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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NEWMAYER & DILLION LLP,

Plaintiff and Appellant,

v.

MARC VANEFSKY et al.,

Defendants and Respondents.

G051000

(Super. Ct. No. 30-2013-00651441)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, H. Michael Brenner, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed, as modified.

Newmeyer & Dillion, Paul L. Tetzloff and Jason L. Morris for Plaintiff and Appellant.

Law Offices of Thomas J. Rotert and Thomas J. Rotert for Defendants and Respondents.

Newmeyer & Dillion LLP (N&D) appeals from the trial court's order vacating its arbitration award for past due attorney fees and costs, and denying without prejudice its request for confirmation of the award. N&D argues the court erred by failing to recognize the arbitrator had authority to determine the existence and validity of an agreement containing an arbitration clause, implicitly requiring it to petition to compel arbitration, and imposing the burden of producing a signed contract when no such burden exists. N&D also requests this court to take judicial notice of all versions of the Judicial Arbitration and Mediation Service (JAMS) comprehensive arbitration rules in effect from 2007 to 2014, the year the appeal in this case was filed.

We reject N&D's contentions and deny the request for judicial notice, as the documents are unnecessary to our decision. But we conclude the court erred in denying N&D's request to confirm the arbitration award without prejudice and modify the order to reflect the denial is with prejudice. The order is affirmed as modified.

FACTS AND PROCEDURAL BACKGROUND

From 2008 to July 2009, N&D represented Marc and Helen Vanefsky¹ in a lawsuit filed against them by their neighbors. Gregory L. Dillion and Joshua B. Vinograd were two of the N&D attorneys who worked on the case. Following a bench trial and verdict against the Vanefskys, Vinograd voluntarily terminated his employment with N&D. In July 2009, the Vanefskys substituted in Vinograd to represent them in post-trial matters and N&D turned over the entire file to him without keeping copies of any documents.

In December 2012, N&D notified the Vanefskys of their right, as clients, to nonbinding arbitration of N&D's claim for unpaid legal fees (Bus. & Prof. Code, § 6200 et seq.). Vanefsky was not interested in nonbinding arbitration and did not respond.

¹ Unless Mrs. Vanefsky or the Vanefskys is indicated, references to Vanefsky will be to Mr. Vanefsky.

The next month, N&D staff counsel Therese A. Vickers e-mailed Vinograd and asked to copy the Vanefskys' file. When she followed up, Vinograd informed her he could not locate the file and likely had not saved a copy of it after he had closed his office. N&D served a second notice of the right to nonbinding arbitration upon the Vanefskys in February 2013. Vanefsky again did not respond.

At the end of April, N&D, through Vickers, filed and served upon the Vanefskys a demand for binding arbitration with JAMS, seeking unpaid legal fees plus interest. The form document required two copies of the entire contract containing the arbitration clause. N&D attached a copy of an unsigned retainer agreement dated November 7, 2008. The three signature blocks for Dillion and the Vanefskys were blank.

The retainer agreement contained the following arbitration clause:
“8. Dispute Resolution. To the extent not prohibited by applicable law or the California Rules of Professional Conduct, any controversy, dispute, or claim arising out of or relating to the interpretation, performance or breach of this agreement shall be finally determined, at the request of any party, by binding arbitration conducted in Orange County, California, in accordance with the then existing rules for commercial arbitration of [JAMS]/Endispute, and judgment upon any awarded rendered by the arbitrator may be entered in any court having jurisdiction thereof.”

In May 2013, N&D filed the complaint in this action against the Vanefskys for breach of contract, unjust enrichment, account stated, and quantum meruit. Newmeyer did not attach a copy of the alleged contract, serve the complaint on the Vanefskys or inform them of the lawsuit.

Later that month, Laura Aguilar, the case manager for JAMS, e-mailed Vanefsky a copy of N&D's notice of intent to initiate arbitration. Vanefsky responded, “Dear Ms. Aguilar. [¶] I received your notice of intent to arbitrate. As this matter was from some years prior and I have not been provided with or have seen the purported

contract where either I or my wife agreed to arbitration, we do not acknowledge or agree to JAMS jurisdiction to arbitrate this matter.”

Aguilar forwarded Vanefsky’s e-mail to Vickers, stating: “Good afternoon Ms. Vickers. [¶] Below is an [e-mail] we received from . . . Vanefsky. . . . I was instructed by my manager to forward it to you and copy . . . Vanefsky so you have an opportunity to respond.” Vickers did not respond or provide a copy of the executed agreement.

JAMS continued to proceed and distributed a list of proposed arbitrators. In at least one telephone conversation, Vanefsky reiterated to Aguilar that he would not participate in arbitration unless he received a signed copy of an agreement in which he consented to arbitrating the fee dispute. Subsequently, Aguilar e-mailed both Vanefsky and Vickers, stating, “Dear Counsel, [¶] . . . Vanefsky has advised me via telephone that he does not agree to proceed with Arbitration. Accordingly, as previously discussed, the issue of whether the parties previously entered into an agreement to arbitrate will be the decision of the Arbitrator.”

Vanefsky did not recall being part of any such discussion and never would have agreed to allow the arbitrator to decide if he had signed an arbitration agreement. He assumed Aguilar was referring to a conversation she had with Vickers.

When JAMS attempted to have Vanefsky pay his fees for the arbitration, he repeated his refusal to participate in arbitration unless shown proof he had agreed to arbitrate. At the end of September, he received an e-mail from JAMS Alternative Dispute Resolution Specialist Tricia Lunceford stating that if he did not “pay, we can still move forward if N&D pays up front. But the arbitrator could order you to pay fees on the backend. Also, if you do not pay the arbitration fees up front, you may not be able to present any affirmative claims, if you have any.”

Apparently, N&D paid for all the fees upfront and selected Hon. John C. Woolley (Ret.) as arbitrator. Upon receiving notice of a telephonic hearing between the

parties and Judge Woolley set for December 13, 2013, Vanefsky e-mailed JAMS to “[p]lease be informed once again that we are not participating in arbitration in the absence of an arbitration agreement.” Lunceford e-mailed back that “[w]hile we know you are not attending, we will continue to send you documentation. It is our duty.”

The Vanefskys did not attend the arbitration held in May 2014 before Judge Woolley. Judge Woolley proceeded in their absence under JAMS Rule 17(j), which states, “[t]he Arbitrator may not render an [a]ward solely on the basis of the default or absence of the [p]arty, but shall require any [p]arty seeking relief to submit such evidence as the Arbitrator may require for the rendering of an [a]ward.”

After considering documentary evidence and testimony by two N&D attorneys including Dillion, Judge Woolley found N&D and the Vanefskys had “entered into a written and enforceable engagement contract (the ‘Agreement’) for legal services that was signed by both parties” and contained a valid and enforceable arbitration clause. He awarded N&D the full amount requested plus interest and the cost of arbitration.

Upon receiving the arbitration award by Judge Woolley, the Vanefskys hired their present counsel, Thomas J. Rotert, to set aside the award. In a records search of civil cases, Rotert discovered for the first time N&D’s current civil lawsuit against the Vanefskys. On the Vanefskys’ behalf, he filed an answer to the complaint, a cross-complaint against N&D for breach of fiduciary duty, fraud, and professional negligence, as well as a petition to vacate the arbitration award on multiple grounds, including that the arbitrator exceeded his powers. (Code Civ. Proc., § 1286.2, subd. (a)(4); all further statutory references are to Code Civ. Proc.)

The petition to vacate the arbitration award was supported by declarations from the Vanefskys. Vanefsky attested he did “not recall ever seeing” or signing any retainer agreement, or “being provided, at any time, an executed copy of any [N&D] retainer agreement bearing either my signature, my wife’s signature, or the signature of any [N&D] attorney on behalf of the firm.” He also described the various written and

e-mail conversations between him and JAMS regarding his unwillingness to submit to “JAMS jurisdiction to arbitrate this matter” without first being provided a copy of the contract in which he and his wife allegedly agreed to arbitrate. For her part, Mrs. Vanefsky declared she “never signed any retainer agreement with” N&D, nor seen one purporting to bear her signature.

N&D opposed the petition to vacate and requested confirmation of the award. In support, it provided Dillion’s declaration attesting that although he did not have a copy of the signed agreement, it was N&D’s and his own custom and business practice to do the following: (1) “obtain a signed engagement agreement from each client it represents”; (2) “provide my clients an opportunity to discuss and negotiate the terms and conditions of the engagement agreement”; (3) “instruct my clients to sign a copy of their engagement agreement, keep a copy for themselves, and return their original signed copy to N&D”; and (4) “not to continue representation in a case without a signed engagement agreement.” He “believe[d]” he “followed N&D’s and [his] own custom and business practice with” the Vanefskys and that Vanefsky signed the agreement.

The trial court granted the petition to vacate the arbitration award and denied the request for confirmation without prejudice. It quoted our opinion in *Gilbert Street Developers, LLC v. La Quinta Homes, LLC* (2009) 174 Cal.App.4th 1185, 1191 (*Gilbert*) as follows: “Arbitration exists as a matter of contract, thus a party cannot be compelled into arbitration without agreeing to it in the first place. The default position on who decides arbitrability is ‘undeniably’ a matter for judges, not arbitrators, so the parties must ‘clearly and unmistakably provide otherwise’ if they want arbitrators to assume the role that judges would be normally expected to assume.” (Fn. omitted.)

Applying *Gilbert*, the trial court reasoned that because N&D could not produce a signed contract, it was not “clearly and unmistakably” shown the parties had agreed to arbitrate the fee dispute and thus it was for the court to decide. According to

the court, if N&D wanted to arbitrate the matter, it was required to petition the court to compel arbitration and absent that, the arbitration award had to be vacated.

DISCUSSION

I. General Legal Principles Regarding Arbitration and the Standard of Review

“Private arbitration . . . ‘is a procedure for resolving disputes which arises from contract; it only comes into play when the parties to the dispute have agreed to submit to it.’ [Citation.] Such arbitration is governed by the California Arbitration Act [citation], ‘a comprehensive, all-inclusive statutory scheme applicable to all written agreements to arbitrate disputes.’ [Citation.] Contractual arbitration awards, if valid, are presumed to be binding and final.” (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1218, fn. omitted (*Toal*).

“After arbitration has resulted in an award, the Arbitration Act permits a party to petition ‘the court to confirm, correct or vacate the award.’ (§ 1285.) The opposing party may respond to such a petition by requesting ‘the court to dismiss the petition or to confirm, correct or vacate the award.’ (§ 1285.2; see § 1287.2.) The proponent of the arbitration award (whether it be the petitioner or the respondent) must recite or attach a copy of the arbitration agreement. (§§ 1285.4, subd. (a), 1285.6.) A court presented with such a petition or response is empowered only to confirm, correct, or vacate the award or to dismiss the proceeding. (§ 1286.)” (*Toal, supra*, 178 Cal.App.4th at p. 1220.)

The powers of an arbitrator are limited by the agreement. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 375.) “[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’ [Citations.]” (*Atkinson v. Sinclair Refining Company* (1962) 370 U.S. 238, 241.) “Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. [Citation.]” (*AT & T Technologies, Inc. v. Communications Workers* (1986) 475 U.S. 643, 649.)

“On appeal from an order confirming [or vacating] an arbitration award, we review the trial court’s order (not the arbitration award) under a de novo standard. [Citations.] To the extent that the trial court’s ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues.’ [Citation.]” (*Toal, supra*, 178 Cal.App.4th at p. 1217; *SWAB Financial v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196 [appeal from order vacating arbitration award].)

II. Judicial Review of Arbitrator’s Decision

As a threshold matter, we must determine whether the arbitrator’s finding the parties had entered an agreement containing an arbitration clause is judicially reviewable at all. We conclude it is.

“The scope of judicial review of arbitration awards is extremely narrow because of the strong public policy in favor of arbitration and according finality to arbitration awards. [Citations.] An arbitrator’s decision generally is not reviewable for errors of fact or law. [Citations.] However, . . . section 1286.2 provides limited exceptions to this general rule, including an exception where ‘[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.’ [Citations.] ‘[W]hether the arbitrator exceeded his or her powers . . . , and thus whether the award should have been vacated on that basis, is reviewed on appeal de novo.’ [Citation.]” (*Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 33.)

An arbitrator may exceed his or her powers by, among other things, ruling on an issue the parties have not agreed to arbitrate (*City of Richmond v. Service Employees Internat. Union, Local 1021* (2010) 189 Cal.App.4th 663, 669-670), or conducting an arbitration where “no agreement to arbitrate exist[s].” (*Northern Cal. Dist. Council of Laborers v. Robles Concrete Co.* (1983) 149 Cal.App.3d 289, 294 [arbitration award vacated where arbitration agreement had been repudiated].)

While generally an arbitrator's decision may not be reviewed for factual or legal errors, such errors do not all warrant the same treatment and thus "courts do not abandon all scrutiny of awards. When the issue goes to the integrity of the arbitration process itself, appellate courts have mandated de novo review of an arbitrator's ruling." (*Trabuco Highlands Community Assn. v. Head* (2002) 96 Cal.App.4th 1183, 1189 (*Trabuco*)). "The notion that a party should be bound by an arbitration award and precluded from substantive judicial review is premised on the assumption that the parties have *agreed* to such finality. [Citation.]" (*Id.* at p. 1190.) Because "[t]he binding nature of the arbitration sought to be confirmed is a structural aspect of the arbitration," "[i]ndependent judicial review of whether an arbitration is binding is necessary to preserve the integrity of the arbitration process and the judicial system." (*Ibid.*)

In *Trabuco*, homeowners and their homeowners' association "agreed in correspondence to submit" certain disputes "to nonbinding arbitration" (*Trabuco, supra*, 96 Cal.App.4th at p. 1186), but the arbitrator issued a "Binding Arbitration Award and Decision." (*Id.* at p. 1187.) After a homeowner called the arbitrator's office to verify the arbitration was nonbinding, the arbitrator issued a letter stating the homeowners had "agreed . . . to seek a final resolution of this dispute" and "rul[ed] that the proceeding was a binding arbitration." (*Ibid.*) In response to the association's petition to confirm the award, the homeowners argued the arbitrator had "exceeded his powers by purporting to render a binding award" where, as indicated in their declarations, they had "never agreed to make the arbitration binding." (*Ibid.*) The trial court declined to take testimony, treated the arbitrator's letter as dispositive, concluded the arbitration was binding, and confirmed the award. (*Id.* at pp. 1187-1188.)

This court reversed. (*Trabuco, supra*, 178 Cal.App.4th at pp. 1188, 1193.) We held that by granting the petition only on the basis of the arbitrator's letter, the trial court had wrongly abdicated its function of determining, as a matter of "[i]ndependent judicial review," whether the arbitration was binding. (*Id.* at pp. 1190-1191.) But had

“the trial court . . . simply decided whether the arbitration was binding based on the declarations of the parties concerning what was said at the arbitration hearing, we might simply affirm the ruling by concluding it was a matter of credibility for the trial court to decide.” (*Id.* at p. 1190.) Since it did not, we reversed and remanded for the trial court to conduct a “careful factual inquiry” to determine whether the parties had in fact agreed the arbitration would be binding. (*Id.* at p. 1191.)

Glaser, Weil, Fink, Jacobs & Shapiro, LLP v. Goff (2011) 194 Cal.App.4th 423 (*Glaser*) involved a fee dispute similar to the one at bar between a law firm and its former clients. The former clients requested binding arbitration, but the law firm declined it. The arbitration service provider, Dispute Resolution Services, Inc. (DRS) sent a letter to the parties advising who the arbitration panel consisted of and that the arbitration would become binding if the parties agreed before the start of arbitration. Once the law firm learned who the arbitrators were, it advised DRS it would agree to binding arbitration. Subsequently, the former clients notified DRS they would not agree to binding arbitration. DRS concluded the former client’s original request for binding arbitration constituted an offer that was later accepted by the law firm. The law firm then received an arbitration award in its favor. (*Id.* at pp. 429-431.)

The former clients opposed the law firm’s petition to confirm the arbitration award on the ground “the arbitrators exceeded their powers by ruling that the arbitration was binding” because “the [f]irm’s rejection of their offer of binding arbitration terminated the offer, which the [f]irm therefore could not accept later when it changed its position; accordingly, the parties never agreed to binding arbitration.” (*Glaser, supra*, 194 Cal.App.4th at p. 431.) The trial court “found that at the start of the arbitration hearing the arbitrators made, and the [former clients] rejected, [an] offer [to make the arbitration nonbinding if the former clients agreed to a continuance]. The court concluded that the [former clients’] rejection of that offer precluded the[m] . . . from now arguing that the arbitration award was nonbinding. The court also reasoned that,

assuming for the sake of argument that the arbitration award was nonbinding when it was made, the [former clients'] failure to request trial de novo within 30 days of service of the award rendered the award binding pursuant to [the county bar association's] rules." (*Id.* at p. 432.)

Glaser concluded the former clients were correct "that the arbitrators' ruling that the arbitration was binding is subject to independent judicial review." (*Glaser, supra*, 194 Cal.App.4th at p. 433). According to *Glaser*, "*Trabuco* applies straightforwardly here. The arbitrators determined that the parties agreed to binding arbitration. But it is not clear whether a *court* has ever determined that the parties agreed to binding arbitration, and the [former clients] contend they did not. Under *Trabuco*, the trial court should have independently reviewed whether the parties had agreed to make the arbitration binding." (*Id.* at p. 434.)

Glaser reasoned, "Any approach other than *Trabuco*'s would mean that, because the arbitrators determined that the parties agreed to binding arbitration, no California court can review that determination, because according to the arbitrators, the parties agreed to be bound by it. That would be precisely the kind of impermissible 'bootstrapping' that the arbitration case law warns against. [Citation.] Put differently, it would mean that the arbitrators' determination is binding because the parties agreed to be bound by it, and we know the parties agreed to be bound by it because the arbitrators determined that the parties agreed to be bound by it The way out of that vicious circle is to follow *Trabuco*'s holding that '[i]ndependent judicial review of whether an arbitration is binding is necessary.'" (*Glaser, supra*, 194 Cal.App.4th at pp. 423, 435.)

N&D uses the same type of impermissible bootstrapping identified in *Glaser* in arguing the arbitrator's decision the parties had agreed to arbitration was binding because the parties had delegated that determination to him. This, however, assumes there was an agreement to arbitrate in the first place. Thus, the principles identified in *Trabuco* and *Glaser* apply with equal, if not more, force here given that the

question in this case is not only whether the parties agreed to binding arbitration, but *whether parties agreed to any type of arbitration*. Because this “goes to the integrity of the arbitration process itself” (*Trabuco, supra*, 96 Cal.App.4th at p. 1189), independent judicial review is required.

N&D cites the rule that “unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.” (*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445-446.) This argument fails to recognize the Vanefskys’ challenge is to the *existence* of a signed contract containing an arbitration clause, not its *validity*. Moreover, “[a] court still must consider one type of challenge to the overall contract: a claim that the party resisting arbitration never actually agreed to be bound. [Citation.] “[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” [Citations.] [Citations.] ‘Where . . . a party’s apparent assent to a written contract is *negated* . . . , there is simply no arbitration agreement to be enforced.’ [Citation.]” (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1284 (*Bruni*).

“[A] court must look to the precise nature of the claim that the party resisting arbitration is making. *If it is claiming that it never agreed to the arbitration clause at all . . . then the court must consider that claim*. On the other hand, if it is not denying that it agreed to the arbitration clause, but instead it is claiming some other defense to enforcement of the arbitration clause—e.g., illegality or fraud in the inducement—then the court must enforce the ‘arbitrability’ portion of the arbitration clause” (*Bruni, supra*, 160 Cal.App.4th at p. 1287, italics added.)

The Vanefsky’s claim is of the first type. As such, whether they agreed to be bound by arbitration is an issue for “the court, not the arbitrator” to determine. (*Bruni, supra*, 160 Cal.App.4th at pp. 1284-1285.)

Glaser explains the rationale for this rule: “the entire system of narrowly circumscribed judicial review of binding arbitration awards is premised on the parties[]

having *agreed* to it. In effect, the parties agree to forgo their day in court (subject to very limited exceptions) in order to obtain the benefits that arbitration provides. Conversely, if the parties have *not* agreed to binding arbitration, then there is no justification for channeling their dispute into the system of extremely limited judicial review that is applicable to parties who *have* agreed to it.” (*Glaser, supra*, 194 Cal.App.4th at p. 437, fn. omitted.) “Therefore, if a party seeks to vacate (or opposes confirmation of) an arbitration award on the ground that the parties never agreed to make the arbitration binding [or as here, to arbitrate any matter], then, in order to determine whether the arbitrators exceeded their powers under subdivision (a)(4) of . . . section 1286.2, *the court hearing the petition must independently review whether the parties agreed to be bound.*” (*Id.* at p. 436, italics added.) Until “a court has first determined for itself that the parties agreed to be bound, the court has no basis for treating any part of the arbitrator’s award as binding. [Citation.]” (*Id.* at p. 438, citing *Bruni, supra*, 160 Cal.App.4th at p. 1291 [unless a court makes the threshold finding that the parties “agree[d] to arbitrate *something*,” they “cannot be required to arbitrate *anything*”]).

For the above reasons, we conclude the arbitrator’s finding the parties had agreed to arbitration was subject to independent judicial review.

III. Requirement of a Petition to Compel Arbitration

The trial court here did not specifically determine whether the parties had agreed to arbitration. Rather, it found that because N&D could not show the parties had agreed to arbitration, N&D was required to petition the court to compel arbitration.

N&D maintains a petition to compel arbitration was not required because the arbitration clause was self-executing. But without an initial determination by a court that the parties had agreed to arbitration, we have no occasion to address this claim or the cases cited by N&D. (See *Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 740 (*Tutti*); *King v. Larsen Realty, Inc.* (1981) 121 Cal.App.3d 349, 354 (*King*); *Kustom Kraft Homes v. Leivenstein* (1971) 14

Cal.App.3d 805, 810 (*Kustom Kraft*.) The discussion in each of these cases on the issue of self-executing arbitration clauses assumes “the *existence* of an arbitration contract.” (See *Kustom Kraft, supra*, 14 Cal.App.3d at p. 809, italics added.) Only after an arbitration agreement has been admitted or found may “any doubts as to its meaning or extent” be resolved, or its validity determined. (*Ibid.*; see *King, supra*, 121 Cal.App.3d at p. 357; *Tutti, supra*, 197 Cal.App.4th at p. 743.)

We need not remand the matter for the trial court to independently review whether the parties had agreed to binding arbitration. In *Glaser*, the appellate court conducted such a review itself because the relevant facts were undisputed. (*Glaser, supra*, 194 Cal.App.4th at pp. 434, 441-442.) We shall do so as well.

IV. The Record Contains Insufficient Evidence the Vanefskys Agreed to Arbitration

“In California, ‘[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.’ [Citations.]” (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.) “For any contract, the parties’ consent is a basic element. [Citation.] In addition, the parties’ consent must be communicated to one another. [Citation.] Thus, a party’s consent is essential to ‘the contractual underpinning of the arbitration procedure’ [Citation.] ‘[T]he asserted absence of contractual consent renders arbitration, by its very definition, inapplicable to resolve the issue.’ [Citation.]” (*Toal, supra*, 178 Cal.App.4th at p. 1221.) “[T]he policy favoring arbitration cannot displace the necessity for a *voluntary* agreement to arbitrate.’ [Citations.]” (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739; accord *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1153.)

N&D concedes “[i]t is undisputed that ‘[t]here was no signed contract available’ and ‘[it] was unable to produce a signed contract’” The following facts are also undisputed: Vanefsky does not recall seeing or signing a retainer agreement, much less one in which he or his wife agreed to arbitration, or being provided an

executed copy of such an agreement with his or his wife's signature or that of any N&D attorney. Mrs. Vanefsky never signed or saw a retainer agreement with her signature, nor did she ever agree to arbitrate any issue regarding her representation by N&D. Dillion's belief Vanefsky signed the retainer agreement was based only on his and N&D's custom and practice of always obtaining a signed engagement agreement, to discuss and negotiate its terms and conditions, to have his clients sign and keep a copy of the engagement agreement and return the original to N&D, and to not continue representing clients without a signed engagement agreement.

The totality of the evidence as summed up by the Vanefskys is that “[n]o executed contract exists[,] . . . no one has said that they ever remember seeing anyone sign the agreement [or] . . . themselves having signed the agreement . . . [and n]o one can say that they remember seeing a signed copy of the agreement [or] . . . discussing the agreement.” As stated by the Vanefskys, the most N&D can point to is “because the firm's custom and practice is to always get retainer agreements signed before too much work is done on a client matter, the agreement between the Vanefskys and [N&D] must have been signed.” (Underline omitted.) But “although custom is admissible for the purpose of interpreting the contract or agreement of the parties, or for furnishing details not expressly covered thereby, it is not admissible to *establish* a contract.” (*Magna Development Co. v. Reed* (1964) 228 Cal.App.2d 230, 240.)

Moreover, no showing has been made the parties agreed to this particular retainer agreement. The unsigned copy of the agreement attached to N&D's response to the Vanefsky's petition to vacate the arbitration award required the Vanefskys' signature only if it “accurately reflects [their] understanding of [their] relationship.” It may be that it did not and thus another arrangement was made—one without an arbitration clause. All we know is the evidence is insufficient to show the parties executed, much less consented, to the terms of this particular agreement.

N&D argues a signed agreement is not the sole method of proving the existence of an agreement. As support, N&D quotes *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 361, for the position that “it is not the presence or absence of a *signature* which is dispositive; it is the presence or absence of evidence of an *agreement* to arbitrate which matters.” But *Banner* also stated, “When it is clear, both from a provision that the proposed written contract would become operative *only* when signed by the parties as well as from any other evidence presented by the parties that both parties contemplated that acceptance of the contract’s terms would be signified by signing it, the failure to sign the agreement means no binding contract was created. [Citations.]” (*Id.* at p. 358.) Such is the case here. The subject agreement specifically states, “If this agreement accurately reflects your understanding of our relationship and fee arrangement, please acknowledge your approval and acceptance of these terms by dating and signing a copy of this letter agreement and return it to me.”

Because the undisputed evidence failed to show the parties consented to arbitrate any matter, much less to binding arbitration, the arbitrator exceeded his powers under section 1286.2, subdivision (a)(4), and the trial court correctly vacated the arbitration award. (*Glaser, supra*, 194 Cal.App.4th at pp. 436, 442.) Although the court based its ruling on grounds different from those stated here, “we review the court’s ruling, not its rationale. [Citation.]” (*Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1127.)

V. Request to Confirm Arbitration Award Should Have Been Denied With Prejudice

The trial court in this case denied N&D’s request to confirm the arbitration award “without prejudice to [N&D] filing a [p]etition to [c]ompel [a]rbitration.” As the Vanefskys’ note, the court erred in denying the request without prejudice. A party seeking to confirm an arbitration award must prove the existence of a valid arbitration agreement. (*Toal, supra*, 178 Cal.App.4th at pp. 1220-1221.) For the reasons explained

above, that cannot be done. As a result, N&D's request to confirm the arbitration award should have been denied *with* prejudice.

DISPOSITION

The order vacating the arbitration award and denying the request for confirmation of the arbitration award is affirmed with the modification that the denial of the latter shall be with prejudice. N&D's request for judicial notice filed April 10, 2015, is denied. The Vanefskys shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.