IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCOTT PATRICK, INC., a New Mexico corporation; SCOTT P. SCHIABOR; SPS INVESTMENTS L.C.,	)	1 CA-SA 07-0118
	)	DEPARTMENT D
Petitioners,	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
THE HONORABLE PAUL J. MCMURDIE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the COUNTY of MARICOPA,	)	**Filed 8-30-07**
Respondent Judge,	)	
GRANT E. GIST; CYNTHIA R. ANDERSON aka CYNTHIA R. WELCH,	)	
Real Parties in Interest.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-015007 and CV2006-015096

The Honorable Paul J. McMurdie, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED IN PART

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J O H N S E N, Judge

¶1 At issue in this special action is an arbitration agreement governed by the Rules of the American Arbitration Association ("AAA"), which grant the arbitrator the power to determine the "existence, scope or validity of the arbitration agreement." Citing the AAA Rules, the superior court granted a motion to compel arbitration over the objections of a non-signatory to the arbitration agreement, who complained that the agreement did not bind him. While we respect the right of parties to an arbitration agreement to agree that questions of arbitrability will be decided by the arbitrator, we hold that it is for the court, not the arbitrator, to in the first instance determine whether a non-signatory is subject to an arbitration agreement.[1]

FACTUAL AND PROCEDURAL HISTORY

¶2 Petitioners are Scott P. Schiabor and two companies he owns, SPS Investments L.C. ("SPS") and Scott Patrick, Inc. (the "Patrick Company"). Real parties in interest are Grant Gist and Cynthia Anderson.

[1] By order issued June 19, 2007, this court accepted jurisdiction and denied relief to SPS and the Patrick Company. In the same order, we granted relief to Schiabor and remanded the matter to the superior court with instructions that it determine in the first instance whether Schiabor was subject to the arbitration agreement on which the arbitration demand was premised. Our order said that a written decision would follow; this is that decision.

¶3 According to a verified complaint the Patrick Company filed on October 2, 2006, Gist approached SPS about an opportunity to acquire a parcel of undeveloped land on Lincoln Drive in Phoenix. The complaint alleged that Gist and SPS agreed that SPS would acquire the property in part with funds provided by Gist, that Gist would work to develop the property, and that he and SPS would split the profits from the eventual sale of the property. "As part of the acquisition of the [p]roperty," the complaint alleged, a company called Lincoln 40 Investments, L.L.C. ("Lincoln 40") was formed under New Mexico law to hold the property pending development and sale. The Lincoln 40 Operating Agreement was initialed by Schiabor, as manager of SPS, and by Gist and Anderson. The Operating Agreement provided that Schiabor would be the manager of Lincoln 40.

¶4 The underlying dispute arose when Lincoln 40 entered into a letter of intent to sell some of the Lincoln property to the Patrick Company. Schiabor signed the letter of intent on behalf of both entities. Gist objected to the letter of intent, claiming that by entering into the transaction, Schiabor ignored better business opportunities for Lincoln 40 in favor of his own interests. Citing an arbitration clause in the Operating Agreement, Gist and Anderson filed a demand for arbitration with

the AAA, listing themselves as claimants and Schiabor and SPS as respondents.

¶5 Schiabor and SPS filed a declaratory judgment action in Maricopa County Superior Court seeking to stay the arbitration and an order declaring the arbitration to be improper. Gist and Anderson, in turn, filed a motion to compel arbitration pursuant to Arizona Revised Statutes ("A.R.S.") section 12-1502 (2003).

¶6 Schiabor and SPS vigorously opposed the motion to compel arbitration. Among other arguments, Schiabor asserted that the arbitration provision in the Lincoln 40 Operating Agreement did not apply to him because he was not a party to that agreement and was not a member of the company. The Lincoln 40 Operating Agreement, at one location, listed the "initial" voting member as Schiabor and non-voting members to be Gist and Anderson. At another location, the Operating Agreement stated that "[f]or purposes of making decisions reserved for the Members," the sole voting member was SPS. Compounding the confusion, the Operating Agreement also designated Schiabor as the non-member manager of Lincoln 40, granting him the exclusive authority to conduct all business of the company not specifically reserved in the Operating Agreement.

¶7 The superior court granted the motion to compel arbitration and stayed the litigation for 180 days to allow

arbitration to be completed.[2] In explaining its ruling, the court noted case authority for the proposition that a non-signatory may be bound by an arbitration agreement and found there was "more than sufficient evidence to allow the Arbitrator to determine" whether Schiabor was subject to the arbitration provision in the Operating Agreement.

¶8 The court subsequently denied Schiabor and SPS's motions for new trial and for entry of a judgment pursuant to Arizona Rule of Civil Procedure 54(b). Schiabor, SPS and the Patrick Company filed a petition for special action seeking review of the court's ruling compelling arbitration.[3]

DISCUSSION

A. Jurisdiction.

¶9 An order granting a motion to compel arbitration is not immediately appealable. *S. Cal. Edison Co. v. Peabody W.*

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[2] The superior court by this time had consolidated the separate actions filed by the Patrick Company and by SPS and Schiabor, respectively.

[3] Although the Patrick Company is identified as one of petitioners, neither the demand for arbitration nor the motion to compel named that entity as a respondent. The motion to compel arbitration specifically sought arbitration only of claims brought in the lawsuit filed by SPS and Schiabor, and the arbitration demand names only SPS and Schiabor as respondents. For this reason, the petition for review is moot as to Scott Patrick, Inc. Petitioners also ask us to vacate the superior court's order compelling arbitration of the claims against SPS for the asserted reason that Gist and Anderson did not allege any arbitrable claims against SPS. In the exercise of our discretion, we decline to grant relief to SPS.

Coal Co., 194 Ariz. 47, 52-53, ¶ 16-17, 977 P.2d 769, 774-75 (1999). Instead, it is reviewable on appeal from the court's post-arbitration confirmation of the arbitrator's award. *Id.* at 49, ¶ 6, 977 P.2d at 771. Or, a party may appeal such an order if the superior court judge grants a request to enter a Rule 54(b) judgment. *Id.* at 53, ¶ 18, 977 P.2d at 775; *see* Ariz. R. Civ. P. 54(b).

¶10 Where (as here), the trial court refuses a Rule 54(b) request, however, review by special action may be appropriate. *Southern California Edison*, 194 Ariz. at 53, ¶ 20, 977 P.2d at 775 ("In the proper case, however, the refusal to enter an appealable order may be reviewed for abuse of discretion by special action proceedings."). As the court explained in *Southern California Edison*, special action review "provides a method for appellate review of non-frivolous, substantial issues about arbitrability while, at the same time, discouraging frivolous or insubstantial claims of non-arbitrability, in keeping with our policy favoring arbitration." *Id.*

¶11 The supreme court in that case explained that the "general rule [prohibiting appeals from orders compelling arbitration] provides little comfort in those cases in which there are complex issues and in which a bona fide dispute exists over arbitrability. In those instances, justice might be better served by pre-arbitration resolution of arbitrability." *Id.* at

¶ 18. Later, in concluding its analysis, the court said by way of summary:

> An order compelling arbitration is not a final judgment and is therefore not appealable under A.R.S. §§ 12-2101(B) or 12-2101.01. A party may, however, request that the trial judge enter a final order or judgment under Rule 54(b) or A.R.S. § 12-2101. If the trial judge makes such an order, it is appealable. If the trial judge refuses to make an order appealable, the aggrieved party may challenge that decision by special action. If the appellate court determines that the trial judge abused his or her discretion in refusing to include language of finality, the court should accept jurisdiction and consider the merits of the arbitrability issue.

Id. at 54, ¶ 23, 977 P.2d at 776.

¶12 We exercise our discretion to accept jurisdiction of this special action petition for the reasons stated in *Southern California Edison* and because the petition presents a narrow legal issue: Is it for the superior court or the arbitrator to determine the existence and scope of an arbitration agreement when a motion to compel arbitration is opposed by a party who contends he is not subject to the agreement? Also weighing in favor of accepting jurisdiction is the injustice that would result if, pursuant to the court's ruling, a party not subject to the arbitration is compelled to participate in an extended arbitration proceeding without an immediate avenue of appeal.

B. Analysis.

¶13 The sole basis for Gist and Anderson's arbitration demand is the arbitration provision in the Lincoln 40 Operating Agreement. Schiabor contends that because he personally is not a party to the Lincoln 40 Operating Agreement, and because he did not otherwise agree to arbitrate with Gist and Anderson, he may not be compelled to arbitrate. He contends that the trial court breached a mandatory duty imposed by A.R.S. § 12-1502 to determine the existence of an arbitration agreement before granting the motion to compel arbitration.

¶14 As noted, Gist and Anderson's motion to compel arbitration was based on A.R.S. § 12-1502, which was enacted in Arizona as part of the Uniform Arbitration Act and is titled "Proceedings to compel or stay arbitration." Subpart A of the statute provides generally that upon an "application of a party showing" an arbitration agreement "and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration." A.R.S. § 12-1502(A). However, the same provision also states, "but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party." *Id*.

¶15 The general rule in states that have enacted the Uniform Arbitration Act is that pursuant to this provision, a

trial court presented with a motion to compel must determine the existence of the arbitration agreement (if contested) before compelling arbitration. *See*, *e.g.*, *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 190, 877 P.2d 284, 289 (App. 1994) ("The trial court's review on a motion to compel arbitration is limited to the determination whether an arbitration agreement truly exists."); *Shahan v. Staley*, 188 Ariz. 74, 76, 932 P.2d 1345, 1347 (App. 1996) (same).[4]

¶16 The same rule applies under the Federal Arbitration Act ("FAA"). 9 United States Code Annotated ("U.S.C.A.") section 4 (2000) (authorizing court to compel arbitration, except that "if the making of the arbitration agreement" is questioned, court first must resolve that issue); *see AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986) ("question of arbitrability . . . is . . . for judicial determination"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (court may adjudicate claim of fraud

[4] To the same effect are *Hazleton Area School District v. Bosak*, 671 A.2d 277, 282 (Pa Commw. Ct. 1996) (court's inquiry on motion to compel arbitration is whether a valid arbitration agreement was entered into and if so, whether the dispute at issue is within the scope of the arbitration); *State v. State Police Officers Council*, 525 N.W.2d 834, 836 (Iowa 1994) (court determines threshold question of whether the parties agreed to arbitrate); and *Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc.*, 320 A.2d 558, 566 (Md. Ct. Spec. App. 1974) (only issue for trial court is whether there is an agreement to arbitrate the subject matter of the dispute) *rev'd on other grounds*, 334 A.2d 526 (Md. 1975).

in the inducement of an arbitration clause); *Kingston v. Ameritrade, Inc.*, 12 P.3d 929 (Mont. 2000).[5]

¶17 Nevertheless, the parties to an arbitration agreement may agree that notwithstanding this general rule, questions of arbitrability are for the arbitrator, rather than for the court. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes--but only those disputes--that the parties have agreed to submit to arbitration"). However, in deciding whether parties have committed the question of arbitrability to the arbitrator, the court "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (alterations in original).

¶18 At issue in *First Options* was an arbitration demand under the FAA. In *Brake Masters Systems, Inc. v. Gabbay*, 206 Ariz. 360, 78 P.3d 1081 (2003), this court followed *First Options* in analyzing a motion to confirm an arbitration award

[5] According to the record, Lincoln 40, SPS and the Patrick Company are New Mexico companies, and Schiabor resides in New Mexico, while Gist and Anderson reside in Arizona. Although the subject matter of the underlying dispute (a company formed in New Mexico for the purpose of engaging in the real estate development business in Arizona) arguably involved interstate commerce, on appeal, none of the parties argues that the Federal Arbitration Act applies.

brought under A.R.S. § 12-1511 (2003). In objecting to confirmation, one of the parties argued that some of the issues resolved by the arbitrator "were not fairly included within those contemplated by the arbitration clause." *Brake Masters*, 206 Ariz. at 362, ¶ 3, 78 P.3d at 1083. Moreover, the party argued that the arbitrator did not in the first instance have the power under the arbitration agreement to determine the scope of that agreement. *Id*. at 362-63, ¶ 4, 78 P.3d at 1083-84.

¶19 The agreement in *Brake Masters* provided that any dispute concerning the agreement "would be submitted for binding arbitration in accordance" with AAA's Rules of Commercial Dispute Resolution Procedures. *Id.* at 364, 366, ¶¶ 10, 17, 78 P.3d at 1085, 1087. Rule 8(a) of those AAA rules (since renumbered as Rule 7(a)) grants to the arbitrator "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." *Id.* at 364 & n.2, ¶ 10, 78 P.3d at 1085 & n.2. The party seeking confirmation of the award argued that by agreeing to the AAA rules, including the rule recited above, the parties agreed to grant to the arbitrator the power to determine the scope of the arbitration agreement. *Id.* at ¶ 10.

¶20 On appeal, both parties cited *First Options*, causing the court to conclude that they each "implicitly accept[ed]" that the FAA governed their agreement. *Id.* at ¶ 11. Applying

First Options' "clear and unmistakable" requirement, the court held the agreement's express reference to and adoption of the AAA rules "indicate[d] that the parties were aware of and consciously chose to allow AAA rules to apply to arbitration in certain situations." *Id.* at 366-67, ¶¶ 17-19, 78 P.3d at 1087-88. The court rejected the contention that the "clear and unmistakable" showing required by *First Options* means that the arbitration agreement must specifically state that the arbitrator will decide arbitrability. *Id.* at 366, ¶ 19, 78 P.3d at 1087. To the contrary, the court held that "unless expressly stated otherwise, reference to a set of rules in an arbitration agreement effectively incorporates into the agreement those rules in their entirety, including any amendments enacted prior to the arbitration." *Id.* Given that the arbitration agreement referenced the AAA rules, and the arbitrator had conducted the arbitration pursuant to those rules, the court held that the arbitrator had the authority to determine the arbitrability of the matters presented. *Id.* at 367, ¶ 20, 78 P.3d at 1088.

¶21 Other courts likewise have concluded that by agreeing to incorporate the AAA rules into their arbitration agreement, parties may "clearly and unmistakably" demonstrate their intent to commit to the arbitrator questions of the existence or scope of the arbitration agreement. *E.g. Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix Int'l Co.,*

LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332 (11th Cir. 2005) (by incorporating AAA rules, "the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid"); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) ("when . . . parties explicitly incorporate 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); *Johnson v. Polaris Sales, Inc.*, 257 F. Supp. 2d 300, 308-09 (D. Me. 2003); *Dream Theater, Inc. v. Dream* Theater, 124 Cal. App. 4th 547, 549 (2004) ("parties state a clear and unmistakable agreement that the arbitrator will decide whether the dispute is subject to arbitration when they incorporate into their agreement the AAA Commercial Arbitration Rules"); s*ee also Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 203 F.R.D. 677, 684-85 (S.D. Fla. 2001).[6]

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[6] At issue in *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989), was an arbitration agreement expressly governed by the Rules of Arbitration of the International Chamber of Commerce ("ICC rules"), which, like the AAA rules, delegate questions of arbitrability to the arbitrator. *Id.* at 470-71. On appeal, the court affirmed a district court order denying a stay pending arbitration because it found that by agreeing to the ICC rules, the parties had ceded to the arbitrator all issues concerning arbitrability. *Id.* at 473-74. Where the parties agree to the ICC rules, the court held, "the *general* rule . . . that the arbitrability of a dispute [will] be

¶22 As noted, *Brake Masters* was a post-arbitration appeal from the confirmation of an award, rather than an appeal pursuant to Rule 54(b) or special action review of an order compelling arbitration. 206 Ariz. at 362, 78 P.3d at 1083. However, the court in that case noted the language quoted above from section 12-1502(A) and explained that a party contesting arbitrability may do so either pre-arbitration (pursuant to A.R.S. § 12-1502(A)) or post-arbitration (by way of an appeal from the confirmation of an award). *Id.* at 363-64, ¶ 9, 78 P.3d at 1084-85.

¶23 We are taught by *First Options* that (even where the FAA applies), the question of whether the parties "clearly and unmistakably" chose to delegate arbitrability to the arbitrator is to be determined by "state-law principles that govern the formation of contracts." 514 U.S. at 944. The Lincoln 40 Operating Agreement provided that it "shall be construed, interpreted, governed, and enforced in accordance with the statutes, judicial decisions, and other laws of the State of New Mexico."[7]

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determined by the court does not apply." *Id.* at 472 (emphasis in original). *See Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 124 (2d Cir. 2003) (same).

[7] The Operating Agreement provides:

> If any controversy or claim shall arise among the parties hereto with respect to any matter set forth

¶24 In their special action petition, Gist and Anderson argue that New Mexico courts have held that the court, not the arbitrator, determines "the threshold issue of whether there was an existing agreement requiring arbitration." *Gonzales v. United S.W. Nat'l Bank of Santa Fe*, 602 P.2d 619, 620 (N.M. 1979); *see Bernalillo County Med. Ctr. Employees' Ass'n Local Union No. 2370 v. Cancelosi*, 587 P.2d 960, 961 (N.M. 1978) (courts decide threshold question of existence of arbitration agreement). In neither of these cases, however, was a New Mexico court asked to review an arbitration agreement that, like the Lincoln 40 Operating Agreement, expressly incorporated the AAA rules.

¶25 We need not speculate, however, whether under *First Options* and New Mexico law, a court would find "clear and unmistakable" evidence that the parties here intended to reserve

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> herein or related hereto, or to the alleged breach thereof, or the construction, interpretation, or enforcement of any provision hereof . . . then [after mediation] such controversy or claim shall be settled by arbitration by the American Arbitration Association in accordance with its then prevailing rules, except as otherwise provided herein or in the New Mexico Uniform Arbitration Act, NMSA 1978, Secs 44-7-11, et seq., as amended . . . utilizing a panel of three (3) arbitrators . . . .

In a separate "governing law" section, the agreement provides, "This Operating Agreement shall be construed, interpreted, governed, and enforced in accordance with the statutes, judicial decisions, and other laws of the State of New Mexico."

arbitrability for the arbitrator. Schiabor's contention is not that the arbitration agreement did not commit arbitrability to the arbitrator. His argument is more fundamental – he contends the terms of arbitration agreement are irrelevant because he is not a party to the Operating Agreement in which the arbitration provision is found.

¶26 New Mexico has adopted the Uniform Arbitration Act, including the provision that on a motion to compel arbitration a court may "order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." N.M. Stat. Ann. § 44-7A-8(a)(2). Consistent with this statute is the general rule in New Mexico that parties may not be compelled to arbitrate if they have not agreed to arbitration. *See, e.g., McMillan v. Allstate Indem. Co.*, 84 P.3d 65, 69 (N.M. 2003); *Alexander v. Calton & Assocs., Inc.*, 110 P.3d 509, 511 (N.M. Ct. App. 2005) ("court may not compel arbitration absent an arbitration agreement"); *Heye v. Am. Golf Corp.*, 80 P.3d 495, 498 (N.M. Ct. App. 2003) (without a legally enforceable contract, parties cannot be forced to arbitrate).

¶27 Applying these principles of New Mexico law, we conclude that one who has not signed an arbitration agreement has not "clearly and unmistakably" agreed that issues of arbitrability under the agreement shall be decided by the arbitrator. This is so even if, as here, the arbitration

agreement's incorporation of AAA rules might otherwise demonstrate an intent to cede arbitrability questions to the arbitrator. The superior court's finding to the contrary with respect to Schiabor was clearly erroneous.[8]

¶28 Our conclusion is in accord with decisions from other jurisdictions. In *AutoNation Financial Services Corp. v. Arain*, 592 S.E.2d 96 (Ga. Ct. App. 2003), for example, a consumer filed suit against a car dealership and its financing corporation for misrepresentations the dealer made about a theft protection program the consumer purchased when he bought a car from the dealer. *Id.* at 97. The consumer signed a sales installment contract that included financing for the anti-theft program. *Id.* The dealership signed the installment contract in its capacity as an agent but the financing corporation did not. *Id.* The installment contract contained an arbitration provision stating that arbitration would be conducted in accordance with AAA rules. *Id.* at 97-98. Additionally, the agreement

[8] We acknowledge that on remand, the superior court may find that Schiabor is bound by the Lincoln 40 Operating Agreement and its arbitration clause, notwithstanding that he did not sign the agreement for himself. *See, e.g., Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1076 (5th Cir. 2002) (identifying five theories of contract and agency law under which a non-signatory may be bound to arbitrate); *Schoneberger v. Oelze*, 208 Ariz. 591, ¶ 14, 96 P.3d 1078, 1081 (App. 2004) (non-party may be bound by estoppel). These cases present an entirely different question than the threshold issue of whether a non-signatory to an arbitration agreement may have "clearly and unmistakably" demonstrated an intent to have arbitrability be resolved by the arbitrator.

specifically stated that "[a]ny disagreement as to whether a particular dispute or claim is subject to arbitration . . . shall be decided by arbitration." *Id.* at 98. In opposition to a motion to compel arbitration, the consumer argued he had not agreed to any arbitration with the financing corporation. Notwithstanding that the arbitration agreement incorporated AAA rules, the appellate court affirmed the trial court's decision to address the threshold issue of whether arbitration could be compelled. *Id.* "It is a fundamental principle that a party cannot be forced to submit to arbitration if he has not agreed to do so." *Id.*

¶29 Gist and Anderson argue that under *Brake Masters*, given that the arbitration provision in the Lincoln 40 Operating Agreement incorporated the AAA rules, the superior court correctly deferred to the arbitrator the issue of whether Schiabor is subject to that provision. They contend that by incorporating the AAA rules the parties have agreed that the existence of the arbitration agreement will be decided by the arbitrator, rather than the court, pursuant to section 12-1502(A).

¶30 But *Brake Masters* and the like cases from other jurisdictions do not apply when, as here, the party contesting arbitration has not signed the agreement to arbitrate. As Schiabor points out, those cases presuppose that the parties to

the arbitration agreement did indeed agree to allow the arbitrator to decide arbitrability. But, as stated in *AutoNation Financial Services Corp.* that rationale does not apply if, as Schiabor contends, he was not a party to any such agreement.[9]

CONCLUSION

¶31 For these reasons, insofar as the special action seeks relief from that portion of the superior court's order compelling arbitration of the claims against Schiabor, we remand with instructions to the superior court to determine, in the first instance, whether Schiabor is subject to the arbitration provision in the Lincoln 40 Operating Agreement.[10]

Diane M. Johnsen, Presiding Judge

[9] We decline Schiabor's request to rule that he is not subject to the arbitration agreement. In this special action, the proper course for us is to decide only whether that issue under the facts presented here should be resolved by the superior court, pursuant to A.R.S. § 12-1502(A), or by the arbitrator, pursuant to the terms of that agreement and the AAA rules.

[10] Schiabor also argues that the superior court's order unlawfully deprives him of a right to a jury trial. Given our resolution of other matters in this special action, we need not address the jury-trial issue.

CONCURRING:

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Lawrence F. Winthrop, Judge

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Philip Hall, Judge