and held the customer's ability to walk away rather than sign the offending contract was not dispositive. “The availability of similar goods or services elsewhere may be relevant to whether the contract is one of adhesion, but even if the clause at issue here is not an adhesion contract, it can still be found unconscionable. Moreover, ‘in a given case, a contract might be adhesive even if the weaker party could reject the terms and go elsewhere. [Citation.]’ [Citation.] Therefore, whether Szetela could have found another credit card issuer who would not have required his acceptance of a similar clause *is not the deciding factor.*” [(*Id.* at p. 1100, 118 Cal.Rptr.2d 862,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=2002253822) italics added; see also [*Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1408-1409, 7 Cal.Rptr.3d 418.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2003896810) The focus of procedural unconscionability in [*Szetela,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2002253822) rather, was on the manner in which the disputed clause was presented. Faced with the options of either closing his account or accepting the credit card company's “take it or leave it” terms, Szetela established the necessary element of procedural unconscionability despite the fact that he could have simply taken his business elsewhere. [(*Szetela, supra,* at p. 1100, 118 Cal.Rptr.2d 862.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=2002253822)

The cases on which GeoEx relies do not hold otherwise. GeoEx relies on [*Morris v. Redwood Empire Bancorp, supra,* 128 Cal.App.4th at page 1320, 27 Cal.Rptr.3d 797,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2006544792) for its statement that the “ ‘procedural element of unconscionability may be defeated[ ] if the complaining party has a meaningful choice of reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable.’ ” “[M]ay be defeated,” true-but not “must,” in all cases and as a matter of law. [*Morris*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2006544792) takes its premise from [*Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 772, 259 Cal.Rptr. 789,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1989094462) in which Division Two of this court expressly declined to hold or suggest “that *any* showing of competition in the marketplace as to the desired goods and services defeats, as a matter of law, *any* claim of unconscionability.” Indeed, [*Morris*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2006544792) itself recognizes that some contracts may be oppressive despite the availability of market alternatives, albeit in the context of employment or medical care-i.e., contracts for “ ‘life's necessities.’ ”   [(*Morris, supra,* at p. 1320, 27 Cal.Rptr.3d 797,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2006544792) quoting [*West v. Henderson* (1991) 227 Cal.App.3d 1578, 1587, 278 Cal.Rptr. 570;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1991046676) see [*Armendariz, supra,* 24 Cal.4th at p. 115, 99 Cal.Rptr.2d 745, 6 P.3d 669](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703) [employment].)

Many of the other authorities cited by GeoEx are inapposite because they concern challenges to release of liability clauses under the rule that invalidates exculpatory provisions that affect the public interest. (See [*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 96-97 & fn. 6, 32 Cal.Rptr. 33, 383 P.2d 441;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&SerialNum=1963109856) [Civ.Code, § 1668](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000200&DocName=CACIS1668&FindType=L).) In this specific context, our courts consistently hold that recreation does not implicate the public interest, and therefore approve exculpatory provisions required for participation in recreational activities. (See, e.g., [*Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 161-162, 21 Cal.Rptr.2d 245](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=1993142717) [swim class]; [*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764, 276 Cal.Rptr. 672](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1991016592) [river rafting]; [*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 597-599, 250 Cal.Rptr. 299](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1988101805) [scuba diving]; [*Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 756, 29 Cal.Rptr.2d 177](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=1994071835) [skydiving]; [*Buchan v. United States Cycling Federation, Inc.* (1991) 227 Cal.App.3d 134, 277 Cal.Rptr. 887](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1991032409) [cycle racing]; [*Coates v. Newhall Land & Farming, Inc.* (1987) 191 Cal.App.3d 1, 8, 236 Cal.Rptr. 181](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1987048911) [riding dirtbike]; [*Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606, 611-612, 246 Cal.Rptr. 310](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=227&FindType=Y&SerialNum=1988052381) [motorcycle dirtbike].) But these cases do not focus on unconscionability, and they do not hold that contracts for recreational activities are immune from analysis for procedural unconscionability.

[[11]](#Document1zzF112021240083) Here, certainly, plaintiffs could have chosen not to sign on with the expedition. That option, like any availability of market alternatives, is relevant to the existence, and degree, of oppression. (See [*Szetela v. Discover Bank, supra,* 97 Cal.App.4th at p. 1100, 118 Cal.Rptr.2d 862;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=2002253822) [*Laster v. T-Mobile USA, Inc.* (S.D.Cal.2005) 407 F.Supp.2d 1181, 1188 & fn. 1;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2008084164&ReferencePosition=1188) see also [*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1376, 59 Cal.Rptr.2d 813](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=1996284021) [nonessential, recreational nature of skiing was one of several factors that indicated a release clause was not substantively unconscionable]; but see [*Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1246, 60 Cal.Rptr.3d 631](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2012440172) [dictum that availability of other cable providers defeated claim of unconscionability].) But we must also consider the other circumstances surrounding the execution of the agreement. GeoEx presented its limitation of liability and release form as mandatory and unmodifiable, and essentially told plaintiffs that any other travel provider would impose the same terms. “Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice....” [(*Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159, 1165, 22 Cal.Rptr.3d 189](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2005746439) [finding no oppression where evidence showed no circumstances surrounding the execution of the agreement, so no showing of unequal bargaining power, lack of negotiation, or lack of meaningful choice].) Here, in contrast to [*Crippen,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2005746439) GeoEx presented its terms as both nonnegotiable and *no different than what plaintiffs would find with any other provider.* Under these circumstances, plaintiffs made a sufficient showing to establish at least a minimal level of oppression to justify a finding of procedural unconscionability. (See [*Morris v. Redwood Empire Bancorp, supra,* 128 Cal.App.4th at p. 1319, 27 Cal.Rptr.3d 797](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2006544792) [“our task is not only to determine *whether* procedural unconscionability exists, but more importantly, *to what degree* it may exist”].)

B. *Substantive Unconscionability*

[[12]](#Document1zzF122021240083) With the “sliding scale” rule firmly in mind [(*Armendariz, supra,* 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669),](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703) we address whether the substantive unconscionability of the GeoEx contract warrants the trial court's ruling. [*Harper v. Ultimo, supra,* 113 Cal.App.4th 1402, 7 Cal.Rptr.3d 418,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2003896810) is analogous. The Harpers hired a contractor to perform work on their property. The contractor allegedly broke a sewer pipe, causing concrete to infiltrate the plaintiffs' soil, plumbing and sewer and wreak havoc on their backyard drainage system. Unfortunately for the Harpers, the arbitration provision in the construction contract limited the remedies against their contractor to a refund, completion of work, costs of repair or any out-of-pocket loss or property damage-and then capped any compensation at $2,500 unless the parties agreed otherwise in writing.

In the words of Justice Sills, substantive unconscionability was “so present that it is almost impossible to keep from tripping” over it. [(*Harper v. Ultimo, supra,* 113 Cal.App.4th at p. 1407, 7 Cal.Rptr.3d 418.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2003896810) “Substantive unconscionability focuses on the one-sidedness or overly harsh effect of the contract term or clause. [Citations.] In the present case, the operative effect of the arbitration is even more one-sided against the customer than the clauses in any number of cases where the courts have found substantive unconscionability. (E.g., [*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 [130 Cal.Rptr.2d 892, 63 P.3d 979]](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2003184025) [either party could appeal any award of more than $50,000 to second arbitrator]; [*Szetela v. Discover Bank* [, *supra* ] 97 Cal.App.4th 1094 [118 Cal.Rptr.2d 862]](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=2002253822) [arbitration clause absolutely barred class actions]; [*Saika v. Gold* (1996) 49 Cal.App.4th 1074 [56 Cal.Rptr.2d 922]](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=1996220607) [arbitration award could be rejected if it exceeded $25,000].) As in [*Little*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2003184025)*,* [*Szetela*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2002253822) and [*Saika,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1996220607) the limitation of damages provision here is yet another version of a ‘heads I win, tails you lose’ arbitration clause that has met with uniform judicial opprobrium.” The arbitration provision in the Harpers' contract did not allow even a theoretical possibility that they could be made whole, because there was no possibility of obtaining meaningful compensation unless the contractor agreed-which, not surprisingly, it did not. [(*Harper v. Ultimo, supra,* at p. 1407, [7 Cal.Rptr.3d 418].)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2003896810)

The arbitration provision in GeoEx's release is similarly one-sided as that considered in [*Harper.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2003896810) It guaranteed that plaintiffs could not possibly obtain anything approaching full recompense for their harm by limiting any recovery they could obtain to the amount they paid GeoEx for their trip. In addition to a limit on their recovery, plaintiffs, residents of Colorado, were required to mediate and arbitrate in San Francisco-all but guaranteeing both that GeoEx would never be out more than the amount plaintiffs had paid for their trip, and that any recovery plaintiffs might obtain would be devoured by the expense they incur in pursing their remedy.[FN3](#Document1zzB00332021240083) The release also required plaintiffs to indemnify GeoEx for its costs and attorney fees for defending any claims covered by the release of liability form.[FN4](#Document1zzB00442021240083) Notably, there is no reciprocal limitation on damages or indemnification obligations imposed on GeoEx. Rather than providing a neutral forum for dispute resolution, GeoEx's arbitration scheme provides a potent disincentive for an aggrieved client to pursue any claim, in any forum-and may well guarantee that GeoEx wins even if it loses. Absent reasonable justification for this arrangement-and none is apparent-we agree with the trial court that the arbitration clause is so one-sided as to be substantively unconscionable. (See [*Armendariz, supra,* 24 Cal.4th at p. 121, 99 Cal.Rptr.2d 745, 6 P.3d 669](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703) [damages remedy unilaterally limited]; [*Pinedo v. Premium Tobacco Stores, Inc.* (2000) 85 Cal.App.4th 774, 781, 102 Cal.Rptr.2d 435](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=2000652760) [damages remedy limited, plaintiff required to pay all costs, and required hearing location was in Oakland].)

[FN3.](#Document1zzF00332021240083) The requirement that the parties share the cost of mediation does not factor into our analysis that the agreement is substantively unconscionable. Whether such cost sharing is appropriate depends on a number of issues that we need not consider. (See [*D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 860-864, 98 Cal.Rptr.3d 300.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2019622779)

[FN4.](#Document1zzF00442021240083) GeoEx is wrong when it claims the trial court erred “in even considering clauses outside the arbitration provision,” such as the limitation of liability and indemnification provisions, “etc.” It is unclear which “etc.” provisions GeoEx contends are “outside” the arbitration clause, but the limitation of liability clause GeoEx specifically identifies appears as subdivision (d) of the paragraph that requires arbitration, while the indemnification provision that immediately follows it is substantively relevant to whether or not the proposed arbitration system would provide an unacceptably one-sided forum for dispute resolution.

**III. *Severability***

[[13]](#Document1zzF132021240083) GeoEx argues that, even if the limitation of liability provision was unconscionable, the court abused its discretion when it refused to strike it and enforce the remainder of the arbitration clause. We disagree.

[[14]](#Document1zzF142021240083)[[15]](#Document1zzF152021240083)[[16]](#Document1zzF162021240083) [Civil Code section 1670.5](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000200&DocName=CACIS1670.5&FindType=L), subdivision (a) gives the trial court discretion to either refuse to enforce a contract it finds to be unconscionable, or to strike the unconscionable provision and enforce the remainder of the contract. It provides: “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” The trial court has discretion under this statute to refuse to enforce an entire agreement if the agreement is “permeated” by unconscionability. [(*Armendariz, supra,* 24 Cal.4th at p. 122, 99 Cal.Rptr.2d 745, 6 P.3d 669;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703) [*Murphy v. Check ‘N Go of California, Inc., supra,* 156 Cal.App.4th at p. 149, 67 Cal.Rptr.3d 120.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2013708476) An arbitration agreement can be considered permeated by unconscionability if it “contains more than one unlawful provision.... Such multiple defects indicate a systematic effort to impose arbitration ... not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage.” [(*Armendariz, supra,* at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703) [*Murphy, supra,* at p. 148, 67 Cal.Rptr.3d 120.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&SerialNum=2013708476) “The overarching inquiry is whether ‘ “the interests of justice ... would be furthered” ’ by severance.” [(*Armendariz, supra,* at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703)

Here, the trial court identified multiple elements of the agreement that indicate GeoEx designed its arbitration clause “not simply as an alternative to litigation, but as an inferior forum” that would give it an advantage. In addition to limiting the plaintiffs' recovery, the agreement required them to indemnify GeoEx for its legal costs and fees if they pursued any claims covered by the release agreement. These one-sided burdens were compounded by the requirements that plaintiffs pay half of any mediation fees and mediate and arbitrate in San Francisco, GeoEx's choice of venue, far from plaintiffs. It was within the court's discretion to conclude this agreement was so permeated by unconscionability that the interests of justice would not be furthered by severing the damages limitation clause and enforcing the remainder. [(*Armendariz, supra,* 24 Cal.4th at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669.)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&SerialNum=2000487703)

**DISPOSITION**

The order denying GeoEx's motion to compel arbitration is affirmed.