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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ADVANCED AIR MANAGEMENT, INC., Plaintiff and Respondent, v. GULFSTREAM AEROSPACE CORPORATION, Defendant and Appellant.	B265723 (Los Angeles County Super. Ct. No. NC059702)

APPEAL from an order of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Reversed with directions.

Jenner & Block, Andrew F. Merrick, Michael A. Doornweerd, Alan J. Iverson, Kate T. Spelman; Greines, Martin, Stein & Richland, Kent L. Richland and David E. Hackett for Defendant and Appellant.

Bailey & Partners, Patrick E. Bailey, Keith A. Lovendosky and F. Phillip Peche for Plaintiff and Respondent.

INTRODUCTION

Gulfstream Aerospace Corporation (Gulfstream) appeals from an order denying its petition to compel arbitration of a complaint filed by Advanced Air Management, Inc. (Advanced). Advanced alleges that Gulfstream negligently maintained and repaired an airplane operated by Advanced. The trial court found that the parties' contract was unconscionable, so the arbitration agreement contained within it was unenforceable.

Gulfstream argues that the parties agreed to delegate to an arbitrator the authority to decide disputes concerning the enforceability of the arbitration agreement, and Advanced never specifically challenged the validity of that delegation, so the trial court was required to order arbitration and allow the arbitrator to decide whether the arbitration agreement as a whole is enforceable. We agree. We therefore reverse the order with directions to grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

Advanced is a charter aircraft company. Advanced operated several aircraft, including a twin-engine Gulfstream G-IV business jet. As that airplane was approaching its 5,000th landing, Advanced arranged for a required inspection and additional maintenance and repair services.

On June 27, 2013, Gulfstream sent Advanced a 15-page proposal for maintenance and repair services. The last paragraph of the proposal immediately above the signature line stated, "This proposal (or estimate) expressly incorporates and is

subject to Gulfstream Aerospace Corporation's standard work authorization Terms and Conditions. Your acceptance of all or any portion of this proposal (or estimate) confirms your agreement to accept those standard Terms and Conditions." On June 27, 2013, Advanced's maintenance director, Scott Chikar, signed the proposal.

On September 19, 2013, Advanced delivered the airplane to Gulfstream's Long Beach facility. Chikar met with Gulfstream's personnel at that time, who handed him a two-page Work Authorization Form. The first page included information about the aircraft, the customer, the service team members, and other information. The second page included the heading "WORK AUTHORIZATION AGREEMENT TERMS AND CONDITIONS" and set forth 19 numbered paragraphs. Paragraph 17 stated:

"ARBITRATION. Any controversy or claim arising out of either this Agreement or Customer's service visit to Gulfstream shall be governed by the laws of the State of Georgia, without regard for rules concerning conflicts of law, and settled by one (1) arbitrator (except, if the claim is in excess of $2 Million, then by three (3) neutral arbitrators) under the Commercial Arbitration Rules of the American Arbitration Association ('AAA') in the City where the work hereunder was performed. . . ."

On September 19, 2013, Chikar signed the front and back of the Work Authorization Form. Gulfstream worked on the airplane for several months.

On April 17, 2014, having completed its work on the airplane, Gulfstream returned the airplane to Advanced. Advanced dispatched the airplane to Europe for a charter flight. On April 21, 2014, during a flight from Kazakhstan to Switzerland, the pilot was forced to make an emergency landing

in Ufa, Russia because of low oil pressure. An inspection revealed that the gearbox oil drain plugs on the left and right engines had been removed and had not been securely replaced; a plug consequently came loose, resulting in loss of oil from the right engine. Advanced returned the airplane to Gulfstream's Long Beach facility for repairs.

B. *Trial Court Proceedings*

On September 30, 2014, Advanced filed a complaint against Gulfstream. Advanced alleged that certain provisions of the Work Authorization Agreement purporting to limit Gulfstream's liability and the arbitration provision of the same agreement are procedurally and substantively unconscionable. Advanced also alleged that Gulfstream was negligent in performing the maintenance and repair work and did not adequately perform its contractual obligations. Advanced alleged causes of action for (1) declaratory relief, seeking a declaration that the challenged provisions are unenforceable; (2) negligence; and (3) breach of contract.

On April 22, 2015, Gulfstream filed a petition to compel arbitration, seeking to enforce the arbitration provision in the Work Authorization Agreement. Gulfstream argued that the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) applied because the contract evidenced a transaction involving interstate commerce. Gulfstream argued that the arbitration agreement was valid and enforceable and encompassed all of the claims alleged in the complaint.

Advanced argued in opposition to the petition that the Work Authorization Agreement and the arbitration agreement

were unconscionable.[1] Advanced argued that the Work Authorization Agreement as a whole, and the arbitration agreement in particular, were procedurally unconscionable because Gulfstream provided the Work Authorization Agreement to Chikar for the first time on September 19, 2013, three months after Chikar had signed the proposal incorporating the Work Authorization Agreement's terms and conditions. Advanced argued that Chikar had no opportunity to negotiate the terms of the Work Authorization Agreement and was not aware of the arbitration agreement in the dense text in small type on the preprinted form. Advanced also argued that the Work Authorization Agreement as a whole, and the arbitration agreement in particular, were substantively unconscionable because the choice of Georgia law was "unexpected and unreasonable" and the provisions limiting Gulfstream's liability were unfairly one-sided.

Gulfstream argued in reply that the arbitrator rather than the court should decide whether the arbitration provision was unconscionable. Gulfstream also argued that the arbitration provision was neither procedurally nor substantively unconscionable.

On June 29, 2015, the trial court entered a minute order denying the petition to compel arbitration. The order stated that Gulfstream had carried its initial burden of establishing the existence of a contract with an arbitration provision. The order also stated that Advanced had carried its burden to show that the Work Authorization Form was procedurally unconscionable based on surprise. The order stated further:

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[1] Advanced did not dispute that the FAA applied.

"The [c]ourt finds that the terms on the Work Authorization Form are also substantively unconscionable. The complaint reveals that [p]laintiff has suffered significant consequential damages due to deficient work by Gulfstream[.] [T]he provision is unilateral; Gulfstream was not similarly limited in the damages it could seek.

"The [c]ourt finds that the terms Gulfstream seeks to enforce were unconscionable, would not have been noticed under the circumstances set forth in the opposing evidence, is unfair and one-sided in effect."

Gulfstream timely appealed from the order denying its petition.[2]

DISCUSSION

Advanced argues that because the parties clearly and unmistakably agreed that the arbitrator shall decide questions of the existence, scope, and validity of the arbitration agreement, the trial court erred by addressing Gulfstream's unconscionability arguments on the merits. Rather, the court should have granted the petition and allowed the arbitrator to decide the issue of unconscionability. We agree.[3]

The FAA provides that a written arbitration agreement is enforceable according to its terms but may be invalidated on

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[2] An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).)

[3] No party has argued, either in the trial court or on appeal, that the issue of whether the arbitrator should decide arbitrability is governed by Georgia law. Both parties have therefore forfeited any such argument.

grounds generally applicable to other contracts, such as fraud, duress, or unconscionability. (9 U.S.C. § 2; *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 67-68 [130 S.Ct. 2772, 177 L.Ed.2d 403] (*Rent-A-Center*).) Section 2 of the FAA "reflect[s] both a 'liberal federal policy favoring arbitration[]' [citation], and the 'fundamental principle that arbitration is a matter of contract[]' [citation]." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 [131 S.Ct. 1740, 179 L.Ed.2d 742].) "The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." (*Moses H. Cone Memorial Hosp. v. Mercury Const.* (1983) 460 U.S. 1, 24 [103 S.Ct. 927, 74 L.Ed.2d 765].) Advanced does not dispute that the Work Authorization Agreement affected interstate commerce and that the FAA therefore applies. (*Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 273-274 [115 S.Ct. 834, 130 L.Ed.2d 753].)

Courts presume the parties intended the court, rather than an arbitrator, to decide questions of arbitrability, which include questions concerning the existence of a valid and enforceable arbitration agreement and whether a particular dispute is within the scope of an arbitration agreement. (*BG Group, PLC v. Republic of Argentina* (2014) ___ U.S. ___, ___ [134 S.Ct. 1198, 1206-1207, 188 L.Ed.2d 220]; *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83-84 [123 S.Ct. 588, 154 L.Ed.2d 491].) The parties, however, may delegate to an arbitrator the authority to decide questions of arbitrability, including the enforceability of an arbitration agreement. (*Howsam*, at p. 83; *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944 [115 S.Ct. 1920, 131 L.Ed.2d 985].) "An agreement to arbitrate a gateway issue is

simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." (*Rent-A-Center*, *supra*, 561 U.S. at p. 70.) Under the FAA, a court must enforce a delegation provision, but only if (1) the manifestation of the parties' intent to delegate questions of arbitrability is clear and unmistakable (*Rent-A-Center*, at p. 69, fn. 1; *Howsam*, at p. 83; *First Options*, at p. 944) and (2) the delegation provision itself is not invalid based on unconscionability or other grounds generally applicable to other contracts (*Rent-A-Center*, at pp. 70, 71). (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 239-240; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 242.)[4]

The trial court ruling on a petition to compel arbitration decides whether the parties have clearly and unmistakably agreed that an arbitrator will decide questions of arbitrability. (*First Options of Chicago, Inc. v. Kaplan*, *supra*, 514 U.S. at p. 944.) If a party challenges a delegation provision as unconscionable, the trial court must decide whether the delegation provision is unconscionable before ordering arbitration. (*Rent-A-Center*, *supra*, 561 U.S. at p. 71 ["If a party

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[4] In *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, the Supreme Court held that the issue of whether an arbitration agreement allows for class arbitration is not an issue of arbitrability and therefore is not presumptively reserved for resolution by a court in the absence of a clear and unmistakable agreement to the contrary. (*Id.* at pp. 249-250, 260.) The present case does not involve class arbitration, but the Supreme Court's analysis reaffirms the general principle that arbitrability is presumptively decided by a court unless the parties clearly and unmistakably decide otherwise.

challenges the validity under [9 U.S.C.] § 2 of the precise agreement to arbitrate at issue [i.e., the delegation provision], the federal court must consider the challenge before ordering compliance with that agreement"]; *Pinela v. Neiman Marcus Group, Inc.*, *supra*, 238 Cal.App.4th at p. 241, fn. 8.) If the party opposing arbitration does not challenge the delegation provision specifically, the court must enforce the delegation provision by ordering arbitration and allow the arbitrator to decide any challenges to the enforceability of the arbitration agreement or the contract as a whole. (*Rent-A-Center*, at p. 72; *Parnell v. CashCall, Inc.* (11th Cir. 2015) 804 F.3d 1142, 1148; *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1559-1560.)

The United States Supreme Court in *Rent-A-Center* explained, "'[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.' [Citations.]" (*Rent-A-Center*, *supra*, 561 U.S. at pp. 70-71.) A challenge to another provision of the contract or to the contract as a whole therefore cannot prevent a court from enforcing an arbitration agreement. (*Id.* at p. 70; *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445-446 [126 S.Ct. 1204, 163 L.Ed.2d 1038].) Similarly, a delegation provision in an arbitration agreement is severable from the remainder of the arbitration agreement, so a challenge to another provision of an arbitration agreement or to the contract as a whole cannot prevent a court from enforcing a delegation provision. (*Rent-A-Center*, at pp. 71-72.) If the parties clearly and unmistakably agree to have an arbitrator decide questions of arbitrability and the party opposing arbitration does not "challenge[] the delegation provision specifically," the court must compel

arbitration and allow the arbitrator to decide the validity of the remainder of the agreement. (*Id.* at p. 72.)

The arbitration provision in the Work Authorization Agreement states that any controversy or claim arising out of either the Work Authorization Agreement or the service visit to Gulfstream will be resolved by arbitration under the Commercial Arbitration Rules of the American Arbitration Association (AAA). Rule R-7(a) of those rules (as of September 19, 2013, when the parties entered into the Work Authorization Agreement) states, "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." This rule explicitly provides that the arbitrator will decide questions of arbitrability.

By expressly incorporating the AAA Commercial Arbitration Rules into the arbitration agreement, the parties clearly and unmistakably agreed to have the arbitrator decide questions of arbitrability. (*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1123 ["By incorporating [AAA rules] into their agreement, the parties clearly evidenced their intention to accord the arbitrator the authority to determine issues of arbitrability"]; *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 557 [incorporation of AAA rules was clear and unmistakable evidence of the parties' intent to delegate to an arbitrator the question of arbitrability]; *Contec Corp. v. Remote Solution, Co., Ltd.* (2d Cir. 2005) 398 F.3d 205, 208 ["when, as here, parties explicitly incorporate [AAA] rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator"]; *Petrofac,*

Inc. v. Dynmcdermott Petroluem (5th Cir. 2012) 687 F.3d 671, 675 ["the express adoption of these [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability"]; *Fallo v. High-Tech Institute* (8th Cir. 2009) 559 F.3d 874, 878 ["the arbitration provision's incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator"]; *Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125, 1130 ["we hold that incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability"]; *Terminix Intern. v. Palmer Ranch Ltd. Partnership* (11th Cir. 2005) 432 F.3d 1327, 1332 ["By incorporating the AAA Rules . . . into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid"]; *Qualcomm Inc. v. Nokia Corp.* (Fed. Cir. 2006) 466 F.3d 1366, 1373 [incorporation of AAA rules into the arbitration agreement clearly and unmistakably showed the parties' intent to delegate to an arbitrator the issue of arbitrability]; cf. *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1442 [incorporation by reference of JAMS arbitration rules clearly and unmistakably showed the parties' intent to delegate arbitrability issues to an arbitrator].)[5]

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[5] No published California or federal appellate case holds to the contrary. In *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, the court rejected the employer defendant's argument that the parties had delegated arbitrability determinations to the arbitrator by incorporating AAA rules, because the arbitration agreement did not clearly and unmistakably incorporate AAA rules. Rather, it provided that

Advanced argues that the parties did not clearly and unmistakably agree to have the arbitrator decide questions of arbitrability, however, because the June 27, 2013, proposal does not expressly address dispute resolution. Thus, according to Advanced, the proposal "permits either party to initiate court proceedings," but the Work Authorization Agreement "attempts to require arbitration of disputes." Advanced concludes that

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the arbitration would proceed "'according to the rules of the National Association of Securities Dealers, Inc. (or, at [the employer's] sole discretion, the [AAA] or any other alternative dispute resolution organization).'" (*Id.* at p. 777; see *id.* at p. 791.) In *Gilbert Street Developers, LLC v. La Quinta Homes, LLC* (2009) 174 Cal.App.4th 1185, the court rejected the defendant's delegation argument because the version of the AAA rules that was in effect when the parties entered into their arbitration agreement did not delegate arbitrability determinations to the arbitrator. (*Id.* at pp. 1188-1189, 1193 ["To go beyond the incorporation of an *existent* rule and allow for the incorporation of a rule that might not even come into existence in the future . . . contravenes the clear and unmistakable rule"].) In *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC* (3rd Cir. 2016) 809 F.3d 746, the Third Circuit rejected a delegation argument because the arbitration agreement did not specify *which* AAA rules were incorporated, and the AAA rules relied on by the defendant did not provide that the availability of class arbitration (which is an issue of arbitrability under Third Circuit case law) would be determined by the arbitrator. (*Id.* at pp. 748, 761-762.) And in *Riley Mfg. Co. v. Anchor Glass Container Corp.* (10th Cir. 1998) 157 F.3d 775, the court rejected a delegation argument but never addressed the issue of whether the parties' incorporation of the AAA Commercial Rules clearly and unmistakably showed they had agreed to delegate arbitrability determinations to the arbitrator. (*Id.* at pp. 777 & fn. 1, 780-781.)

because the proposal and the Work Authorization Agreement conflict on this point, "[t]he parties did not clearly consent to refer any issue of arbitration validity to an arbitrator."

The argument lacks merit. The proposal expressly incorporated the terms and conditions of the Work Authorization Agreement and was otherwise silent on the issue of dispute resolution. There is consequently no conflict between the proposal and the Work Authorization Agreement concerning arbitration. And the Work Authorization Agreement clearly and unmistakably evidences the parties' intention to have the arbitrator decide issues of arbitrability.

Because the parties clearly and unmistakably agreed to have an arbitrator decide questions of arbitrability, the trial court was required to enforce the delegation unless Advanced challenged the delegation specifically. Advanced argued in the trial court that the Work Authorization Agreement as a whole, and the arbitration agreement in particular, were procedurally unconscionable, and that they were substantively unconscionable because the choice of Georgia law was "unexpected and unreasonable" and the provisions limiting Gulfstream's liability were unfairly one-sided. Advanced did not argue that the agreement to have arbitrability decided by the arbitrator was substantively unconscionable, so Advanced did not specifically challenge the delegation.[6]

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[6] Under both California and Georgia law, both procedural and substantive unconscionability must be present to establish unconscionability. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243; *NEC Technologies, Inc. v. Nelson* (1996) 267 Ga. 390 [478 S.E.2d 769, 773 & fn. 6].) Again, Advanced has never

Gulfstream argues in addition that by failing to challenge the delegation specifically in the trial court, Advanced forfeited any arguments on that issue. (See *Rent-A-Center*, *supra*, 561 U.S. at pp. 72, 74.) In its respondent's brief, Advanced argues that it has not forfeited any such arguments. But Advanced again does not specifically challenge the enforceability of the delegation. Thus, regardless of whether Advanced forfeited any arguments on the issue by failing to raise them in the trial court, Advanced has yet to articulate any basis on which we could find the delegation to be unenforceable.

Advanced also appears to argue that Gulfstream forfeited the issue of delegation of arbitrability to the arbitrator by failing to raise the issue until Gulfstream's reply in support of the petition to compel arbitration. The issue, however, was not first raised in Gulfstream's reply. The first cause of action in Advanced's complaint was for declaratory relief, alleging that the Work Authorization Agreement did not apply to the repairs at issue and that the arbitration agreement (among other provisions of the Work Authorization Agreement) was unconscionable. The first cause of action thus sought declarations concerning arbitrability (both scope and enforceability of the arbitration agreement). Gulfstream's petition expressly referred to all of Advanced's causes of action ("declaratory relief, negligence, and breach of contract") and sought to compel arbitration of "the entire case." Gulfstream's memorandum of points and authorities in support of the petition likewise expressly addressed the declaratory relief claim and sought to compel

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argued that the agreement to have the arbitrator decide questions of arbitrability is substantively unconscionable.

Advanced "to pursue its claims in arbitration." Gulfstream thus sought to compel arbitration of arbitrability from the outset.

In addition, even if we assume for the sake of argument that Gulfstream did not raise the issue of delegation in the petition, the doctrine of invited error does not apply because Gulfstream did expressly and unambiguously argue delegation in its reply. (See generally *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [describing the doctrine of invited error, which "is an 'application of the estoppel principle'"].) Because Gulfstream's reply thus informed the court, in advance of the hearing, that Gulfstream wanted the arbitrator, not the court, to decide arbitrability, the court could not have been misled to the contrary. The doctrine of invited error is therefore inapplicable. (See *ibid.* [no invited error because the appellants "did not mislead the superior court in any way"].) To the extent that the petition invited the trial court to decide arbitrability, Gulfstream expressly withdrew that invitation in its reply, so Gulfstream is not barred from arguing that the trial court erred by accepting it.

DISPOSITION

The order denying the petition to compel arbitration is reversed with directions to enter a new order granting the petition. Gulfstream shall recover its costs of appeal.

MENETREZ, J.*

I concur:

ZELON, Acting P. J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

SEGAL, J., Concurring and Dissenting.

The majority's opinion, agreeing with Gulfstream's argument on appeal that the parties agreed to have the arbitrator decide the issue of arbitrability, is well reasoned and well written. The only problem I have is that in the trial court Gulfstream did not ask the arbitrator to decide the issue of arbitrability. To the contrary, Gulfstream in its petition to compel arbitration asked the trial court to decide that issue. Gulfstream did not raise the issue whether the court or the arbitrator should decide whether Advanced Air's claims were arbitrable until its reply. I would hold that, because Gulfstream invited the error it argues the trial court made in deciding the issue Gulfstream asked it to decide, Gulfstream cannot argue on appeal the arbitrator rather than the court should decide whether Advanced Air's causes of action were arbitrable.

On the merits, however, I would hold the trial court erred in ruling the arbitration provision was unconscionable. I do not think the arbitration provision was adhesive or procedurally or substantively unconscionable. Therefore, I would reverse the trial court's order denying the petition to compel arbitration with directions to enter an order requiring Advanced Air to arbitrate its causes of action against Gulfstream, rather than, as the majority directs, an order having the arbitrator decide whether Advanced Air must arbitrate its causes of action against Gulfstream.

A. *The Doctrine of Invited Error Bars Gulfstream from Arguing the Arbitrator Should Decide Whether Advanced Air's Claims Were Arbitrable*

"'Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error.'" (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000.) In particular, an "'appellant cannot submit a matter for determination by the lower court and contend on appeal that the matter was beyond the scope of the issues.'" (*Bains v. Department of Industrial Relations* (2016) 244 Cal.App.4th 1120, 1126, quoting 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 390(1)(d), p. 449; accord, *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1555; see also *In re Armstrong's Estate* (1966) 241 Cal.App.2d 1, 7 [appellant could not argue an issue "was beyond the scope" of probate court proceedings after "*invoking* the jurisdiction of the court" to decide the issue].)

As Advanced Air repeatedly points out in its respondent's brief, nothing in any of Gulfstream's moving papers said anything about having the arbitrator decide any of the issues raised by the petition or whether Advanced Air's claims were subject to arbitration. Gulfstream's petition to compel arbitration asked the court, not the arbitrator, to rule that Advanced Air's causes of action were arbitrable. The notice stated Gulfstream was asking the court, not the arbitrator, "for an order compelling arbitration of the complaint" (capitalization omitted) and argued Advanced Air's causes of action "arise out of or relate to the Work Authorization and/or [Advanced Air's] visit to Gulfstream's service center and therefore are subject to arbitration."

Gulfstream asked the court, not the arbitrator, to "compel [Advanced Air] to arbitrate its claims in the appropriate forum."

In its petition, Gulfstream asked the court, not the arbitrator, for an order "compelling [Advanced Air] to submit the claims raised in [Advanced Air's] Complaint to binding arbitration in compliance with the parties[']contract." In particular, Gulfstream argued to the court that Advanced Air's "claims for declaratory relief, negligence, and breach of contract [were] based on the allegation that Gulfstream failed to perform work on the aircraft in a workmanlike manner and that [Advanced Air] suffered damages as a result. Because [Advanced Air's] claims arise out of the parties' contract and/or [Advanced Air's] visit to Gulfstream's service center, the entire case should be submitted to binding arbitration." As Advanced Air notes in its respondent's brief, Gulfstream specifically prayed for an order from the court "compelling [Advanced Air] to arbitration pursuant to the parties' contractual arbitration agreement."

In its supporting memorandum of points and authorities, Gulfstream did not argue the arbitrator should determine whether the arbitration provision covered Advanced Air's causes of action. Instead, Gulfstream argued repeatedly to the court that Advanced Air's "claims fall squarely within the scope of the arbitration provision." Gulfstream argued it was "the court's . . . role," not the arbitrator's role, "to determine (1) whether a valid arbitration agreement exists and (2) whether the scope of the parties' dispute falls within that agreement." Finally, the proposed order Gulfstream asked the court to sign was to "compel[ ] the parties to arbitrate the claims asserted in [Advanced Air's] complaint." Gulfstream did not mention the issue of who decides arbitrability or the delegation provision until

its reply brief, filed six months later. On appeal, Gulfstream concedes "its initial briefing simply argued that (a) the AAM/Gulfstream contract included the arbitration clause; and (b) AAM's claims were therefore subject to arbitration."

I do not believe it is fair to the trial court or to Advanced Air to allow Gulfstream to argue on appeal the trial court erred by not delegating the arbitrability issue to the arbitrator. The doctrine of invited error is designed to prevent such litigation conduct. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 ["[a]t bottom, the doctrine [of invited error] rests on the purpose of the principle, which prevents a party from misleading the trial court and then profiting therefrom in the appellate court"]; accord, *Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 530.) I think the doctrine of invited error precludes Gulfstream, after asking the trial court to rule whether the arbitration provision required Advanced Air to arbitrate its claims, from arguing on appeal that the trial court should not have ruled whether the arbitration provision required Advanced Air to arbitrate its claims because the arbitrator should make that ruling. (Cf. *Fidelity & Cas. Co. v. Dennis* (1964) 229 Cal.App.2d 541, 543-544 [appellant who submitted arbitrability "issue as a matter to be decided by the arbitrator" could not subsequently challenge the arbitrator's jurisdiction to decide arbitrability].)

The situation here is not that different from *Bains v. Department of Industrial Relations*, *supra*, 244 Cal.App.4th 1120, where the plaintiffs "submitted the key interpretive question to the trial court for decision." (*Id.* at p. 1126.) The Court of Appeal held that under the doctrine of invited error the plaintiffs "cannot now complain that the trial court should not have decided the issue they themselves pressed the trial court to decide." (*Id.* at p.

1127.) To hold otherwise would be to allow a party "'to "trifle with the courts by . . . permitting the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable."'" (*Ibid.*; see *City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, 29 ["'where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error'"].) Here, had the trial court decided the arbitrability issue in Gulfstream's favor, Gulfstream would not be arguing on appeal the trial court should have let the arbitrator decide that issue. Having lost the arbitrability issue in the trial court, Gulfstream seeks a second bite at the arbitrability apple by arguing (1) the trial court erred in deciding the arbitrability issue and (2) the trial court erred in ruling the arbitration provision was unconscionable. I think the doctrine of invited error precludes this kind of heads-I-win, tails-you-lose strategy.

Gulfstream argues that, even though its petition did not make any mention of referring arbitrability to the arbitrator, it impliedly or indirectly asked the court to refer arbitrability to the arbitrator by asking the court to compel Advanced Air to arbitrate the claims raised in its complaint. And, Gulfstream argues, "one of the 'claims raised' in [Advanced Air's] complaint was that the arbitration clause was unconscionable."

Gulfstream is referring to Advanced Air's first cause of action for declaratory relief. This is what Advanced Air alleged in that cause of action:

> "Plaintiff is informed and believes that an actual controversy has arisen and now exists between plaintiff and defendants relative to the respective

rights and duties, if any, that arise under the Work Authorization Agreement attached as Exhibit 1 in that plaintiff contends that the Work Authorization Agreement does not apply to the oil change work conducted on the aircraft engines or the installation of inappropriate horizontal bushings or failure to discover the right engine thrust reverser defect since those work items were completed by defendants pursuant to a separate request or work order not affected by the Work Authorization Agreement. Plaintiff also contends that the Work Authorization Agreement provisions relating to limitations of liability, limitations of remedy, waiver and release of tort and contract claims, and a requirement to pursue arbitration are void on the grounds of unconscionability. Plaintiff asserts that the Work Authorization Agreement is one-sided, oppressive, and represents an unconscionable attempt by defendants to hold themselves harmless for negligence and other tortious actions arising out of their conduct of maintenance and inspection services performed upon jet aircraft. Plaintiff asserts that the above-referenced provisions of the Work Authorization Agreement also unconscionably attempt to immunize defendants from statutory obligations and requirements set forth by the United States government in the Federal Aviation Regulations. Plaintiff also asserts that the limitations as to remedies and damages, as well as the requirement to pursue arbitration, are unconscionable from both a procedural and substantive standpoint. The provisions arise from an inequality of bargaining power, an absence of real negotiation, and meaningful choice."

Did you miss it? So did I. Here it is again, with the language on which Gulfstream relies italicized:

> "Plaintiff is informed and believes that an actual controversy has arisen and now exists between plaintiff and defendants relative to the respective rights and duties, if any, that arise under the Work Authorization Agreement attached as Exhibit 1 in that plaintiff contends that the Work Authorization Agreement does not apply to the oil change work conducted on the aircraft engines or the installation of inappropriate horizontal bushings or failure to discover the right engine thrust reverser defect since those work items were completed by defendants pursuant to a separate request or work order not affected by the Work Authorization Agreement. Plaintiff also contends that the Work Authorization Agreement provisions relating to limitations of liability, limitations of remedy, waiver and release of tort and contract claims, *and a requirement to pursue arbitration* are void on the grounds of unconscionability. Plaintiff asserts that the Work Authorization Agreement is one-sided, oppressive, and represents an unconscionable attempt by defendants to hold themselves harmless for negligence and other tortious actions arising out of their conduct of maintenance and inspection services performed upon jet aircraft. Plaintiff asserts that the above-referenced provisions of the Work Authorization Agreement also unconscionably attempt to immunize defendants from statutory obligations and requirements set forth by the United States government in the Federal Aviation Regulations. Plaintiff also asserts that the limitations as to remedies and damages, *as well as the requirement to pursue arbitration*, are

> unconscionable from both a procedural and substantive standpoint. The provisions arise from an inequality of bargaining power, an absence of real negotiation, and meaningful choice."

The gravamen of Advanced Air's declaratory relief cause of action is that Advanced Air's claims against Gulfstream are governed by the June 27, 2013 contract (which does not contain an arbitration provision), not the September 19, 2013 Work Authorization Agreement (which does), and that the latter's terms limiting Gulfstream's liability and obligation to pay damages are unconscionable. The Work Authorization Agreement's limits on liability is the dog; arbitration is, at most, a very short tail. I do not think it is reasonable to infer, based on Gulfstream's post hoc interpretation of these allegations, that Gulfstream, by asking the court to compel arbitration of Advanced Air's declaratory relief cause of action and without mentioning the delegation provision, was (or even thought it was) asking the court to have the arbitrator determine whether Advanced Air's claims were arbitrable.

Finally, I note the trial court in its order did not address whether the arbitrator should decide arbitrability. With good reason: Gulfstream asked the court to decide that issue. The trial court did exactly what it was supposed to do: decide the issue presented by the petition. Therefore, I respectfully dissent from the majority's holding that the trial court erred by not allowing the arbitrator to decide whether Advanced Air's claims were arbitrable. I would not reverse a trial court for deciding the issue the parties asked it to decide.

B. *The Arbitration Provision Is Not Unconscionable*

But I would reverse the trial court's order denying the petition to compel arbitration because I do not think Advanced Air met its burden of showing the agreement or any of its terms were unconscionable. (See *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247 ["[t]he party resisting arbitration bears the burden of proving unconscionability"]; accord, *Penilla v. Westmont Corporation* (2016) 3 Cal.App.5th 205, 213.)

"[T]he core concern of the unconscionability doctrine is the ""absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."" [Citations.] The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as ""overly harsh"" [citation], "'unduly oppressive'" [citation], "'so one-sided as to 'shock the conscience'" [citation], or 'unfairly one-sided' [citation]. All of these formulations point to the central idea that the unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain' [citation], but with terms that are 'unreasonably favorable to the more powerful party' [citation]. These include 'terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.'" (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145.)

"Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (*Pinnacle Museum Tower Assn.*, *supra*, 55 Cal.4th at p. 246; see *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1469.) """The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." [Citation.] But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243-1244.)

Advanced Air did not prove the agreement was procedurally unconscionable. """The procedural element of an unconscionable contract generally takes the form of a contract of adhesion "'which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'"""" (*Sonic-Calabasas A, Inc.*, *supra*, 57 Cal.4th at p. 1133; see *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 984 ["[i]n

determining whether a contract term is unconscionable, we first consider whether the contract . . . was one of adhesion"].) The arbitration agreement was not adhesive. Both sides had plenty of time to, and in fact did, negotiate its terms. The contracting parties were businesses, and there was no evidence of any inequality of bargaining strength. (See *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 743 [contract was "not adhesive because it was the result of bargaining between parties enjoying equal bargaining strength"]; *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1035-1036 [contract was not adhesive and therefore not unconscionable where the plaintiff "had the opportunity to negotiate the contract and its terms" and his "bargaining strength was equal to" the defendant's].)

Moreover, the "procedural element of unconscionability . . . focuses on two factors: oppression and surprise. 'Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice.' [Citation.] """"'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms."""""" (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 243.) Here, there was neither oppression from inequality of bargaining power nor surprise from hidden terms. Yes, the font of Gulfstream's standard terms and conditions, which included the arbitration provision, was small, and the copies of the agreement in the record are hard to read without using the Mag Light app. And one could conjure a scenario of procedural unconscionability based on lack of opportunity to negotiate where Scott Chikar, Advanced Air's Director of Maintenance, and Krisztian Romvari, a Gulfstream Service Center Coordinator

Supervisor, are standing on the tarmac in Long Beach next to the aircraft, buffeted by high winds and the loud *whoosh whoosh* of helicopters taking off, yelling at each other while Gulfstream technicians begin dismantling the plane for service:

Romvari: SIGN THIS.

Chikar: WHAT?

(A jet plane takes off.)

Romvari: SIGN THIS!

Chikar: WHAT IS IT?

(A helicopter lands, increasing the wind on the tarmac.)

Romvari: JUST SIGN IT SO WE CAN GET STARTED!

Chikar: OKAY!

But that's not what happened. Advanced Air had seen Gulfstream's standard terms and conditions, including the arbitration provision, many times before, and had signed contracts referencing and including those terms. Advanced Air had plenty of time in the quiet, air-conditioned comfort and solitude of its offices to review, negotiate, and reject any of Gulfstream's terms. Although Advanced Air did not see the arbitration provision for this transaction before it delivered its aircraft to Gulfstream for service and maintenance, Advanced Air had seen it in previous transactions between the parties.

Nor, in my view, did Advanced Air meet its burden of proving the arbitration agreement was substantively unconscionable. Advanced Air's primary unconscionability argument is that the agreement includes a Georgia choice of law provision. I see nothing substantively unconscionable about that. (See *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 462 ["the choice-of-law rules derived from California decisions and the Restatement Second of Conflict of Laws . . . reflect strong

policy considerations favoring the enforcement of freely negotiated choice-of-law clauses"]; *Harris v. Bingham McCutchen LLP* (2013) 214 Cal.App.4th 1399, 1404 ["California strongly favors enforcement of choice-of-law provisions [citation], and its courts have upheld application of other states' internal statutes, rules and laws to arbitration contracts"]; see also *Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 917 [the *Nedlloyd* "approach 'reflect[s] strong policy considerations favoring the enforcement of freely negotiated choice-of-law clauses'"].) The choice of law provision refers to the laws of the State of Georgia, not the former Soviet republic. The State of Georgia has legislators and judges, statutes and case law. I see nothing wrong (let alone unconscionable) about two sophisticated commercial enterprises entering into a contract and deciding they want the law of Georgia (or Minnesota or Iowa or Texas) to govern "[a]ny controversy or claim arising out of" that contract, particularly where one of the contracting parties is a Georgia company and the contract involves an airplane that flies all over the world (including to Kazakhstan, which is not that far from the country Georgia). (See *Nedlloyd*, at p. 466 [choice of law provision enforceable unless "'(a) the chosen state has no substantial relationship to the parties and there is no other reasonable basis for the parties[']' choice, or [¶] (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties'"]; accord, *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 973.)

The closest thing to an unconscionable provision in the agreement is the clause that limits Gulfstream's, but not Advanced Air's, liability for consequential or incidental damages. In some circumstances, like consumer contracts or employment agreements, a limitation on liability for certain kinds of damages may be substantively unconscionable. (See *Lennar Homes of California, Inc. v. Stephens* (2014) 232 Cal.App.4th 673, 693 ["courts often analyze provisions in contracts of adhesion between corporation and consumer having the practical effect of limiting the consumer's recourse to the courts in the event of a dispute," and "[i]n those contexts, there are 'any number of cases' where arbitration clauses effectively limiting the defendant corporation's exposure to damages have been found substantively unconscionable"]; *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 798 [provisions in employment agreement waiving the employee's rights to seek statutory and other damages were unconscionable]; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407 ["limitation of damages provision" in a customer's contract with a contractor "is yet another version of a 'heads I win, tails you lose' arbitration clause that has met with uniform judicial opprobrium"]; see generally *Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 712 ["[a] damages limitation may be unconscionable if it contravenes public policy by limiting remedies available in the statute under which a plaintiff proceeds, or if it is one-sided"].)

But that is not the situation here. When two relatively equal contracting parties agree to a limitation on liability or consequential damages, they are negotiating the provision as part of the purchase price of the goods or services. It is an economic issue, not a legal one. If a purchaser such as Advanced

Air wants the right to hold a service provider such as Gulfstream liable for consequential damages for breach of contract, the purchaser can negotiate for such a right, but it will have to pay for it. Gulfstream's right to be free from exposure to consequential damages is factored into the (reduced) purchase price Advanced Air agreed to pay for the services. (See *Reuben H. Donnelley Corp. v. Krasny Supply Co., Inc.* (1991) 227 Ill.App.3d 414, 420 ["advertisers receive[d] the benefit of a lower price for advertising than they would if liability for consequential damages were not limited"]; *Kearney & Trecker Corp. v. Master Engraving Co., Inc.* (1987) 107 N.J. 584, 599 ["the commercial reality is that for many sellers, immunity from liability for their customers' consequential damages may be indispensable to their pricing structure"].)

Therefore, because I do not believe Advance Air met its burden of showing the contract was unconscionable, I would reverse the trial court's order denying Gulfstream's petition to compel arbitration. For that reason, I concur in the judgment of reversal, but I would remand with directions to enter an order granting Gulfstream's petition to compel arbitration of Advanced Air's claims, not with directions to enter an order requiring the arbitrator to decide whether to compel arbitration of Advanced Air's claims.

SEGAL, J.