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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OFAPPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RAMAR PRODUCTION SERVICES, INC. et al., Plaintiffs and Respondents, v. APPLIED UNDERWRITERS, INC. et al., Defendants and Appellants.	D071443 (Super. Ct. No. ECU9409)

APPEAL from a judgment of the Superior Court of Imperial County, L. Brooks Anderholt, Judge. Reversed and remanded with directions.

Hinshaw & Culbertson and Spencer Y. Kook, Travis Wall for Defendants and Appellants.

Larry J. Lichtenegger for Plaintiffs and Respondents.

Defendants and appellants Applied Underwriters Inc. (Applied Underwriters), Applied Underwriters Captive Risk Assurance Company, Inc (AUCRA) and California Insurance Company (CIC) (Collectively Applied) appeal the court's order denying their motions to compel arbitration and to stay the action of plaintiffs and respondents Ramar Production Services, Inc. and J.J.S.B., Inc. (collectively Ramar) based on inconvenient forum. They contend (1) California law did not apply to their agreements with Ramar; (2) Ramar had challenged the arbitration contract as a whole and not just the arbitration agreement's delegation clause, therefore, the arbitrator and not the court must decide the arbitrability issue; and (3) Nebraska law applies to the parties' agreement. Finally, appellants renew their evidentiary objection to Ramar's counsel's declaration.

Appellants also filed in this court a petition for "writ of mandate and/or prohibition or other appropriate relief," challenging the superior court's order denying their motion to stay based on inconvenient forum and seeking to set aside that order. They present the following issue for review: "Forum selection clauses are presumptively valid and enforceable. The trial court denied Petitioners' venue motion on the basis of unproven allegations of fraud in the inducement as to the contract as a whole. Are general allegations of fraud sufficient to invalidate a mandatory forum selection clause even though that fraud is not specific to the forum selection clause itself?" We ordered the writ petition considered with this appeal.

We conclude the court properly concluded it was authorized to decide the gateway issue of arbitrability; however, it erred by not exercising its authority to decide that

matter by applying the appropriate law dealing with unconscionability. Instead, the court applied California law to the separate issue of third-party defendants without explaining why it disregarded the parties' choice of law clause. Accordingly, we reverse the court's ruling on the motions to compel arbitration and stay the action based on inconvenient forum. On remand, the court will decide the issue of arbitrability by addressing Ramar's claim the delegation clause was unconscionable. In light of our disposition, the evidentiary claim is moot. We deny the writ petition by separate order.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties and their Agreement

Ramar, doing business as Imperial Date Gardens, is an Arizona corporation with its principal place of business in Imperial County, California. It grows, harvests and sells dates and date-related products. Applied Underwriters is a Nebraska Corporation; AUCRA is a property and casualty insurer and an Iowa corporation with its principal place of business in Omaha, Nebraska. Both corporations are members of the Berkshire Hathaway Group. CIC is a California company and Applied Underwriters' subsidiary. Western Growers Association (Western) is an insurance broker and a California corporation, but it is not a party to this appeal.

Western helped Ramar obtain workers compensation insurance through Applied's "EquityComp program," which is a " 'profit sharing plan' whereby the insured would receive back a portion of the premiums paid based on lower than expected losses at the end of the three-year term." In December 2012, Ramar executed the first Reinsurance Participation Agreement (RPA), by which AUCRA provided it workers compensation

insurance for its California and Arizona operations from January 1, 2013, through December 31, 2015. Afterwards, Ramar entered into a second RPA to run from January 1, 2016 to December 31, 2018.

Ramar's Complaint

Ramar alleges that by March 2016, its "incurred loss ratio" was low; therefore, it anticipated lower premium payments based on appellants' representations in their proposals. However, Ramar paid substantially more for workers' compensation insurance because appellants calculated Ramar's premiums using a different method that it refused to disclose, thus violating statutory and regulatory requirements.

Ramar alleges causes of action for tortious breach of the implied covenant of good faith and fair dealing; fraud and misrepresentation; unconscionability; and unjust enrichment. It also seeks declaratory relief and rescission. Ramar alleges a professional negligence claim against Western.

Ramar alleges that in negotiating its insurance contract with Applied, it executed a "Request to Bind" that incorporated one set of CIC policy terms. However, the Request to Bind also obligated Ramar to execute an RPA that Applied Underwriters had not yet shown to Ramar, and that was actually an agreement with AUCRA. It alleges the RPA's alter the original terms of the CIC policies and supplant them where they differ. Specifically, "[t]he RPA's change the formula the insured has to pay under the CIC policies . . . , the RPA's change the short-rate cancellation formulas under the CIC policies, change the dispute resolution procedures from the mandated California statutory provisions of [Insurance Code section] 11737, introduce a forum selection provision not

contained in the CIC policies, introduce a choice of law provision not contained in the CIC policies, offer a 'profit-sharing' provision not contained in the CIC policies and, finally, contain a non-renewal penalty disfavored by the Insurance Code."

Ramar alleges the RPA's are adhesion contracts because they favor appellants and were presented to Ramar unilaterally without any option to review or reject them. Ramar alleges: "The RPA's as a whole contain numerous requirements that unreasonably favor the Applied Defendants and are otherwise adhesive, ambiguous and uncertain, one-sided and collectively unconscionable. The RPA's are labeled, written and structured to purposely mislead Ramar and circumvent California regulatory insurance laws." (Some capitalization omitted.) Specifically, the RPA's are not filed with the California Department of Insurance as required by Insurance Code section 11658, which makes it illegal to sell a policy, endorsement or collateral agreement to the policy unless it is previously filed with the Workers Compensation Insurance Rating Bureau and approved by the California Insurance Department.

Ramar alleges appellants engaged in a "conspiratorial scheme" to "mislead the regulatory agencies and avoid scrutiny about the RPA[']s." Ramar attached to the complaint the California Commissioner of Insurance's June 2016 decision and order in a case that involves some of the same appellants as here and presents a similar issue. (*In the matter of the Appeal of Shasta Linen Supply Inc.*, File AHB-WCA-14-31 (the Shasta

Order).)[1] The Commissioner in the Shasta Order concluded the RPA alters the underlying rates, costs and fees of an insurance policy as well as the choice of law, dispute resolution and cancellation terms. As such, it is by definition a collateral agreement. The Commissioner found: "CIC's EquityComp program and the accompanying RPA constitute a collateral agreement pursuant to California Code of Regulations, title 10, section 2268, and CIC's failure to file and secure approval of the EquityComp and the RPA, in violation of Insurance Code section 11658, renders the

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1 The Commissioner in the Shasta Order identified the parties as follows: "Shasta Linen is a privately-held family-owned California corporation in the linen rental business." "CIC [] is a licensed property and casualty insurance company, domiciled in California and licensed to transact business in 26 states. CIC is wholly-owned by North American Casualty Company, a non-insurer, which is in turn wholly-owned by Applied Underwriters, Inc. (AU), a Nebraska corporation. [Fn. omitted.] AU is an indirect subsidiary of Berkshire Hathaway Inc. AUU is also the parent company for Applied Underwriters Captive Risk Assurance Company, BVI (AUCRA) and Applied Risk Services (ARS)." The Insurance Commissioner added: "AUCRA is an insurance company organized under the law of the British Virgin Islands and domiciled in Iowa. [Fn. omitted.] AUCRA's sole purpose in the Berkshire Hathaway family is to serve as CIC's reinsurance arm. [Fn. omitted.] It does not reinsure any other entities or perform any other functions."

The issues presented in the Shasta Linen case were (1) whether CIC violated the Insurance Code and California Code of Regulations by failing to file the EquityComp program and the RPA with the Workers Compensation Insurance Rating Bureau and the Insurance Commissioner; (2) whether the RPA's were collateral agreements under the California Code of Regulations; (3) whether CIC violated the Insurance Code by failing to specify in Shasta Linen's worker's compensation insurance policy the basis and rates upon which the final premium is to be determined and paid; and (4) whether CIC violated Insurance Code section 11658.5 by failing to inform Shasta Linen of its right to negotiate the policy's dispute resolution provisions and by failing to secure written receipt of such disclosure before issuing the policy.

RPA void as a matter of law." The Commissioner designated the decision and order as precedential under Government Code section 11425.60, subdivision (b).[2]

Motions to Compel Arbitration and to Stay Based on Inconvenient Forum

In October 2016, appellants moved the superior court to compel arbitration and stay the action on grounds the 2013 RPA contains an arbitration agreement encompassing all the parties' disputes.[3] Under the arbitration agreement, all arbitrations shall be conducted in accordance with the rules of the American Arbitration Association (AAA)

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[2] In July, 2016, CIC and AUCRA filed a verified petition for a peremptory writ of mandate and complaint for declaratory and injunctive relief, and moved to stay the Shasta Order in the Los Angeles Superior Court. However, the parties subsequently entered into a stipulated consent cease and desist order regarding the EquityComp product in general and the RPA in particular, resulting in amended RPA's. The order states: "Arbitrations under either an RPA that is currently an in-force RPA or a past RPA entered into or issued in California will take place in California."

In June 2017, the parties entered into a settlement agreement stating that although it is an issue for courts ultimately to decide, "[t]here is a good faith dispute between the [p]arties . . . as to the remedy authorized by the California Insurance Code and whether the RPA is void as a matter of law under the California Legislature's comprehensive regulatory scheme and relevant case law." The settlement agreement also states it "applies to policies and Amended RPA's covering loss exposures in California, claims arising within locations in California and California workers." The parties subsequently agreed to dismiss the writ petition.

[3] The arbitration clause in the 2013 RPA states: "All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management of operations of the Company, or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be settled amicably by good faith discussion among all of the parties hereto, and, failing such amicable settlement, finally determined exclusively by binding arbitration in accordance with the procedures provided herein. . . . All disputes arising with respect to any provision of this Agreement shall be fully subject to the terms of this arbitration clause."

and take place in Tortola, British Virgin Islands or at some other location agreed to by the parties.

Appellants argued that although the 2016 RPA does not include an arbitration clause but instead mandates a bench trial in Nebraska,[4] the allegations concerning the two RPA's are inextricably intertwined. Appellants argued the gravamen of Ramar's challenge is that the RPA's are illegal and void; therefore, under the arbitration clause, the arbitrator—and not the court—was required to resolve that dispute. Likewise, because the arbitration clause incorporated AAA rules, arbitrability issues are delegated to the arbitrator. Appellants also argued the Shasta Order did not apply to this case partly because it was then being challenged through a writ of mandamus and thus it was not final. Appellants argued that even assuming the RPA's were regarded as unfiled ancillary agreements under the Insurance Code, the arbitration agreement was nonetheless enforceable.

Ramar opposed the motion to compel, arguing the delegation clause is void and unenforceable under both federal and state law; arbitration agreements concerning insurance are illegal in Nebraska; and under Code of Civil Procedure section 1281.2, subdivision (c), Western is a third-party defendant not bound by the arbitration

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4 The 2016 RPA's different dispute resolution mechanism provides in part: "Any legal suit, action or proceeding arising out of, related to or based upon this agreement, or the transactions contemplated hereby or thereby must only be instituted in the federal courts of the United States of America or the courts of the State of Nebraska . . . . The parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action or any proceeding in such courts and irrevocably waive and agree not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum." (Some capitalization omitted.)

agreement. Ramar argued the arbitration clause itself is unenforceable for those same reasons.

Appellants separately moved to stay the action based on an inconvenient forum, arguing the 2016 RPA contains a mandatory forum selection clause requiring lawsuits to be filed in Nebraska federal or state courts.[5] Appellants argued the court should stay the proceedings and instruct Ramar to file its claims in Nebraska because Nebraska courts can accomplish substantial justice such that litigating there would not violate California public policy, and Insurance Code section 11658 does not preclude enforcement of the forum selection clause.

Ramar opposed the motion to stay, arguing the forum selection clause was void and unenforceable because, as the Commissioner determined in the Shasta Order, appellants failed to comply with Insurance Code section 11658 requiring collateral agreements, like the RPA's, to be filed with the Department of Insurance. Ramar further argued that a violation of Insurance Code section 11658.5 requires a default to California

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[5] The 2016 RPA's forum selection clause states: "Any legal suit, action or proceeding arising out of, related to or based upon this agreement, or the transactions contemplated hereby or thereby must only be instituted in the federal courts of the United States of America or the courts of the State of Nebraska, in each case located in Omaha and the county of Douglas, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding . . . . The parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action or proceeding in such courts and irrevocably waive and agree not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum." (Some capitalization omitted.)

for choice of law and forum and, in any event, enforcement of the forum selection clause would be unfair and unreasonable under a conflict of law analysis.

At the hearing on the motions to compel arbitration and to stay the action, Ramar's counsel argued to the court: "[I]f you sent it to arbitration you would send it to arbitration under the delegation clause, which we . . . contend is the same—has the same underlying illegality and unlawfulness as the arbitration agreement." Ramar's counsel argued the choice of law clause in both RPA's was an adhesive provision that "doesn't apply to Ramar itself, but it does apply to [J.J.S.B.], who is a California employer . . . and they're entitled to the protection of [Insurance Code section]11658.5 and, clearly, Applied Underwriters did not comply with [that code section] and give [J.J.S.B.] the opportunity to negotiate in a forum other than California." Ramar's counsel further argued that although the court could not compel J.J.S.B. to litigate its case in Nebraska, Ramar could be required to go there, thus resulting in multiple, costly litigation in different forums.

The court denied the motion to compel arbitration, finding that certain third-party defendants who were not parties to the arbitration clause would be negatively impacted under Code of Civil Procedure section 1281.2, subdivision (c). It added: "[T]he threshold question posed by the complaint is ultimately whether the [RPA's] and related documents are subject to rescission based on fraud in the inducement. If Plaintiffs satisfy the court that such agreements should be rescinded, then there is no contract, hence no contractual basis for arbitration." The court continued: "The same analysis applies to the question of whether Nebraska law should govern the relationship between the parties. There was no evidence presented that the choice of law provision found in both [RPA's]

was the subject of any negotiation whatsoever. On the other hand, it appears that [d]efendant [Western] brokered the arrangement that gives rise to this case in California, for application and enforcement in California, such that there is no reasonable basis to have the law of Nebraska apply, other than the strategic desire of [d]efendant [AUCRA] to include such a provision."

The court denied the motion to stay the action on ground of inconvenient forum, reasoning that "until there is a determination as to whether the entire arrangement which includes the [RPA's] was the product of fraud in the inducement as to [p]laintiffs, any analysis with respect to the propriety of venue in the State of Nebraska is premature. In addition, [p]laintiffs, their witnesses, and [d]efendant [Western] are located in California, whereas there is no connection with Nebraska that is relevant to the controversy other than the fact that some defendants have main offices there. The court is not willing to accept moving [d]efendant's assumption that when the documents forming the basis for the case were negotiated, any party on plaintiffs' side knowingly evaluated choice of law issues and opted for Nebraska as a source of law, much less a forum. The fact that [p]laintiffs have operations in Arizona does not make the application of Nebraska law more appropriate than California law."

In Applied's moving papers, it had objected to a declaration by Ramar's attorney on grounds he was not an expert witness and therefore was unqualified to opine on the way the RPA's work. The court elected not to rule on Applied's objections to that declaration, reasoning the declaration was not relevant to its decision. We agree with the

court's resolution of that matter, and conclude the declaration also is not pertinent to our analysis; therefore, we do not disturb the court's ruling.[6]

DISCUSSION

"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration." (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.) "If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed." (*Ibid.*) "Interpreting a written document to determine whether it is an enforceable arbitration agreement is a question of law subject to de novo review when the parties do not offer conflicting extrinsic evidence regarding the document's meaning." (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60.)

Here, in determining it was the one authorized to decide whether this dispute is arbitrable, the trial court relied on Code of Civil Procedure section 1281.2 regarding third-party defendants, and it analyzed the RPA's. We therefore review the trial court's ruling of those legal matters de novo.

When a party is claiming that an arbitration agreement is unenforceable, it is important to determine whether the party is making a specific challenge to the

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6 We grant Ramar's motion for judicial notice of the settlement agreement in the Shasta Linen matter. We deny Ramar's motion for judicial notice of Applied Underwriters' patent of the EquityComp program because it is not necessary for our resolution of this appeal. For the same reason we deny Applied's motion for judicial notice of a copy of Senate Bill 684, an act to add section 1658.5 to the Insurance Code.

enforceability of the delegation clause or is simply arguing that the agreement as a whole is unenforceable. If the party's challenge is directed to the agreement as a whole—even if it applies equally to the delegation clause—the delegation clause is severed out and enforced; thus, the arbitrator, not the court, will determine whether the agreement is enforceable. By contrast, if the party is making a specific challenge to the delegation clause, the court must determine whether the delegation clause itself may be enforced (and can only delegate the general issue of enforceability to the arbitrator if it first determines the delegation clause is enforceable). (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 70; *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1559-1560.)

Here, Ramar argued that both the delegation clause and the arbitration agreement were unconscionable. As Ramar made a specific challenge to the delegation clause, the trial court was required to resolve the merits of that challenge. However, the trial court did not do so.

Both the United States Supreme Court and California courts agree that, for a delegation clause to be enforceable, it must be clear and unmistakable. (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944-945; *Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 709.) The reason for this is that the issue of who (arbitrator or court) should decide arbitrability "is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. [Citation.] And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one

can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." (*First Options of Chicago, Inc. v. Kaplan, supra,* 514 U.S. at p. 945.)

As stated, the delegation clause here provides: "All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management of operations of the Company, or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be settled amicably . . . and, failing such amicable settlement, finally determined exclusively by binding arbitration in accordance with the procedures provided herein. . . . All disputes arising with respect to any provision of this Agreement shall be fully subject to the terms of this arbitration clause." The arbitration agreement also incorporates the AAA procedures, Rule 7 of which provides: "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 or to the arbitrability of any claim or counterclaim."

There is no suggestion that this language of the AAA rule was not sufficiently clear and unmistakable. Thus, the delegation clause was enforceable, unless it was unconscionable. (*Malone v. Superior Court, supra,* 226 Cal.App.4th at p. 1560.)

"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." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246.) " ' "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." ' " (*Id.* at p. 247.) When a contract of adhesion is imposed and drafted by the party with superior bargaining power, the adhesive nature of the contract is "evidence of some degree of procedural unconscionability." (*Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 403.) However, the fact that an agreement is adhesive is not, alone, sufficient to render it unconscionable. (*Id.* at p. 402.)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience." ' " (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC, supra,* 55 Cal.4th at p. 246.)

"The party resisting arbitration bears the burden of proving unconscionability. [Citations.] Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on ' "a sliding scale." ' [Citation.] '[T]he 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.' " (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC, supra,* 55 Cal.4th at p. 247.) "Where there is no other

indication of oppression or surprise, the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796.)

"All of these [unconscionability] formulations point to the central idea that 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.)

Here, Ramar in its opposition papers presented the issue of the unconscionability of the delegation clause squarely before the court. Ramar argued the delegation clause was void as a matter of law because Applied did not present it for approval of the relevant authorities as required by the Insurance Code. Ramar also relied on the Shasta Order to support its claim.

The trial court recognized the centrality of the issue of the unconscionability of the delegation clause to the resolution of this matter, ruling that the threshold question was whether the RPA and related documents were subject to rescission based on fraud in the

inducement. It acknowledged that a positive answer to that question could eliminate a contractual basis for arbitration. It added that "until there is a determination as to whether the entire arrangement, which includes the [RPA's,] was the product of fraud in the inducement as to [p]laintiffs, any analysis with respect to the propriety of venue in the [s]tate of Nebraska is premature."

However, the court erred by not taking the next step and deciding the arbitrability of the delegation clause in light of the unconscionability concerns raised. Instead, the court proceeded to deny the motion to compel arbitration by applying California law regarding third-party defendants. In so doing, it inverted the logical order by first setting aside the parties' choice of law provision before deciding whether their delegation clause was unconscionable. On remand, the court is directed to resolve the motion to compel by first ruling on the threshold issue of the unconscionability of the delegation clause.

DISPOSITION

The order granting the motion to compel arbitration and stay the action based on inconvenient forum is reversed. The court is directed to decide the motion to compel in accordance with this opinion.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.