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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

UNION INTERNATIONAL FOOD
COMPANY,

Plaintiff and Respondent,

v.

HARRIS FREEMAN & CO. INC.,

Defendant and Appellant.

A132384

(Alameda County
Super. Ct. No. RG10532170)

Harris Freeman & Co., Inc. (Harris Freeman) appeals from the denial of its motion to compel arbitration of a contract dispute with Union International Food Company (Union) pursuant to the rules of the American Spice Trade Association (ASTA). The trial court denied the motion on two grounds: that (1) Harris Freeman did not sufficiently advise Union of the specific terms and rules governing the proposed arbitration; and (2) the existence of a related third-party action raised the possibility of conflicting rulings and duplication of resources. We reverse and remand with instructions to grant the motion to compel arbitration.

BACKGROUND

Harris Freeman is an importer and wholesaler of spices. Since 1998 it has sold spices to Union, an international food company with subsidiaries, manufacturing facilities and sales offices on both coasts and throughout Asia and Latin America.

In 2009 a multi-state outbreak of *Salmonella* Rissen was traced back to Union products that contained white pepper, with predictably deleterious business and financial

consequences for Union. Union had a history of purchasing white pepper in bulk from Harris Freeman. In August 2010, Union sued Harris Freeman for breach of contract, breach of the covenant of good faith and fair dealing and negligence, alleging that Harris Freeman sold it contaminated peppercorns in or around October and/or November 2007.

Harris Freeman moved to compel arbitration pursuant to an arbitration agreement in its sales contracts with Union. It submitted, inter alia, an August 29, 2007 contract for the sale of 20 metric tons of Vietnamese white pepper to be delivered to Union in November 2007. The one-page contract listed four provisions in addition to price, quantity and delivery terms: (1) that it was made upon the terms, conditions and rules contained in the ASTA standard contract; (2) that controversies would be resolved by arbitration in New York under the ASTA rules; (3) that repackaged merchandise must be marked with the country of origin, and the contract did not guarantee microbiological levels; and (4) that the sale was not governed by the Uniform Law on the International Sale of Goods.

According to Harris Freeman vice-president Prashant Shah, Harris Freeman had been wholesaling spices to Union through Union's president, Daniel Chen, since 1998 and every sale was pursuant to a standard ASTA contract. On each occasion Chen would obtain a quote from Shah, who would have a contract sent to him and arrange for the shipment. Chen would pay the price invoiced in the contract. Between 2006 and 2011 Harris Freeman made approximately 42 such sales to Union, each pursuant to a contract containing the same standard terms as in the August 29, 2007 contract.

Chen signed and returned one or two of these contracts early on in their business relationship, but Harris Freeman did not require his signature for every purchase. According to Shah, ASTA contracts with ASTA arbitration clauses are the standard contract in use in the American spice industry, and "[e]very trader, exporter, supplier, broker and buyer of spices in the United States commonly trade using ASTA contract terms, including ASTA arbitration clauses, regardless of whether they are an actual member of ASTA." Union never objected to the arbitration clause, voiced any

unfamiliarity with ASTA contract terms, or asked Harris Freeman for the arbitration rules referenced in its contracts.

In opposing the motion to compel arbitration, Union denied that it had ever agreed to arbitrate with Harris Freeman, that Harris Freeman sent it any sales contracts during the relevant period, and that Union signed an arbitration agreement at any time. Alternatively, Union asserted that if there was an arbitration agreement, it was procedurally and substantively unconscionable. Finally, Union argued arbitration was inappropriate because a related lawsuit pending in Alameda County could result in conflicting rulings.

Chen's declaration stated that there were four, not one, standard ASTA contracts, and that "Union is not and never has been a member of the American Spice Trade Association. Union could not obtain the four standard ASTA contracts from ASTA because it does not have access to the secure member-only portion of the ASTA Web site where the contracts are apparently available for download. Harris Freeman never sent Union a copy of any of those contracts, nor, to my knowledge, has Union ever received or obtained them from any other source. I have personally never seen those contracts before this litigation. Harris Freeman did not bring its reference to the 'standard contract of the American Spice Trade Association' to the attention of myself or Union, nor did we ever consent to Harris Freeman's attempted incorporation by reference." In addition, Chen said that "Harris Freeman never mentioned ASTA Arbitration Booklet #4 and never provided a copy of it to Union."

According to Chen, the last Harris Freeman contract he signed "was apparently in August 2007, but no arbitration terms were discussed nor were the rules of arbitration provided." Chen said Harris Freeman sent no sales contracts for Union's purchases in 2008 and 2009, and specifically denied having received a sales contract dated September 23, 2008.¹

¹ Although Union's complaint alleges the contaminated shipment was sent in October or November 2007, when it opposed the motion to compel arbitration it asserted the dispute centered on shipments sent in 2008 and 2009.

The trial court declined to enforce the arbitration clause. Noting that the first step in the analysis is to “determine[] that an agreement to arbitrate the controversy exists,” (Code Civ. Proc., § 1281.2), the court summarized the evidence on this point, including the September 2008 contract and Shah’s and Chen’s declarations. It observed that, while Harris Freeman’s position would be stronger if there were a signed contract for the applicable period, “a signature by the party to be bound is not required if the other evidence establishes that the party agreed to the terms of the contract orally or by other conduct.” But the court did not make a finding on whether the evidence proved, or failed to prove, such an agreement. Instead, it ruled that the arbitration provision was unenforceable in either case because Harris Freeman failed to adequately establish its specific terms and rules.

The court explained: “[T]he form contracts at issue provided that controversies were to be ‘settled by Arbitration in New York under the rules of the’ ASTA. [Harris Freeman] did not present evidence that it sent a copy of those rules, or the ‘standard contract’ of the ASTA to which [Harris Freeman’s] standard sales contract referred, at any time prior to this litigation, and it failed to attach such contract or terms to the present motion. Union presented evidence that the ASTA ‘standard contract’ and arbitration rules had some differences over time, were not sent to Union or brought to its attention prior to this litigation, and were not known or easily available to it. This presents some question as to their enforceability. [Citation.] Further, such factors give rise to the possibility that the agreement is procedurally unconscionable. [Citation.] The fact that the agreement required the parties to arbitrate in New York despite the fact that at least some versions of the ASTA rules contain substantial limitations on remedies, gives rise to the possibility of substantive unconscionability.” [Citations.]”

Lastly, due to a related personal injury action against Union and/or Harris Freeman, the court declined to compel arbitration because it “would involve duplication of resources and raise possible inconsistent results to require arbitration as to the issue of [Harris Freeman’s] potential liability to Union on its cross-complaint when issues bearing

on the parties' respective fault or strict liability are being determined in the other actions." This timely appeal followed.

DISCUSSION

I. Legal Standards

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement. (c) A party to the arbitration is also a party to a pending court action or special proceeding . . . and there is a possibility of conflicting rulings on a common issue of law or fact." (Code Civ. Proc., § 1281.2.)²

When a party moves to compel contractual arbitration, "the petitioner bears the burden of establishing the existence of a valid agreement to arbitrate, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356 (*Banner*)). If the evidence is undisputed, "we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law. [Citations.]" (*Kleveland v. Chicago Title Ins. Co.* (2006) 141 Cal.App.4th 761, 764 (*Kleveland*)). However, if the trial court's determination as to the existence of an arbitration agreement or its unconscionability is based on disputed facts, we affirm it if it is supported by substantial evidence. (*Banner, supra*, at pp. 357-362; *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 820-821 (*Lhotka*)). "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." (*Lhotka, supra*, at p. 822.)

² Further statutory citations are to the Code of Civil Procedure.

II. Was There an Agreement to Arbitrate?

The threshold issue, as the court observed, is whether the parties entered into an arbitration agreement relevant to the sale at issue. (§ 1281.2.) Although the issue was disputed, the court addressed but did not resolve it. The absence of a finding on such a threshold issue would normally require remand for the trial court to make that determination, since “the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court’s discretion, to reach a final determination” on a petition to compel arbitration. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) We need not do so here, however, because the evidence reasonably supports only one conclusion. (See *id.* at p. 973 [resolution of factually disputed issues raised by arbitration petition required remand unless no evidence supported the opposing party’s claims]; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414.)

In the arbitration context, as in contract law generally, “ ‘a party is bound by the provisions of an agreement which he signs, even though he does not read them and signs unaware of their existence.’ [Citation.] Further, ‘[a] contract may validly include the provisions of a document not physically a part of the basic contract. . . . “It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document. [Citations.] But each case must turn on its facts. [Citation.] For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.” ’ ” (*Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 641 (*Chan*), italics omitted.)

As noted above, Harris Freeman submitted evidence that there was a substantively identical contract for every sale to Union since 1998. Shah attested that “[s]ince 2006 through the present, Harris Freeman has sent Union approximately forty-two (42) ASTA contracts, each containing the same arbitration clause, one for every transaction entered into between Harris Freeman and Union for the purchase of Harris Freeman’s raw spices.

Union has sent payment for every spice purchased from Harris Freeman pursuant to these ASTA contracts.” Chen occasionally signed the sale contracts and returned them to Harris Freeman, but he did not always do so and Harris Freeman did not require it. However, Chen always received an ASTA contract for every spice order from Harris Freeman, after which Union would accept delivery and pay the price specified in the contract. Harris Freeman attached ASTA contracts for pepper sales to Union, each containing the identical arbitration clause, dated April 2005, August 2006, August 2007, June 2008, and September 23, 2008. All of them were signed by Shah, and the April 2005 and August 2007 contracts bear Chen’s signature as well.

Union maintains that Harris Freeman never sent it any contracts in 2008 and 2009, which it now identifies as the time period at issue. The complaint, however, identifies the contaminated shipment as having occurred in October or November of 2007. Harris Freeman produced an August 2007 contract for that sale executed by both Shah and Chen. While there now seems to be some factual uncertainty as to which sale, or sales, were the source of the contamination, Union’s claim that it never received contracts sales in 2008 and 2009 has no bearing on whether it entered into a contract for the 2007 sale put at issue in its complaint.

Moreover, Harris Freeman produced overwhelming evidence that these two merchants continually conducted their business pursuant to the written sales contracts. There are sales contracts signed by Shah dated from April 2005 to September 2008; a June 4, 2008 email from Shah to Chen to provide “confirmation of business done” that day, which identified the terms of business as the “ASTA contract” of the same date (also produced); and undisputed evidence that Union accepted and paid the contract price for each and every one of some 42 spice shipments. “A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” (Com. Code, § 2204, subd. (1).) Although Chen was free to suggest different contract terms (see Com. Code, § 2207, subds. (1) & (2)), there is no evidence he ever proposed the arbitration provision be

changed or deleted from Harris Freeman sales contracts.³ The evidence compels the conclusion that Union's spice purchases from Harris Freeman were pursuant to the written sales contracts. (See, e.g., *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.* (2nd Cir. 1987) 815 F.2d 840, 845-846 [purchase order form included arbitration clause; purchaser received forms without objection and returned some of them with initials or signature]; *Dallman Supply Co. v. Smith-Blair, Inc.* (1951) 103 Cal.App.2d 129, 132; cf. *Banner, supra*, 62 Cal.App.4th at p. 358.) We turn now to the trial court's grounds for declining to enforce the arbitration provision in those agreements.

III. Were the ASTA Arbitration Rules Adequately Incorporated into the Sales Contract?

The court found the arbitration agreement unenforceable because of evidence the ASTA arbitration rules "were not sent to Union or brought to its attention prior to this litigation, and were not known or easily available to it." But the enforceability of the agreement does not turn on whether Harris Freeman physically provided Union with the arbitration rules. The critical question, rather, is whether the rules were adequately incorporated by reference into the sales agreements and sufficiently accessible to Union. "It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document. [Citations.] But each case must turn on its facts. [Citation.] For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of

³ In relevant part, Commercial Code section 2207 provides: "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. [¶] (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: [¶] (a) The offer expressly limits acceptance to the terms of the offer; [¶] (b) They materially alter it; or [¶] (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

the incorporated document must be known or easily available to the contracting parties.’ ” (*Wolschlager v. Fidelity Nat. Title Ins. Co.* (2003) 111 Cal.App.4th 784, 790; *King v. Larsen Realty, Inc.* (1981) 121 Cal.App.3d 349, 353.)

We are not bound by the trial court’s construction of the agreement if it does not depend on extrinsic evidence. (*Chan, supra*, 178 Cal.App.3d at p. 642; *Kleveland, supra*, 141 Cal.App.4th at p. 764 [de novo review of arbitration agreement unless interpretation depends on disputed evidence].) Here, the reference to the ASTA rules appeared clearly and unequivocally on the face of the contract: “Any controversies to be submitted to and settled by Arbitration in New York under the rules of the American Spice Trade Association, if no amicable settlement is possible.” The reference was one of just four brief standard provisions on the face of the one-page sales agreement. It was not concealed or obscured by other language. No more was required to make Union aware that arbitration of disputes would occur under ASTA rules.

Union’s claim that the rules were not “known or easily available” (see *Wolschlager, supra*, 111 Cal.App.4th at p. 790) is also unpersuasive.⁴ Union relies on Chen’s testimony that “[t]he last Harris Freeman contract that I signed was apparently in August 2007 but no arbitration terms were discussed nor were the rules of arbitration provided” and “[t]he documents sent by Harris Freeman to Union during the relevant time period after 2007 did not contain arbitration clauses.” Chen also said that Union could not obtain the standard ASTA contracts from ASTA “because it does not have access to the secure member-only portion of the ASTA Web site where the contracts are apparently available for download,” and it may reasonably be inferred from this that Union was also unable to access the ASTA arbitration rules from the association’s website. This, however, falls far short of showing the rules were not readily available from other sources. Union provided *no* evidence that it made any request for or effort to

⁴ The trial court commented that Union’s evidence on this point “present[ed] some question” as to enforceability, but it is not clear from the court’s order that it in fact found the incorporation by reference defeated the formation of a valid arbitration agreement. For purposes of our discussion, we assume it did.

obtain ASTA's arbitration rules from ASTA or any other source. It is undisputed that Union never asked Harris Freeman for the arbitration rules, never voiced any lack of familiarity with the ASTA contract terms, and never informed Harris Freeman it was not an ASTA member. On the other hand, Shah testified that ASTA contracts with ASTA arbitration clauses are the industry standard and are commonly used by every trader, exporter, supplier, broker and buyer of spices in the United States. Shah's testimony, also, is undisputed.

The sales agreements clearly and unequivocally incorporated the ASTA arbitration rules. The undisputed evidence is that those rules are in common use in Union's industry, and nothing in the record proves Union's claim that they were not easily available. Accordingly, the trial court's ruling that Harris Freeman failed to sufficiently establish the terms and rules governing arbitration is contradicted by the evidence and must be reversed.

IV. The Related Actions No Longer Warrant Refusal to Enforce Arbitration

Under section 1281.2, subdivision (c), the court in its discretion may deny a request for arbitration if "[a] party to the arbitration is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." Here, the primary ground for the court's order was the risk of conflicting rulings in a related third-party product liability action. Harris Freeman asserts the ruling was an abuse of discretion. We need not address the merits of this assertion, because it is undisputed that the related action has been settled and dismissed.⁵ In the absence of any other basis for affirming the denial of Union's motion to compel arbitration, it makes little sense to ignore the settlement and analyze the legal issue as if

⁵ We grant judicial notice of court records reflecting the settlement, the accuracy of which Union does not dispute. (Evid. Code, §§ 452, subd. (d)(1), 459; see *In re Marina S.* (2005) 132 Cal.App.4th 158, 166 [taking judicial notice of post-judgment minute order].) Harris Freeman's motion to augment the record on appeal to include those records and Union's motion to augment the record with other documents filed after the order on appeal here are both denied.

the related action continues to pose a threat of conflicting rulings and wasted resources. To do so would simply force the parties and the court to expend the time and resources necessary to re-litigate the arbitration issue in light of the current circumstances.

Because the parties have both devoted substantial portions of their appellate briefs to issues of procedural and substantive unconscionability, we observe that the issue is not properly presented for appellate review. Although the order denying the motion to compel states that certain factors “gives rise to the possibility” of unconscionability, the court made no determination on whether Union met its burden of proof on the issue, and Union’s evidence is far from overwhelming.

DISPOSITION

The order denying Harris Freeman’s motion to compel arbitration is reversed and this case is remanded. On remand, the superior court shall order the parties to proceed to arbitration.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.