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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PAUL RYAN ASSOCIATES,

**Cross-Complainant and
Appellant,**

v.

**HAWAIIANA PAINTING &
MAINTENANCE, INC.,**

Cross-Defendant and Respondent.

A136052

**(San Francisco County
Super. Ct. No. CGC-10-504430)**

Paul Ryan Associates (Ryan Associates) appeals from an order quashing service of its cross-complaint against respondent Hawaiiiana Painting & Maintenance, Inc. (Hawaiiiana) in this construction defect action. Ryan Associates contends the court erred because Hawaiiiana had consented to personal jurisdiction in California when it entered into a subcontract that purportedly incorporated a term from another contract, between Ryan Associates and the owner of the construction project, which stated that those parties would litigate in San Francisco.

We will affirm the judgment. The forum selection clause, even if it were incorporated into the subcontract, did not subject Hawaiiiana to personal jurisdiction in California since, among other things, it did not refer to litigation with subcontractors or even mention personal jurisdiction. Furthermore, the forum selection clause was unreasonable as applied to Hawaiiiana under the circumstances presented to the court.

I. FACTS AND PROCEDURAL HISTORY

This litigation arises from a project to build a vacation residence in Maui, Hawaii. The owner of the project is Thomas Weisel, a California resident, who hired Ryan Associates, a California corporation, to be the general contractor. Ryan Associates thereafter subcontracted work to multiple subcontractors, including respondent Hawaiiiana, a Hawaii corporation. The issue of personal jurisdiction turns on the language in the General Contract between Weisel and Ryan Associates, and the subcontract between Ryan Associates and Hawaiiiana.

A. *General Contract Between Weisel and Ryan Associates*

In August 1999, Weisel and Ryan Associates entered into a contract entitled “Standard Form of Agreement Between Owner and Contractor” for construction of the project. The contract, based on a standard industry form (“AIA Document A111”), consisted of 14 pages. Attached to this contract and made a part thereof is a document entitled “General Conditions of the Contract for Construction.” This document is also on an industry form (“AIA Document A201”) and consists of 24 pages of provisions in a two-column format with small print. Several pages of attachments follow. The parties refer collectively to these documents as the General Contract or Prime Contract; we will refer to it as the General Contract.

Included in the General Contract is “Attachment No. 4,” which purports to insert provisions into “AIA Document A111.” On the last page of this attachment, nearly at the end of the General Contract, is Paragraph 24.3.3.

Paragraph 24.3.3 of the General Contract is entitled “Attorneys’ Fees and Costs.” But it also contains some language pertaining to the location of prospective lawsuits between Weisel and Ryan Associates. Paragraph 24.3.3 reads: “If either Owner [Weisel] or Contractor [Ryan Associates] brings any suit or other proceeding with respect to the subject matter or the enforcement of this Agreement, the prevailing party (as determined by the court, agency, or other authority before which such suit or proceeding is commenced), in addition to such other relief as may be awarded, shall be entitled to recover reasonable attorneys’ fees, expenses, and costs of investigation

actually incurred. The foregoing includes, without limitation, attorneys' fees, expenses, and costs of investigation incurred in appellate proceedings, costs incurred in establishing the right to indemnification, or in any action or participation in, or in connection with, any case or proceeding under Chapter 7, 11, or 13 of the Bankruptcy Code, 11 United States Code Section 101 et seq., or any successor statutes. [¶] Owner [Weisel] and Contractor [Ryan Associates] agree that any dispute which may arise from the performance of this contract shall be subject to resolution pursuant to California law. *Furthermore, should any dispute arise resulting in arbitration or litigation, the proceeding will take place in San Francisco, California.*" (Italics added.)

B. *Ryan Associates' Subcontract with Hawaiiiana*

In May 2001, Hawaiiiana entered into a subcontract with Ryan Associates to supply the labor and materials to complete the exterior painting for the Hawaii project.

As mentioned, Hawaiiiana is a Hawaii corporation. It is not registered to do business in California, has no offices or employees in California, and does not perform contracting work in California. There is no contention in this appeal that Hawaiiiana had contacts with California sufficient for the exercise of personal jurisdiction.

The subcontract between Hawaiiiana and Ryan Associates does not contain any provision by which the parties explicitly consent to, or agree upon, jurisdiction, venue, or any particular "forum" in the case of litigation. Nor does the subcontract contain anything like Paragraph 24.3.3 of the General Contract. The only reference to a location for litigation appears in Paragraph 14 of the subcontract, which is actually entitled "ARBITRATION." Paragraph 14 provides that Ryan Associates may demand that subcontractors become a party to an arbitration between Ryan Associates and Weisel, that certain disputes arising out of the subcontracts may be subject to arbitration, but that Ryan Associates may elect to have a dispute *litigated* only "in a Court of Law where all parties can be joined."¹

¹ Paragraph 14 reads: "ARBITRATION: If the *Prime* Contract calls for arbitration, and an arbitration concerning or related to Subcontractor's work and/or materials is commenced between Owner and Contractor, Subcontractor will, on

Paragraph 2 of the subcontracts purports to incorporate by reference the terms of the General Contract. Paragraph 2 provides: “Subcontractor [Hawaiiiana] agrees that he has read or is familiar with the General Contract and all the terms, conditions, modifications, plans and specifications thereof, and that he will abide by and comply with, each and all of the same, and agrees that all are included as a part of this subcontract.” In addition, Paragraph 12 of the subcontracts provides in part that the “entire contract between Subcontractor [Hawaiiiana] and Contractor [Ryan Associates] is embodied in the terms and conditions of this contract together with any supplemental document, specifications, drawings, notes, instruction, engineer’s notices or technical data referred to herein.”

C. The Litigation

In October 2010, Weisel filed this litigation in San Francisco Superior Court, seeking damages from Ryan Associates and others for alleged defects in the design and construction of the project, including defects purportedly arising from Hawaiiiana’s performance of its subcontract. Weisel named Hawaiiiana as a defendant but dismissed Hawaiiiana when Hawaiiiana’s attorney stated she would be filing a motion to quash for lack of personal jurisdiction.

In June 2011, Ryan Associates filed a cross-complaint against a number of subcontractors, including Hawaiiiana, alleging breach of a contractual duty to defend and seeking equitable contribution, indemnity, and relief under several other causes of action. Eight of the nine cross-defendant subcontractors are from Hawaii.

demand of Contractor, become a party to such arbitration proceedings and shall submit to any award that may be rendered therein. Subject to the foregoing, if any questions arise regarding the work required and/or materials supplied under this subcontract, or regarding the rights and obligations of Contractor and Subcontractor, under the terms of this subcontract or the *General Contract Documents*, such question shall be subject to arbitration, provided however, if the work involves the Owner to participate in such arbitration, then Contractor may elect to have the dispute litigated in a Court of Law where all parties can be joined” (Italics added.) It is not explained why Paragraph 2 of the subcontracts refers to the “General Contract,” and Paragraph 14 refers to the “Prime Contract” as well as the “General Contract.” Hawaiiiana asserts that there is no document called the “Prime Contract.”

Ryan Associates purported to serve Hawaiiiana with the cross-complaint in June 2011, by mailing the summons, cross-complaint and other documents addressed to Hawaiiiana's designated agent for service of process in Hawaii, with a return receipt requested. The designated agent for service contends she never received the mailing. Ryan Associates purported to serve Hawaiiiana again in November 2011, by mailing the summons, cross-complaint and other documents addressed to another individual – not the designated agent – with a return receipt requested.

Hawaiiiana filed a motion to quash the service of the cross-complaint, contending it was not subject to jurisdiction in California, no valid forum selection clause existed, and service was defective. Ryan Associates opposed the motion, contending Hawaiiiana was subject to California jurisdiction, the purported forum selection clause in the General Contract (Paragraph 24.3.3) was incorporated into Hawaiiiana's subcontract and binding on it, and service was proper.

In June 2012, the court granted Hawaiiiana's motion to quash by written order, adopting the following tentative ruling: "Assuming arguendo that service was proper, Cross-Complainant fails to establish that cross-defendant has minimum contacts with California to warrant personal jurisdiction through the subcontract, which incorporated the prime contract. There is nothing in the prime contract to indicate that the forum selection clause applies to subcontractors."

This appeal followed.² (See Code Civ. Proc., § 904.1, subd. (a)(3) [order granting motion to quash is appealable order].)

II. DISCUSSION

Code of Civil Procedure section 410.10 provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." One such basis for jurisdiction – and the only one asserted by

² Ryan Associates also cross-complained against Maui Waterproofing, First Glass, Inc., and Dorvin D. Leis Company, Inc. (Leis), each of whom filed motions to quash as well. The court denied the motions of Maui Waterproofing and First Glass. The court granted Leis's motion to quash, a ruling that is the subject of pending appeal number A134235.

Ryan Associates in this appeal – arises where the defendant has *consented* to personal jurisdiction by a provision in a contract. (See, e.g., *National Equipment Rental, Ltd. v. Szukhent* (1964) 375 U.S. 311, 315-316 [“[It] is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.”]; Code Civ. Proc., § 410.40 [authorizing contractual consent to California jurisdiction where the contract chooses California law, the transaction involves at least \$1 million, and the contract “contains a provision or provisions under which the foreign corporation or nonresident agrees to submit to the jurisdiction of the courts of this state”].) Indeed, a party may consent to personal jurisdiction when it would otherwise be unavailable. (See *Estate of Heil* (1989) 210 Cal.App.3d 1503, 1512 [jurisdiction over defendant who had no minimum contacts with the state, where defendant consented to jurisdiction on another basis: by answering a petition and participating in discovery and settlement].)

Here, Ryan Associates argues that Hawaiiiana consented to personal jurisdiction in California by signing a subcontract that incorporated the terms of the General Contract, which included Paragraph 24.3.3, by which Ryan Associates and Weisel agreed that California law would apply to their disputes and a lawsuit between them would be held in San Francisco. We first consider whether, as a matter of contract interpretation, the provisions of the subcontract and General Contract constituted a consent by Hawaiiiana to personal jurisdiction in California. We then consider whether enforcement of the clause against Hawaiiiana would be unreasonable under the facts of the case.

A. Contract Interpretation: Hawaiiiana Did Not Consent to Personal Jurisdiction

The parties introduced no extrinsic evidence concerning the interpretation of Hawaiiiana’s subcontract and the General Contract. We review the trial court’s interpretation of these contracts *de novo*. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.)

The canons of contractual interpretation are well-established. We interpret the contract so as to give effect to the parties’ mutual intentions at the time of contracting.

(Civ. Code, § 1636.) The language of the contract governs if it is clear and explicit and does not involve an absurdity; we discern the parties intent from the language alone, if possible, and we view the contract as a whole. (Civ. Code, §§ 1638, 1639, 1641.) A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates, and preference should be given to the general intent over particular words and clauses. (Civ. Code, §§ 1647, 1650, 1652, 1653.) And, “[i]n cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.” (Civ. Code, § 1654.)

We will first address whether the subcontract incorporates the terms of the General Contract, and then consider the meaning of the terms that are incorporated.

1. *Does the Subcontract Incorporate the Terms of the General Contract?*

As mentioned, Paragraph 2 of the subcontract reads: “Subcontractor [Hawaiiiana] agrees that he has read or is familiar with the General Contract and all the terms, conditions, modifications, plans and specifications thereof, and that he will abide by and comply with, each and all of the same, and agrees that all are included as a part of this subcontract.”

Terms may be incorporated into a contract if there is a sufficient basis for the parties to know what those terms are. “ “ “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.*” ’ ’ ” (Shaw v. Regents of University of California (1997) 58 Cal.App.4th 44, 54, italics added; see also Wolschlager v. Fidelity National Title Ins. Co. (2003) 111 Cal.App.4th 784, 790-791 [insured bound by arbitration clause in title policy where preliminary title report incorporated entire policy, gave notice where a copy could be obtained, and directed insured to read it, even though title report did not itself explicitly mention the arbitration clause].)

In the matter before us, there is no evidence or representation that the General Contract was attached to Hawaiiiana’s subcontract or otherwise provided to Hawaiiiana by the time it signed the subcontract. On the other hand, Hawaiiiana represented in Paragraph 2 of its subcontract that it “agrees that [it] *has read or is familiar with the General Contract and all the terms, conditions, modifications, plans and specifications thereof.*” (Italics added.) Furthermore, Hawaiiiana’s brief in this appeal acknowledges that parties to a contract may incorporate by reference the terms of a separate contract.

We will assume for purposes of this appeal that Hawaiiiana’s subcontract incorporates by reference the terms of the General Contract, including Paragraph 24.3.3. The next question is what those terms mean.

2. *Did Hawaiiiana Consent to Jurisdiction Under Paragraph 24.3.3?*

There are two problems with interpreting Paragraph 24.3.3 of the General Contract as a consent by Hawaiiiana to personal jurisdiction in California: (1) the paragraph does not expressly apply to subcontractors like Hawaiiiana; and (2) the paragraph does not expressly discuss personal jurisdiction.

a. *Paragraph 24.3.3 does not refer to subcontractors*

In Paragraph 2 of the subcontract, Hawaiiiana agreed that it would “abide by and comply with” the terms of the General Contract, and those terms were “included as a part of this subcontract.” One such term – Paragraph 24.3.3 – reads: “Owner [Weisel] and Contractor [Ryan Associates] agree that any dispute which may arise from the performance of this contract shall be subject to resolution pursuant to California law. *Furthermore, should any dispute arise resulting in arbitration or litigation, the proceeding will take place in San Francisco, California.*” (Italics added.)

The effect of the incorporation of Paragraph 24.3.3 into Hawaiiiana’s subcontract is subject to two interpretations. On the one hand, Hawaiiiana agreed it would “abide by and comply with” the term that, as to “any dispute which may arise from the performance of this [General Contract],” arbitration or litigation “will take place in San Francisco, California.” This could be interpreted to mean that Hawaiiiana agreed that *any* litigation between Weisel and Ryan Associates – even if Hawaiiiana became a part of it – would

take place in California, and Hawaiiana therefore submitted to the California forum too.

On the other hand, it could be also concluded from the contractual language that Hawaiiana acquiesced in the agreement between Weisel and Ryan Associates that any litigation *between Weisel and Ryan Associates* would take place in California, but because Paragraph 24.3.3 nowhere mentioned a venue or forum for *subcontractors*, Hawaiiana did not consent that it too would be bound to litigate in California.

Since the language of the contractual provisions is reasonably susceptible of both of these interpretations, the language is ambiguous. As we discuss *post*, this ambiguity itself suggests that the clause may not be enforced; but for purposes of our discussion of contractual interpretation, we will attempt to resolve the ambiguity.

Ryan Associates points out that we must interpret the contract as a whole, and argues that another provision of the General Contract – Paragraph 5.3.1 – resolves the ambiguity in its favor. Paragraph 5.3.1 provides: “*By appropriate agreement, written where legally required for validity, the Contractor [Ryan Associates] shall require each Subcontractor [e.g. Hawaiiana], to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and Architect. . . . The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract.*” In essence, Ryan Associates argues, Paragraph 5.3.1 provides that Hawaiiana assumes towards Ryan Associates all the responsibilities that Ryan Associates owes to Weisel under the General Contract; therefore, since Ryan Associates is obligated to Weisel to litigate in San Francisco, Hawaiiana is obligated to Ryan Associates to litigate there too.

We disagree. Paragraph 5.3.1 is expressly conditioned on there being an “appropriate agreement,” ostensibly separate from the General Contract and the

subcontract (since it requires a writing only where required for legality and presupposes the existence of the General Contract and subcontract). As Hawaiiiana points out, the record does not contain any such agreement. Paragraph 5.3.1 thus has no effect.

Paragraph 5.3.1, therefore, does not resolve the ambiguity. Nor do the parties resolve the ambiguity by any of the other tenets of contractual interpretation summarized *ante*, and no extrinsic evidence on the issue was presented in the trial court.

We therefore must turn to Civil Code section 1654, which instructs us to resolve uncertainty by interpreting the language most strongly against the party who caused it to exist. That party was Ryan Associates, since it was Ryan Associates – not Hawaiiiana – that drafted Paragraph 24.3.3. Resolving the ambiguity in Hawaiiiana’s favor, Paragraph 24.3.3 does not apply to Hawaiiiana, and it therefore does not constitute any consent by Hawaiiiana to the litigation proceeding in San Francisco. On this basis, the court did not err in granting Hawaiiiana’s motion to quash.

Moreover, even if Paragraph 24.3.3 *did* apply to Hawaiiiana, it still would not subject Hawaiiiana to the personal jurisdiction of the California courts for another reason: as discussed next, the paragraph does not mention anything about personal jurisdiction.

b. Paragraph 24.3.3 does not refer to personal jurisdiction

The language in Paragraph 24.3.3 of the General Contract does not state that *anyone* is submitting to personal jurisdiction in California; it merely specifies that arbitration or litigation will take place in San Francisco, California. The question therefore arises whether a forum selection clause alone is sufficient to confer personal jurisdiction over a defendant. Relevant to this question are two California decisions – *Global Packaging, Inc. v. Superior Court* (2011) 196 Cal.App.4th 1623 (*Global Packaging*) and *Berard Construction Co. v. Municipal Court* (1975) 49 Cal.App.3d 710 (*Berard*).

In *Global Packaging*, Epicor Software Corporation (Epicor), a Delaware corporation with its principal place of business in Orange County, California, licensed software to Global Packaging, Inc. (Global Packaging), located in Pennsylvania. The software was shipped with an “end user license agreement” that contained the

following provision: “Any controversy or claims arising out of or relat[] to this Agreement shall be venued only in the state or federal court in and [] (a) Orange County, California or (b) the jurisdiction in which the Software is located; without regard to their conflict of laws and principle [sic]. Such venue shall be determined by the choice of the plaintiff bringing the action.” (*Global Packaging, supra*, 196 Cal.App.4th at p. 1627.) The agreement also provided that California law would control its interpretation. (*Id.* at p. 1627, fn. 3.)

After a payment dispute arose, Epicor sued Global Packaging in Orange County, pursuant to the agreement. The trial court denied Global Packaging’s motion to quash service of the summons, and Global Packaging filed a petition for writ of mandate. (*Global Packaging, supra*, 196 Cal.App.4th at pp. 1627-1628.)

The Court of Appeal granted Global Packaging’s petition and directed the trial court to grant the motion to quash. (*Global Packaging, supra*, 196 Cal.App.4th at p. 1635.) In doing so, the appellate court carefully distinguished between clauses in which parties consent to a particular *forum*, and clauses in which the parties consent to *personal jurisdiction*.³ The court explained: “Does an agreement to litigate in a certain location, a forum, then necessarily imply an additional, separate agreement to submit to the jurisdiction of that forum, one in which personal jurisdiction would not otherwise be available? We hold it does not. Given the crucial role played by limits on jurisdiction in the American legal system, and in particular their importance as a preserver of individual liberty, we cannot agree that consenting to a location in and of itself carries with it a consent to personal jurisdiction. [Footnote omitted.] In the forum-selection-clause context, forum and jurisdiction are distinct concepts with different legal implications. [Footnote omitted.] To give but one example, a plaintiff opposing a motion to quash for lack of personal jurisdiction has the initial burden of

³ The court also pointed out that a proper forum selection clause should refer to a state where the litigation is to be conducted, not a county, since venue is a matter of statute. (*Global Packaging, supra*, 196 Cal.App.4th at p. 1628 & fn. 5.) The court nonetheless analyzed the clause as a forum selection clause, as we do here in regard to Paragraph 24.3.3. (*Id.* at p.1628.)

proving facts justifying the exercise of jurisdiction. [Citation.] The allocation of the burden comports with the importance to due process of limiting jurisdiction. A forum selection clause, however, is presumed valid; the party opposing its enforcement bears the ‘substantial’ burden of proving why it should *not* be enforced. [Citations.] Using a forum selection clause as the sole means of establishing personal jurisdiction in effect places the burden of proof on exercise of jurisdiction on the defendant.” (*Id.* at pp. 1632-1633.)

In addition to drawing this legal distinction, the court in *Global Packaging* considered the intent manifested by the language in the end-user agreement. Refuting the argument that Epicor’s inclusion of a forum selection clause must have reflected its intent to subject customers to jurisdiction too, the court observed: “If Epicor meant [the paragraph] to include a consent to jurisdiction, why not say so? Why leave it to implication? It is ridiculously easy to prepare and insert a clause embodying a consent to jurisdiction. . . . Such explicitness would have had two salutary effects: it would have apprised Global Packaging that it was consenting to jurisdiction outside Pennsylvania, and it would very probably have kept this contract interpretation dispute out of the court.” (*Global Packaging, supra*, 196 Cal.App.4th at p. 1634.)

We find the reasoning of *Global Packaging* persuasive. Paragraph 24.3.3, which merely states that “the proceeding will take place in San Francisco, California” and does not mention personal jurisdiction, is at best a forum provision, insufficient to confer personal jurisdiction where such jurisdiction would not otherwise be constitutionally permissible.

Of course, the absence of any mention of personal jurisdiction in Paragraph 24.3.3 of the General Contract makes sense in light of the fact that both parties to the *General Contract* – Weisel and Ryan Associates – are California residents, already subject to jurisdiction in this state. Conversely, the absence of any mention of personal jurisdiction in Paragraph 24.3.3 – or anywhere else in the General Contract or the subcontracts – manifests the *lack* of any intention by the parties to use the provision to bind subcontractors from other states to a California court.

Ryan Associates attempts to distinguish *Global Packaging* on two grounds, both of which are unavailing. First, Ryan Associates asserts that *Global Packaging* involved an adhesion contract, where the defendant passively agreed to the terms of the end-user license agreement without negotiating its terms, while Hawaiiana and Ryan Associates negotiated the subcontracts (and Weisel and Ryan Associates negotiated the General Contract) at arm's length. However, the adhesive nature of the end-user agreement was barely mentioned in *Global Packaging*, and it was decidedly *not* the basis of the court's distinction between personal jurisdiction clauses and forum selection clauses. (*Global Packaging, supra*, 196 Cal.App.4th at p. 1632.)

Second, Ryan Associates argues, the agreement in *Global Packaging* specifically restricted itself to venue, while Paragraph 24.3.3 states that disputes “shall be subject to resolution pursuant to California law” and “the proceeding will take place in San Francisco, California.” The fact that Paragraph 24.3.3 provides for California law is not a distinction, however, since the clause in *Global Packaging* did too. (*Global Packaging, supra*, 196 Cal.App.4th at p. 1627, fn. 3.) And while Paragraph 24.3.3 does not expressly limit itself to venue, the point is that it does not say anything about personal jurisdiction.

While Ryan Associates is unable to distinguish *Global Packaging* from the matter before us, it refers us to another decision – *Berard, supra*, 49 Cal.App.3d 710 – which it contends holds contrary to *Global Packaging*. *Berard* is not persuasive authority, at least under the circumstances of the matter before us.

In *Berard*, lessor Percin entered into a lease with lessee Berard Construction Co. (Berard). The lease contained the following provision: “CONSTRUCTION, VENUE AND ATTORNEY’S FEES: This lease constitutes the entire agreement between the parties, and each party acknowledges that the other has made no representations, warranties, conditions, or provisions which are not incorporated herein. This agreement may not be modified except by writing executed by both parties. This lease is executed in Los Angeles, California, and shall be construed under the laws of the State of California, and *the parties hereto agree that any action relating to this lease shall be instituted and*

prosecuted in the courts in Los Angeles County and each party waives the right to change of venue. In the event of suit brought by Lessor to enforce any provisions of this lease, or suit by or against Lessor by reason of failure of Lessee to perform hereunder, Lessor shall be paid its reasonable attorney’s fees and all costs incurred.” (*Berard, supra*, 49 Cal.App.3d at pp. 720-721, italics added.)

The court in *Berard* ruled that *Berard* had consented to jurisdiction: “The provision that ‘any action relating to this lease shall be instituted and prosecuted in the courts in Los Angeles County’ is an unequivocal consent to the jurisdiction of the California courts.” (*Berard, supra*, 49 Cal.App.3d at p. 721.) The court further held that the provision was valid, relying principally on *Frey & Horgan Corp. v. Superior Court* (1936) 5 Cal.2d 401 (*Frey*), which had ruled that a defendant consented to jurisdiction in a contract providing that disputes would be arbitrated under California law. Ryan Associates argues that the language in Paragraph 24.3.3 of the General Contract — “should any dispute arise resulting in arbitration or litigation, the proceeding will take place in San Francisco, California” — is akin to the one in *Berard*.

In our view, *Global Packaging* addressed the issue more thoroughly (and certainly more recently) than *Berard*, and we find *Global Packaging*’s analysis more persuasive. *Berard* did not distinguish between selection of a forum, waiver of objections to venue, and submission to personal jurisdiction. We also question *Berard*’s reliance on *Frey*, since *Frey* pertained to jurisdiction for the purposes of compelling an arbitration to which the parties had undisputedly agreed, unlike the parties in *Berard*, *Global Packaging*, or this case. Indeed, *Global Packaging* noted the holding in *Berard* but observed that “[c]ases pertaining to jurisdiction in arbitrations are inapposite in light of [Code of Civil Procedure] section 1293, which deals specifically with this subject.” (*Global Packaging, supra*, 196 Cal.App.4th at

pp. 1632-1633, fn. 10.)⁴ Furthermore, the holding in *Global Packaging* better tracks Code of Civil Procedure section 410.40, which authorizes a contractual consent to California jurisdiction where the contract “contains a provision or provisions under which the foreign corporation or nonresident agrees to submit to the *jurisdiction* of the courts of this state.” (Italics added.)

In any event, *Berard* is distinguishable from the matter at hand. *Berard* dealt with a provision in a contract negotiated by the plaintiff and defendant. Here, by contrast, Hawaiiiana did not negotiate the General Contract in which Paragraph 24.3.3 appears. And by no means did *Berard* hold that the provision in the lease would subject a *third* party to personal jurisdiction in California simply because the third party signed a separate contract purporting to incorporate the terms of the lease. Indeed, Ryan Associates presents no authority for the proposition that consent to personal jurisdiction may be established solely by incorporating a forum selection clause from another contract between a different set of parties.

In sum, to the extent that Paragraph 24.3.3 applied to Hawaiiiana, it did not constitute a consent by Hawaiiiana to personal jurisdiction in California. The court did not err in granting Hawaiiiana’s motion to quash.

⁴ In *Frey*, one party filed a petition to compel arbitration in superior court pursuant to a contract with Frey, which stated in part: “Any dispute arising hereunder shall be submitted to arbitration before a committee of the Foreign Commerce Association of the San Francisco Chamber of Commerce . . . This contract in all respects shall be governed and construed by the laws of the State of California.” (*Frey, supra*, 5 Cal.2d at pp. 402-403.) Frey moved to quash service of the petition. The court ruled that Frey had consented “to the jurisdiction within which the arbitration must operate” because (1) “[t]he agreement to submit the dispute to the arbitration committee is an agreement to cooperate in that proceeding” and (2) the contractual reference to California law incorporated into the contract the Code of Civil Procedure provision authorizing the filing of petitions for arbitration in superior court. (*Id.* at pp. 404-405.) Unlike *Frey*, however, the matter before us does not concern jurisdiction for the purpose of compelling arbitration.

B. *Enforcing Paragraph 24.3.3 To Establish Jurisdiction Would Be Unreasonable*

Even if a forum selection clause *could* bind a party to the personal jurisdiction of a court for which there was otherwise no constitutional basis for jurisdiction, and Paragraph 24.3.3 *did* apply to subcontractors, we would conclude that the trial court did not err in granting Hawaiiiana's motion to quash for another reason: it would be unreasonable to enforce Paragraph 24.3.3 against Hawaiiiana under the circumstances of this case. While the trial court did not expressly assert this reason as a basis for its order, the argument was asserted by Hawaiiiana in the trial court and has been briefed in this appeal, and we will uphold a trial court order on any lawful ground. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.)

A forum selection clause will not be enforced if it is unreasonable under the facts of the case. (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 496 [“forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of such a clause would be unreasonable”] (*Smith*); see generally *The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 15 [forum selection clause will be upheld unless party clearly shows that its enforcement would be unreasonable and unjust or the clause is invalid].) The reasonableness of a forum selection clause turns on whether the forum was selected freely and voluntarily, will accomplish substantial justice, has a rational basis in light of the circumstances of the case (such as the location of the parties and dispute), and does not contravene public policy. (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 12 (*AOL*); *CQL Original Products, Inc. v. National Hockey League Players Assn.* (1995) 39 Cal.App.4th 1347, 1354 (*CQL*).) More generally, “[c]ourts will enforce forum selection clauses contained in a contract freely and voluntarily negotiated at arm's length unless enforcement would be unfair or unreasonable,” and reasonableness requires “adequate notice to the defendant that he was agreeing to the jurisdiction cited in the contract.” (*Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 908 (*Hunt*).)

Enforcement of Paragraph 24.3.3 as a forum selection clause against Hawaiiiana, so as to subject Hawaiiiana to personal jurisdiction where it otherwise would not exist, would be unreasonable. In the first place, while Paragraph 24.3.3 had some nexus to Weisel and Ryan Associates (since they are both from California), it had little if any nexus to Hawaiiiana (a Hawaii company, with no business or office in California, working on a project in Hawaii).

Moreover, as Hawaiiiana urged in the trial court, Hawaiiiana was not given adequate notice that it was agreeing to submit itself to the personal jurisdiction of the California courts. There was, of course, nothing that expressly provided such a warning in either Hawaiiiana's subcontract or the General Contract. Although the subcontract stated that Hawaiiiana knew or was familiar with the General Contract's terms, as a practical matter Hawaiiiana would have to figure out that Paragraph 24.3.3 – placed near the end of a contract spanning roughly 50 pages, and entitled “Attorney’s Fees and Costs” – not only existed, but actually contained a provision regarding the location of litigation that might result from disputes. Then Hawaiiiana would have to recognize that Paragraph 24.3.3, which addresses where Weisel and Ryan Associates will litigate their disputes but does not mention Hawaiiiana, any other subcontractor, or even the word “subcontractor,” nonetheless applies to disputes with Hawaiiiana too. Then Hawaiiiana would have to discern that the provision, which does not state that anyone is submitting to personal jurisdiction, was subjecting Hawaiiiana to personal jurisdiction in California. And this deduction might be quite elusive, for two reasons: Article 5 of the General Contract, entitled “Subcontractors,” does not mention anything about subcontractors submitting to personal jurisdiction in California or even litigating in California; and Paragraph 14 of the subcontract promises that Ryan Associates would bring litigation only in a court in which all parties can be joined, without any mention of California. Even *CQL, supra*, on which Ryan Associates relies and which upheld a forum selection clause, involved a clause that expressly informed the party that it was submitting to the jurisdiction of the forum's courts. (*CQL, supra*, 39 Cal.App.4th at p. 1352.)

It would have been much clearer, more reasonable – and so easy – for Ryan Associates to specify in its subcontracts that the subcontractor submits to personal jurisdiction in California. Even inserting such a direct statement in Article 5 of the General Contract (dedicated to subcontractors) or in Paragraph 24.3.3 itself, would have been clearer and more reasonable than what Ryan Associates actually did. And while it may be that Hawaiiiana is a sophisticated business entity, so is Ryan Associates – who certainly cannot be ignorant of the possibility that its subcontracts could lead to litigation, and that an express consent to jurisdiction in California is a simple and effective means of accomplishing what it now claims it wanted to do circuitously.

Ryan Associates argues that *Hunt, supra*, which concluded that a clause failed to provide the defendant adequate notice of its consent to the forum, is inapposite because the clause in *Hunt* was contained in a contract of adhesion. (*Hunt, supra*, 81 Cal.App.4th at p. 908.) The argument is unconvincing. *Hunt*'s statement regarding the requirement that forum selection clauses be reasonable was directed at contracts “freely and voluntarily negotiated at arm’s length” (*ibid.*), and the court’s concern over adequate notice to the defendant was based on cases that did not involve adhesion contracts (*id.* at p. 908, fn. 5). And while the nature of an adhesion contract may have contributed to the conclusion that the forum clause failed to give sufficient notice in *Hunt*, so too does the fact that the clause in this case did not appear in the document signed by Hawaiiiana and made no reference to subcontractors or jurisdiction. Similarly, while the clause in *Hunt* was ambiguous because, unlike Paragraph 24.3.3, it failed to identify a specific forum for the litigation, Paragraph 24.3.3 was deficient because, unlike the clause in *Hunt*, it was not in the document signed by the parties and never referred to jurisdiction. At bottom, the clause in *Hunt* was unreasonable for the flaws stated there, and the application of Paragraph 24.3.3 is unreasonable for the flaws stated here.

Ryan Associates also refers us to *CQL, supra*, contending that it upheld contractual language similar to Paragraph 24.3.3 as a valid forum selection clause. In *CQL*, the court held that the following provision was neither contrary to public policy nor ambiguous: “[A]ny claims arising hereunder shall, at the Licensor’s election, be

prosecuted in the appropriate court of Ontario.” (*CQL, supra*, 39 Cal.App.4th at p. 1358.) However, *CQL* is distinguishable from the matter at hand. First, *CQL* merely held that substantial evidence supported the trial court’s enforcement of the forum selection clause; it did not state that it would have been an abuse of the court’s discretion to refuse to enforce the clause. (*Id.* at p. 1354.) Second, unlike Paragraph 24.3.3, the provision in *CQL* contained an express stipulation to the personal jurisdiction of the forum. Third, unlike Paragraph 24.3.3, the provision in *CQL* was contained within the document signed by the parties and was freely and voluntarily agreed upon by the parties. (*Id.* at pp. 1352, 1355.)

In the final analysis, and as an alternative ground for upholding the trial court’s order granting the motion to quash, there was an adequate basis to conclude that enforcing the forum selection clause against Hawaiiiana was unreasonable under the circumstances of this case. The court did not err in granting the motion to quash.

C. Ryan Associates’ Other Arguments

We have considered all of the other arguments presented in Ryan Associates’ appellate briefs and find them all unconvincing. For brevity, we address only one of them here: a new argument, not presented in the trial court, that Hawaiiiana is subject to jurisdiction in California because of an indemnity provision in the subcontracts.

In Paragraph 5 of its subcontracts, Hawaiiiana agreed “to indemnify, hold harmless and defend Contractor [Ryan Associates] and Owner [Weisel] against any claims, demands, liabilities or action, including attorney’s fees, for personal injury or death or property damage, or any or all of them, arising out of the performance of this subcontract, except claims which may arise from the sole negligence of Contractor or Owner.” Ryan Associates argues that this provision itself compels Hawaiiiana to appear in this case to defend Ryan Associates upon proper tender, which Ryan Associates contends it made.

Ryan Associates’ argument is meritless. Besides the fact that Ryan Associates does not point to any “personal injury or death or property damage” alleged against it that might trigger the contractual obligation to defend and indemnify, nothing in the

indemnity provision purports to require Hawaiiiana to consent to personal jurisdiction in California or to select the San Francisco Superior Court as a forum for resolving disputes between Ryan Associates and Hawaiiiana. While the contractual duty to defend might require payment for Ryan Associates' defense, it does not require Hawaiiiana to make itself amenable to a lawsuit in this state. At any rate, Ryan Associates cannot now argue that the trial court erred based on an issue it never asked the court to consider.

Ryan Associates fails to establish error.⁵

III. DISPOSITION

The judgment is affirmed.

⁵ We do not decide whether a defendant might be subject to personal jurisdiction if its alleged breach of a contractual indemnity obligation, and the damage therefrom, occurred in the jurisdiction. That basis for jurisdiction would arise from the defendant's contacts with the state, not from the forum selection clause on which Ryan Associates based its appeal. The issue is therefore not before us. We also need not, and do not, decide whether Ryan Associates' service of the cross-complaint on Hawaiiiana was proper.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUNIERS, J.