No. 23-cv-1046

District of Columbia Court of Appeals

BDO USA, P.C., *et al.*,
Appellants,

v.

Eric Jia-Sobota, *et al.*,
Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Action No. 2020 CA 2600 B
Judge Neal E. Kravitz

APPELLANTS' OPENING BRIEF

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LIST OF INTERESTED INDIVIDUALS AND ENTITIES

Following is a complete list of parties and their counsel in the trial court.

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Defendants & Counter-Plaintiffs

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RULE 26.1 CORPORATE DISCLOSURE

BDO Public Sector LLC is wholly owned by BDO USA, P.C., which is a closely-held professional services corporation. It has no parent corporation.

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INTRODUCTION

Defendant Eric Jia-Sobota is a sophisticated and wealthy businessperson who holds himself out as an expert in government-contract consulting. He is the founding principal of EverGlade Consulting, now known as defendant JSCO Enterprises. (For simplicity's sake, we refer to the defendants collectively as Jia-Sobota.)

When Jia-Sobota joined BDO as a partner in 2012, he signed the firm's partnership agreement containing a broadly written arbitration clause. It provides that "[a]ny controversy or dispute relating to this Agreement or the Partnership and its affairs . . . shall be considered and decided by an arbitration panel." App. 90a .

In early 2020, while still a partner at BDO, Jia-Sobota founded EverGlade. BDO alleges that Jia-Sobota attempted to (and did) lure away many BDO employees and attempted to (and did) steal BDO's clients, all in breach of his fiduciary duties and the plain terms of the partnership agreement. BDO sought a preliminary injunction from the D.C. Superior Court to protect its rights while an arbitral panel was set up—a form of relief expressly allowed by the arbitration clause itself.

In the time since, the parties have engaged in *four years* of litigation, all just to decide whether the dispute between BDO and Jia-Sobota should be compelled to arbitration. Jia-Sobota has argued strenuously against arbitration, raising two arguments: First, that BDO waived its right to arbitrate by seeking preliminary relief in court; and second, that the arbitration clause is unconscionable and thus unenforceable because the arbitral panel was to be comprised of BDO partners, who could not be impartial.

The trial court initially bought Jia-Sobota's first argument, holding BDO waived its right to arbitrate by coming to court for a PI. But this Court unanimously reversed on interlocutory appeal, remanding to the trial court to determine whether the arbitration clause was unconscionable.

On remand, BDO sought to avoid additional litigation on unconscionability by simply waiving that part of the arbitration agreement to which Jia-Sobota objected. That is to say, BDO agreed to arbitrate before the AAA rather than a panel of BDO partners. And Section 5 of the Federal Arbitration Act and New York law both allow a court to appoint a substitute arbitrator in just such circumstances. The court nonetheless refused.

The parties thus engaged in another six months of discovery and briefing on the unconscionability question. But around 5pm on the evening before the hearing on that motion, the trial court directed the parties to be prepared to address an issue that Jia-Sobota had never himself raised and that the parties had not briefed—whether the arbitration clause applied at all.

Two weeks later, the trial court issued an order denying BDO's motion to compel arbitration. The court declined to resolve the unconscionability question and instead held that the arbitration clause was inapplicable, despite that Jia-Sobota had not made that argument and the parties did not brief it. The court held in the alternative that the entire agreement to arbitrate was "destroyed" now that BDO—a professional services corporation as of July 2023—no longer has partners to appoint to an arbitral panel.

That decision was wrong in every possible respect. First, this case is plainly a "dispute relating to [the partnership] agreement or the partnership and its affairs" as to which the arbitration clause applies. The trial court's contrary decision spurned the ordinary rules of English that govern contract interpretation. Moreover, the trial court abused its discretion by introducing a new defense to arbitration that Jia-Sobota long ago waived. It also was wrong to conclude that the contract forecloses a substitute arbitrator under Section 5 of the FAA and N.Y. CPLR § 7504, which numerous other courts have applied in circumstances just like these.

Four years of litigation on the question of arbitration is enough. This Court should reverse and remand with instructions to compel this case to arbitration before the AAA, mooting any remaining arguments Jia-Sobota may have concerning unconscionability.

JURISDICTIONAL STATEMENT

This is an appeal from orders denying BDO's motion to compel arbitration. Title 9, Section 16 of the United States Code permits immediate appeals from orders denying a request to compel arbitration. 9 U.S.C. § 16(a)(1)(C). This Court has jurisdiction pursuant to D.C. Code §§ 11-721(a)(1) and 11-721(a)(2)(A). *See Bank of America v. District of Columbia*, 80 A.3d 650, 660-61 (D.C. 2013).

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in holding that the claims in this case are not a "dispute relating to [the BDO Partnership] Agreement or the Partnership and its affairs" that "shall be considered and decided by an arbitration panel."

2. Whether the trial court erred by not appointing a substitute arbitrator in lieu of the panel identified in the agreement, pursuant either to 9 U.S.C. § 5, or N.Y. CPLR § 7504, or BDO's waiver of its contractual rights.

3. After more than four years of wasteful litigation over the question of arbitration, whether this Court should remand with instructions to compel arbitration before a substitute arbitrator, once and for all.

STATEMENT OF THE CASE

BDO filed this lawsuit on May 26, 2020, seeking preliminary relief in aid of arbitration. Jia-Sobota filed counterclaims.

The trial court denied preliminary relief and BDO's motion to compel arbitration of the counterclaims, holding that BDO had waived its right to arbitrate by seeking preliminary relief in court. Jia-Sobota sought an order denying the motion to compel on the alternative ground that the arbitration clause was unconscionable and thus unenforceable, but the court did not decide that question.

This Court unanimously reversed on interlocutory appeal and remanded for the trial court to resolve the question of unconscionability. *See BDO USA, LLP v. Jia-Sobota*, 283 A.3d 699 (D.C. 2022).

On remand, the trial court denied BDO's motion to substitute the AAA for the arbitration panel identified in the parties' agreement, which, if granted, would have mooted the unconscionability issue. The parties then re-briefed the question of whether the trial court should compel arbitration. The court denied the motion. In doing so, it again refused to resolve the unconscionability question and instead

decided the case on the basis of an issue never raised by the counter-plaintiffs. This appeal followed.

STATEMENT OF FACTS

A. Jia-Sobota joins BDO as a partner

Eric Jia-Sobota is an expert in government-contract consulting. He started his career in this field more than twenty years ago. App. 213a, Jia-Sobota Dep. Tr. (EJS Tr.) 16:13-18. He later joined the government contracting practice at Argy Wiltse & Robinson's (AWR), a successful regional accounting and consulting firm with hundreds of employees. Jia-Sobota was eventually made a minority partner at AWR, with one share of stock. App. 217a, EJS Tr. 45:11-19.

Soon thereafter, the named partners of AWR informed Jia-Sobota and the twenty-or-so other minority partners that the firm was entering negotiations to merge with BDO. Upon receiving this news, Jia-Sobota could have explored alternative employment opportunities but chose not to do so. App. 218a, EJS Tr. 48:18-22, 114:10-115:3.

AWR partners received initial drafts of the documents governing the merger several weeks before the merger took place. App. 251a. The documents flagged and incorporated by reference the arbitration clause from the BDO partnership agreement. App. 266a (§ 6.10); App. 90a (§ 14.7).

The AWR minority partners (including Jia-Sobota) were invited to elect two representatives to participate in the negotiations with BDO. App. 251a. They elected two such individuals, who committed to "distill your comments to use, as

appropriate, for proposed changes (or comment or question) to the supplemental agreements" in their discussions with "the Firm's legal counsel or BDO" concerning the merger. App. 251a. At the same time, AWR leadership noted in the weeks leading up to the merger that there was an "unprecedented number of calls that [our] staff are getting from recruiters" and that "[w]e are well aware from our own situation that there are numerous openings at public accounting firms right now." App. 317a.

The minority-partner representatives compiled feedback and shared proposed changes to the deal documents with representatives of BDO. Two of the changes were incorporated into the final agreement. App. 320a; App. 229a, EJS Tr. 104:5-106:6. Jia-Sobota did not once raise any questions about, or propose any changes to, any provision of any of the deal documents. App. 227a-228a, EJS Tr. 100:7-101:2; App. 233a, EJS Tr. 112:9-22.

Jia-Sobota signed the deal documents, including the BDO partnership agreement, and became a BDO partner effective November 1, 2012. App. 219a, EJS Tr. 58:13-19. Before, Jia-Sobota's income had been $300,000 per year. App. 238a-239a, EJS Tr. 140:8-141:8. After the merger, his income doubled to $595,000. App. 240a-241a, EJS Tr. 142:4-10, 143:18-144:22. While he had been one of the most junior partners at AWR prior to the merger, he leapfrogged nearly all senior AWR minority partners that joined BDO to become the second highest paid among them. App. 323a. In his last year at BDO, Jia-Sobota's earnings exceeded $1.2 million. App. 325a. Over his eight-year tenure, he received more than $6.5 million. App. 325a.

B. The partnership agreement requires arbitration

For partners wishing to separate from the firm, the BDO partnership agreement in force at the time included a six-month garden leave period, during which time the departing individual would effectively stop working but remain a partner of the firm, with fiduciary duties to the partnership. App. 79a (§ 11.2). The point of this provision was to make it more difficult for partners to spring a departure on firm leadership, which would have made it easier for them to steal employees and clients. The garden-leave provision was supplemented by an express non-compete clause that prohibited any departing partner, for a period of two years following a separation, from soliciting BDO clients and luring away BDO employees. App. 89a (§ 14.5).

The agreement also included an arbitration clause, which specified that "[a]ny controversy or dispute relating to this Agreement or the Partnership and its affairs or otherwise arising between a Partner and the Partnership . . . shall be resolved and disposed of in accordance with this section." App. 90a (§ 14.7). The clause subsequently provided that "[a]ny dispute or controversy" covered by the clause "shall be considered and decided by an arbitration panel" as thereafter defined. App. 90a. The arbitration clause appears in the section titled "Dealings Among Partners" and is in the same size, color, and type face as all of the other provisions in the partnership agreement. App. 90a.

While Jia-Sobota was a partner at BDO, the arbitration clause specified that the arbitration panel was to consist of five members—two from BDO's board of

directors selected by the board, and three other BDO "Partners" not on the board of directors and "mutually agreed to by the Board of Directors and the parties." App. 90a. At all relevant times, the agreement specified that no partner on the panel could be "involved in the controversy or dispute" or even reside in an office of a partner involved in the dispute. App. 90a.

BDO, which was formerly a limited liability partnership, adopted a new corporate structure effective July 1, 2023. From that date onward, it has operated as a closely-held professional services corporation, BDO USA, P.C. The owners of the company are now denominated "Principals" by the governing documents, not "Partners." Because BDO is no longer a partnership and no longer has "Partners" within the meaning of Section 14.7 of the contract between Jia-Sobota and BDO, it is no longer possible to constitute an arbitral panel of BDO "Partners" according to the terms of the original arbitration clause.

C. Jia-Sobota breaches his fiduciary duties

By 2019, Jia-Sobota was one of the most handsomely paid partners at BDO, and he was the national head of the firm's Industry Specialty Services Group (ISSG). BDO alleges that, when Jia-Sobota was not chosen for an expanded leadership role, he embarked on a months-long scheme to launch his own business by stealing the ISSG practice, including its employees and clients. App. 28a-31a (Compl. ¶¶ 1-7).

In early 2020, Jia-Sobota attempted (unsuccessfully) to withdraw from BDO without observing the six-month garden leave period. Shortly thereafter, he officially launched a competing firm. BDO alleges that he and his co-conspirators began

actively recruiting BDO employees, encouraging at least 11 members of the ISSG team to resign from BDO to join Jia-Sobota at his new firm. Several did so. App. 34a, 38a-41a (Compl. ¶¶ 30-32, 58-61). They also contacted BDO clients, informing them that Jia-Sobota was leaving BDO to start his own firm, falsely claiming that the ISSG practice would move wholesale to the new firm. App. 41a-42a (Compl. ¶¶ 62-68).

Jia-Sobota served as the chairman and CEO of his new firm for several years. More recently, however, he was suspended pending an investigation into BDO's allegations, in a parallel Delaware lawsuit, that Jia-Sobota had defamed and tortiously interfered with BDO's client relations. *See BDO USA, LLP v. EverGlade Global, Inc.*, 2023 WL 1371097 (Del. Super. Ct. Jan. 31, 2023). As part of that suit, the Delaware court found that Jia-Sobota and his firm had engaged in pervasive, bad-faith document destruction—indeed, "acts of spoliation [that were] among the worst one could imagine." *Id*. at *16. The court also observed that Jia-Sobota personally had "lie[d] in his prior deposition testimony," and it rejected his testimony across the board as "not credible." *Id*. at *10, *14. In other words, it found that Jia-Sobota is a liar and bad-faith litigant.

The Delaware court ultimately entered a default judgment in favor of BDO and sanctioned Jia-Sobota's firm more than $5 million for its "extreme" litigation misconduct. *See BDO USA, LLP v. JSCo Enterprises, Inc.*, 2023 WL 5191146 (Del. Super. Ct. Aug. 8, 2023). In the time since, Jia-Sobota's consulting firm has filed for bankruptcy. *See In re JSCo Enterprises, Inc.*, No. 23-42151 (Bankr. E.D. Tex.).

D. The trial court refuses to compel arbitration

1. BDO filed this litigation in mid-2020, seeking preliminary injunctive relief in aid of arbitration (App. 1a), as permitted by the arbitration clause then contained in BDO's partnership agreement (App. 90a (§ 14.7)). Wary that Jia-Sobota was immediately and aggressively attempting to steal BDO's clients and employees, BDO filed a verified amended complaint and a motion for a temporary restraining order in the D.C. Superior Court. App. 3a. While the motion for a TRO was still pending, BDO filed a demand for arbitration, commencing the process for resolving its claims against Jia-Sobota pursuant to Section 14.7 of the partnership agreement. App. 3a. A few days later, Jia-Sobota filed an answer and six counterclaims. App. 107a.

The trial court denied BDO's motion to compel arbitration and Jia-Sobota's cross-motion to stay arbitration. App. 12a. The court held that "the totality of the circumstances of [BDO's] conduct shows that [BDO] waived the right to arbitrate." *Id.* Following further motions practice, the trial court held that BDO could not proceed with arbitration of its own claims, either. *Id*.

2. This Court unanimously reversed on interlocutory appeal. *See BDO USA, LLP v. Jia-Sobota*, 283 A.3d 699 (D.C. 2022). The Court held that BDO had not waived its right to arbitrate, finding that "the arbitration agreement between BDO and Jia-Sobota allowed either party to pursue an injunction without waiving its arbitration rights," and "BDO took [no] action inconsistent with its intent to arbitrate its underlying claims" in its pursuit of such relief. *Id*. at 701.

The Court vacated the Superior Court's order but elected "not to resolve the question of [the] enforceability" of the arbitration agreement. *Id.* at 710. The Court instead remanded for the trial court to determine whether the arbitration clause in Jia-Sobota's partnership agreement is unconscionable and thus unenforceable in light of the fact that it provided that BDO partners serve as arbitrators. *Id*.

3. On remand, BDO moved the trial court to appoint AAA as arbitrator. BDO argued that the method for selecting arbitrators had failed because Jia-Sobota had refused for longer than two years to participate in the process. App. 22a. BDO also argued that having an objectively neutral, court-appointed arbitrator such as the AAA would moot any unconscionability objections associated with BDO partners serving as arbitrators. App. 24a.

The trial court denied BDO's motion. App. 202a. It held that it "lack[ed] authority to order the parties to arbitration with AAA" because this Court had remanded for it to decide whether the arbitration clause itself was unconscionable. App. 203a.

The case proceeded to discovery on the question of unconscionability, which included document discovery and depositions. During the discovery period, BDO reorganized its corporate structure from a partnership to a closely held corporation.

Upon the conclusion of discovery, BDO again moved the court to compel arbitration before the AAA. App. 24a. BDO argued that there was no evidence of either procedural or substantive unconscionability related to the arbitration clause; Jia-Sobota was a sophisticated party who had agreed to arbitrate, and the clause thus

had to be enforced according to its terms. *Id*. But BDO also argued that the question of substantive unconscionability was by then moot because there no longer are any BDO partners who can sit as arbitrators. *Id*. BDO argued that under these circumstances, the court is required to appoint an alternative arbitrator, proposing the AAA. *Id*.

After briefing on the question of unconscionability and the substitution of the AAA, the Superior Court scheduled a hearing for November 7, 2023, at 11:00am. *Id*. At 4:57pm on November 6, 2023—the evening before the hearing—Judge Kravitz's clerk emailed the parties directing them to be prepared to address a new, unbriefed defense to arbitration that Jia-Sobota himself had never before raised: whether the arbitration clause applies to former partners as well as current partners. App. 449a. This new contract defense was the principal focus of the hearing.

Soon after the hearing, the trial court entered an order denying the motion to compel arbitration. App. 522a. The court held that (1) "the arbitration provision in the partnership agreement does not apply to disputes between BDO and its former partners," even when those disputes relate to the agreement or the partnership and its affairs; and (2) "even if the arbitration provision did apply to such disputes, the court could not substitute AAA for the panel of current BDO partners specified in the partnership agreement." App. 526a-527a. The court did not decide the "ultimate question of unconscionability," which is the one question that this Court had directed the trial court to answer. App. 526a.

SUMMARY OF ARGUMENT

I. The arbitration clause here covers any controversy or dispute relating to the partnership agreement or the partnership and its affairs. That expansive language plainly covers alleged breaches of the partnership agreement and of the fiduciary duties owed under the law of partnership. The trial courts' contrary opinion rewrote the contract, turning an "or" into an "and" and adding limits that did not appear in the contract. It cannot be sustained.

Moreover, Jia-Sobota waived any argument concerning the applicability of the arbitration clause, and the district court abused its discretion by inserting the issue into the case *sua sponte* at the eleventh hour. In civil cases especially, parties represented by competent counsel are assumed to know what is best for them and are responsible for advancing the arguments entitling them to relief. Courts, for their parts, are neutral arbiters of the legal questions presented by the parties before them. They are not to perform takeovers of cases, adding issues that they would prefer to see litigated.

II. The trial court erred by not appointing a substitute arbitrator, and the Court should reverse and remand with instructions to compel arbitration of all claims before the AAA. Courts in New York and across the country have uniformly recognized that appointment of a substitute arbitrator is required under Section 5 of the FAA (and N.Y. CPLR § 7504) when a party refuses to comply with the method for appointing an arbitrator as specified in the contract, delaying the process indefinitely; when a party waives its right to enforce an arbitrator-appointment

provision when the provision is challenged as unconscionable; and when an arbitrator-appointment provision cannot be enforced because of some change in circumstances. All three scenarios are present here, and the trial court was wrong not to appoint the AAA. After four years of wasteful litigation, the case should be sent to arbitration.

ARGUMENT

I. THE ARBITRATION CLAUSE COVERS THE DISPUTE HERE

A. By its plain terms, the arbitration clause covers this dispute

Any contention that the arbitration clause doesn't cover the dispute here is indefensibly wrong. The trial court's contrary decision adds words that do not appear in the contract, renders inoperative words that do appear in the contract, and produces absurd results that the parties never could have intended. Reversal is manifestly warranted.

1. The dispute here is one "relating to this Agreement or the Partnership and its affairs"

Section 14.7 of the partnership agreement states in clear language:

> Any controversy or dispute relating to this Agreement or the Partnership and its affairs or otherwise arising between a Partner and the Partnership . . . shall be resolved and disposed of in accordance with this section.

App. 90a. A plain-text reading of this language indicates that the arbitration provision covers two kinds of disputes. *First* are "any" disputes that "relate" to the partnership agreement or the partnership to which the agreement gives rise. The scope of that language is capacious. "Read naturally, the word 'any' has an

expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008). Similarly, the ordinary meaning of the term "relating to" is a "broad one," meaning "'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)).

It follows that the first element of the first sentence of the arbitration clause covers any and every dispute pertaining in any way to the partnership agreement or the partnership's affairs—ineluctably including alleged breaches of the partnership agreement and alleged breaches of the fiduciary duties owed under the law of partnership.

Falling within the *second* category of covered disputes are those that arise between a partner and the partnership, even when they do *not* relate to the partnership agreement or the partnership. That follows from the word "otherwise." As New York courts have explained, "employment of the word 'otherwise'" in the formulation "or otherwise" must be "taken literally to mean 'different from.'" *Matter of Riefberg's Estate*, 446 N.E.2d 424, 428 (N.Y. 1983). Put another way, "'Otherwise' means, 'In a different manner; in another way, or in other ways.'" *Dunham v. Omaha & Council Bluffs Street Railway*, 106 F.2d 1, 3 (2d Cir. 1939).

The words "or otherwise" are thus ones of enlargement. For example, "[t]he words 'or otherwise' following 'any suit or proceedings in equity' can only enlarge the reference to the form of action to include any other suit or proceedings" different

from, and in addition to, a suit in equity. *Id*.; *accord In re Bisconti's Will*, 119 N.E.2d 34, 36 (N.Y. 1954) (explaining that "the words, 'or otherwise', represent terms of enlargement to include every conceivable situation outside those stated" in the prior element of the disjunction of which they are a part).

Thus, in the contract language here, "[t]he word 'otherwise' . . . means exactly what any person of ordinary intelligence would understand: that the [arbitration clause] extends . . . not only" to disputes relating to the partnership agreement itself or the partnership and its affairs, but also to every other conceivable dispute that might arise between a partner and the partnership, including ones that do *not* relate to the partnership agreement or the partnership and its affairs. *United States v. Cavallaro*, 553 F.2d 300, 304 (2d Cir. 1977) (construing "or otherwise" appearing in 18 U.S.C. § 1201).

Understood in this way, the second element of the relevant contract language would include, for example, a personal injury claim that asserts premises liability. A slip-and-fall suit by a partner against the partnership does not relate to the partnership agreement—it relates, instead, to the condition in which real property is maintained—but it still must be arbitrated.

Thus, as we explained at the oral argument before the trial court, this two-pronged interpretation gives meaning to both elements of the first sentence of the arbitration clause. And under this reading, the dispute here is plainly covered by the arbitration clause. BDO alleges that Jia-Sobota violated the terms of the partnership agreement and breached his fiduciary duties to the BDO partnership. It would beggar

belief to say that such claims are not ones "relating to" the partnership agreement or the partnership and its affairs within the meaning of section 14.7. As long as the clause is enforceable, the dispute here accordingly must be arbitrated.

2. The trial court's contrary interpretation spurns the text of the contract and violates every canon of construction

a. The trial court saw things differently. In its view, the two kinds of disputes identified by the first sentence of the arbitration clause "are not to be interpreted separately." App. 530a. Rather, "the first phrase must be read in light of—and as limited by—the second phrase." *Id*. According to this unusual approach, the first sentence of the clause must be rewritten so that it applies to "[a]ny controversy or dispute [between a Partner and the Partnership] relating to this Agreement or the Partnership and its affairs or otherwise arising between a Partner and the Partnership . . ." App. 531a. (*alterations supplied by the court*). This follows principally, the court reasoned, from the word "otherwise," which combined with the word "or" (a disjunction) must be taken to mean "and" (a conjunction). App. 530a-531a.

The trial court ruled that the arbitration clause, read this way, does not apply here because Jia-Sobota is a *former* partner, not a *current* partner. And "BDO, which drafted the partnership agreement, . . . knew full well how to specify those parts of the agreement that were intended to apply to former partners" by saying so expressly. App. 528a. "The absence of such a state-ment in Section 14.7 thus is strong evidence that the arbitration provision is not intended to apply to disputes between BDO and its former partners." *Id*.

b. It is a very peculiar approach to contract interpretation that expressly rewrites the terms of the agreement, adding words in some places and swapping them in others. No surprise, the trial court's adoption of that approach violates virtually every rule of contract interpretation—including the rule "that a court may not, under the guise of interpretation, make a new contract for the parties." *Rodolitz v. Neptune Paper Products, Inc.*, 239 N.E.2d 628, 630 (N.Y. 1968). As New York courts have held repeatedly, courts must "concern [them]selves with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote." *Id.* at 631.

The ruling below conflicts with this basic tenet. To begin, the difference between a disjunction ("or") and a conjunction ("and") has real significance. The two words "are certainly not ordinarily convertible, and to change one into the other at will, to suit the mood of the reader, would work wondrous mischief with legal instruments, to say nothing of its singular effects upon the meaning of any English author one may chance to take down from the shelf." *In re Duffy's Will*, 256 N.Y.S. 743, 746 (N.Y. Sur. Ct. 1932).

The difference between the two is hardly subtle. "The use of the conjunctive" when joining two contract conditions indicates that "both conditions must be satisfied" to trigger the clause's application. *Jakubowicz v. A.C. Green Electrical Contractors, Inc.*, 25 A.D.3d 146, 151 (N.Y. App. Div. 2005). Thus, the trial court's ruling might have some force if the parties had written the first sentence of the arbitration clause to provide that arbitration was required for "any controversy or

dispute relating to this Agreement or the Partnership and its affairs *and* arising between a Partner and the Partnership." But that is not the language the parties chose.

They instead specified that arbitration was required for "any controversy or dispute relating to this Agreement or the Partnership and its affairs *or otherwise* arising between a Partner and the Partnership." The use of the disjunctive "is ordinarily employed to indicate an alternative; as one or the other, but not both." *Koch v. Fox*, 71 A.D. 288, 292 (N.Y. App. Div. 1902); *see also Megaris Furs, Inc. v. Gimbel Bros*., 172 A.D.2d 209, 210 (N.Y. App. Div. 1991) (when two conditions "are stated in the alternative" using a dis-junction, "no [conjunctive] limitation may be read into the contract"). The arbitration agreement here therefore must be understood to apply whenever the underlying dispute *either* relates to the agreement or partnership and its affairs *or* is between a partner and the partnership.

There is no ambiguity on this point. As New York authorities make clear, "[w]here two conditions are joined by the word 'or'" like this, "they are deemed to be alternative conditions, and the occurrence of one is sufficient to trigger the operative contract provision even where the other has not occurred." 22 N.Y. Jur. 2d Contracts § 240. And as we have shown, use of the word "otherwise" confirms rather than alters that conclusion. Again, the word "otherwise" in this context "means, 'In a different manner; in another way, or in other ways.'" *Dunham*, 106 F.2d at 3.

Nor do the surrounding provisions indicate anything different. It is true, as the trial court recognized, that the partnership agreement elsewhere distinguished between "partners" and "former partners." *See* App. 528a-529a. But the most that

suggests is that the second half of the relevant sentence—the phrase covering disputes "otherwise arising between a Partner and the Partnership"—does not cover disputes arising between a *former* partner and the partnership. That possibility has no bearing here, because a controversy involving allegations of breaches of the partnership agreement and violations of fiduciary duties is one "relating to this Agreement or the Partnership and its affairs." App. 90a.

Finally, it bears mention that, not only does the decision below openly change the language of the provision, but in doing so, it renders much of the first sentence inoperative. As the trial court saw it, the words

> any controversy or dispute relating to this Agreement or the Partnership and its affairs or otherwise arising between a Partner and the Partnership

must be interpreted to mean

> any controversy or dispute *between a Partner and the Partnership* relating to this Agreement or the Partnership and its affairs *and* arising between a Partner and the Partnership

See App. 528a-530a. But aside from rewriting the contract, this approach makes the first part of the sentence wholly redundant of the second part. The clause would have the precise same meaning if it were limited simply to "any controversy or dispute arising between a Partner and the Partnership." Neither Jia-Sobota nor the trial court has given any account of why the parties would have included substantial unnecessary words like this. The trial court's interpretation is thus contrary the "standard principle[] of contract interpretation" that every word and clause in the contract should be given meaning and not rendered "superfluous." *Lawyers' Fund*

for Client Protection of State of N.Y. v. Bank Leumi Trust Co. of N.Y., 727 N.E.2d 563, 567 (N.Y. 2000); *accord, e.g.*, *Rastall v. CSX Transportation*, 574 A.2d 271, 278 (D.C. 1990).

3. The trial court's reading would make circumvention too easy

In addition to the errors in the trial court's reasoning already demonstrated, the trial court's interpretation is wholly "[in]consistent with the general purpo[se] of the agreement" (*Sutton v. East River Savings Bank*, 435 N.E.2d 1075, 1079 (N.Y. 1982)), which was to ensure that disputes concerning the parties to the partnership agreement would be resolved relatively more efficiently in arbitration rather than litigation.

The trial court's interpretation of the arbitration clause would exclude from arbitration any and all disputes between BDO and *former* partners. Thus a partner could avoid the agreement to arbitrate—even in serious disputes ranging from breach of fiduciary duty to theft of property—simply by resigning from the partnership. The trial court's reading of the provision—that arbitration is required only if the complaining or defending partner remains a partner—thus undermines the core purpose of the agreement to ensure arbitration takes place. And it does so in circumstances when its application would have been top of mind to the drafters.

It is also telling that, in all the prior cases in which the enforceability of the arbitration clause was raised, the individual party never once argued that the provision is inapplicable as against former BDO partners. *See, e.g.*, *BDO Seidman, LLP v. Bee*, 970 So. 2d 869 (Fla. Dist. Ct. App. 2007) (enforcing arbitration

provision against former partner seeking retirement benefits); *Hottle v. BDO Seidman LLP*, 846 A.2d 862 (Conn. 2004) (enforcing arbitration provision against former partner after dispute regarding compensation); *Greenwald v. Weisbaum*, 785 N.Y.S.2d 664 (N.Y. Sup. Ct. 2004) (enforcing arbitration provision against former partner who withdrew from partnership agreement to bring class action suit regarding wrongful terminations).

B. The trial court abused its discretion by deciding the motion to compel arbitration on a long-ago waived, un-briefed issue

The self-evident errors in the trial court's order below all were avoidable, if only the court had stuck to the defenses that Jia-Sobota himself had raised and the parties had actually briefed. The trial court's abuse of discretion in deciding issues that Jia-Sobota long ago had waived and were never briefed by the parties is yet another reason to reverse.

1. When BDO moved for an order compelling arbitration of Jia-Sobota's counterclaims, Jia-Sobota resisted the request on just two grounds: that (1) BDO had waived its right to arbitrate by seeking a preliminary injunction in court, and (2) the arbitration clause was unconscionable and thus unenforceable. The litigation proceeded through multiple substantive motions over the course of the next year on the basis of just those two defenses.

Jia-Sobota also made just two arguments in the first appeal before this Court. In reversing, this Court "agree[d] with BDO that [BDO] did not waive its right to arbitrate, contrary to the trial court's ruling." *BDO*, 283 A.3d at 701. But it also

recognized that Jia-Sobota had raised a fallback defense, requesting that the Court "affirm on the alternative ground that the arbitration clause is unenforceable" on unconscionability grounds. *Id*. The Court declined that request, instead "remand[ing] for the trial court to address the arbitration clause's enforceability in the first instance." *Id.* at 710.

Through all of that, the assumption underlying Jia-Sobota's arguments was that the clause would apply to the dispute here, so long as BDO did not waive arbitration and the clause was enforceable. The same assumption remained in place when the case returned to the trial court for it to resolve the outstanding unconscionability issue: The parties engaged in additional discovery on the question of unconscionability only, and they exchanged two rounds of additional briefing addressed to that issue only, together with the substitution question.

At no point over the past four years, either before or after the first appeal, did Jia-Sobota even hint that the arbitration clause did not apply by its plain terms to the dispute at issue here, assuming it was enforceable.

Matters changed only at 4:57pm on the day before oral argument on the most recent motion to compel arbitration. By email just 18 hours before the hearing was to commence, the trial court *sua sponte* directed the parties to "be prepared to discuss whether and why Section 14.7 applies to former partners." App. 449a. Although the trial court heard oral presentations on the question from both parties, it did not afford BDO an opportunity to brief the issue.

Approximately two weeks later, the trial court denied the motion to compel arbitration, reasoning that the "question of unconscionability" was too "complex" to decide. App. 526a. It ruled, instead, that even assuming "the arbitration provision in the partnership agreement is not unconscionable, the court concludes that the provision does not apply to disputes between BDO and its former partners." App. 527a. In reaching that conclusion, the trial court relied not only on the new defense raised in its 4:57pm email, but also on additional new contentions that the court did not raise and the parties did not address at the hearing. App. 532a n.4.

2. The trial court manifestly abused its discretion by resolving the long-running motion to compel arbitration on the basis of a contract-interpretation defense that Jia-Sobota had not raised and the parties did not brief.

"In our adversarial system of adjudication, [courts must] follow the principle of party presentation." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). That means they must "rely on the parties to frame the issues for decision" and assume only "the role of neutral arbiter of matters the parties present." *Id*. (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). In civil cases especially, the idea is "that parties represented by competent counsel know what is best for them and are responsible for advancing the facts and argument entitling them to relief." *Id*. at 375-76 (cleaned up).

This general rule recognizes that "courts are essentially passive instruments of government." *Id.* at 376 (cleaned up). They must "wait for cases to come to them, and when cases arise, . . . decide only questions presented by the parties." *Id*.

(cleaned up). "[Federal] courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

This rule has special purchase in private contract cases like this one, where only private rights are at stake. In such cases especially, it is not for courts to "interven[e]" on behalf of one party or the other, orchestrating a "takeover" of the case when a favored party omits a theory of relief the court thinks preferable. *Sineneng-Smith*, 590 U.S. at 378-79.

The policies underlying this rule are many, and this case makes two of them clear: *First*, it is unreasonable to decide cases on grounds as to which the parties had no opportunity to make their own, best arguments. Fairness requires that parties be given an opportunity to research and brief all claims and defenses, so the issues are subjected to "the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Here, BDO had no meaningful opportunity to respond to the issues that drove the outcome below, because Jia-Sobota himself never raised them.

Second, it risks wasting judicial resources if courts do not stick to the issues presented by the parties. This case proves the point: Because the trial court blazed its own path without the benefit of an adversarially tested roadmap, it issued an opinion that is plainly mistaken. The meritless position underlying the lower court's order now must detain the parties and this Court on appeal, achieving nothing but wasted effort.

3. We made these points at the oral argument below, urging the trial court not to resolve the motion on the basis of a defense not pressed by Jia-Sobota or briefed by the parties. App. 453a; *see also* App. 470a. But the court dismissed our waiver point in a footnote, stating simply that it had "notified the parties [at 4:57pm the day before] that they should be prepared to address the applicability of the arbitration provision to disputes involving former partners, and Mr. Jia-Sobota and JSCo argued at the hearing on November 7, 2023 that the provision does not apply." App. 532a.

That is no answer at all. Of course Jia-Sobota "rode with an argument suggested by the [court]" in its email, because "[h]ow could [he] do otherwise?" *Sineneng-Smith*, 590 U.S. at 379. In the court's ultimate adjudication of the motion to compel, Jia-Sobota's "own arguments," not being the preferred approach, "fell by the wayside, for they did not mesh with the [court's] theory of the case." *Id*. No litigant would turn down a trial judge's opening an escape hatch like that.

More fundamentally, the court's brush-aside of our waiver argument ignores BDO's interest in a meaningful opportunity to make fully considered and researched arguments in a written brief. This new arbitration-clause-doesn't-apply defense was available to Jia-Sobota all along, and "[o]ral argument is far too late in the day to be raising an issue that was evident at the outset of the case." *Frobose v. American Savings and Loan Association of Danville*, 152 F.3d 602, 612-13 (7th Cir. 1998); *accord Sanchez v. Magafan*, 892 A.2d 1130, 1133 (D.C. 2006) ("[t]o raise an issue for the first time on oral argument is too late") (quoting *Coates v. Watts*, 622 A.2d 25, 28 (D.C. 1993) (Steadman, J., concurring)).

Sandbagging at oral argument is especially unfair here, given that the arbitration question had already been the subject of four extensively briefed motions, multiple oral arguments, and an entire prior appeal before this Court—all taking place over the course of *four years*. In all that time, Jia-Sobota had practically limitless opportunity to develop and frame his defenses against arbitration however he liked. His failure to raise the trial court's own pet theory until he was prompted at the last minute constitutes waiver.

For all of these reasons, Jia-Sobota waived this issue, and the trial court abused its discretion by inserting it into the case *sua sponte* at the oral argument. This, also, is a basis for reversal.

II. THE COURT SHOULD REMAND WITH INSTRUCTIONS TO COMPEL ARBITRATION BEFORE A SUBSTITUTE ARBITRATOR

Reversing the trial court's mistaken conclusion that the arbitration clause does not apply will not, by itself, resolve the question whether this long-running case should be sent to arbitration. On that score, the Court should hold that the case can and must be arbitrated before the AAA.

BDO and Jia-Sobota entered into an agreement that included an arbitration clause. The terms of that clause specified that disputes relating to the partnership agreement "shall be resolved and disposed of . . . by an arbitration panel," which was to be "selected" according to particular rules provided in the agreement. App. 90a. For three independent reasons, however, those rules for selection of an arbitral panel have not been, and cannot be, followed: *first*, Jia-Sobota refused from the start

to participate in the selection of an arbitral panel; *second*, after remand from this Court, BDO waived enforcement of the panel-selection provisions and agreed instead to arbitration before the AAA; and *third*, the panel-selection clause logically cannot be enforced any longer because, as of July 2023, BDO does not have "partners." For any and each of these reasons, the trial court should have appointed, and this Court now should order the appointment of, the AAA or another reputable arbitrator to arbitrate this dispute.

A. Appointing a substitute arbitrator is authorized and appropriate under the circumstances

Federal law and New York law both require the Court to appoint an arbitrator if the method specified by the parties fails. *See* 9 U.S.C. § 5; N.Y. CPLR § 7504; *see also* D.C. Code § 16-4411(a).[1] Under the FAA,

> if a method [for appointing an arbitral panel] be provided [by agreement] and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators . . . who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein.

[1] The Federal Arbitration Act applies alongside N.Y. CPLR § 7504. The trial court devoted substantial time to the choice-of-law question (App. 533a-536a), but its analysis confused the issue. The parties specified, in § 16.9 of the partnership agreement, that New York law governs the construction of the arbitration clause. A general choice-of-law provision of this sort is commonplace, and it does not displace application of the FAA's substantive provisions, including Section 5. Were it otherwise, the FAA would never apply. Tellingly, the New York authorities on which the trial court based its decision generally rely on the FAA and federal law. In all events, Section 5 and N.Y. CPLR § 7504 are coextensive.

9 U.S.C. § 5. New York law is to the same effect: "if the agreed method" for selecting an arbitrator "fails or for any reason is not followed, . . . the court, on application of a party, shall appoint an arbitrator." N.Y. CPLR § 7504. When these conditions are met, appointment is mandatory and not discretionary; the word *shall* "imposes a mandatory duty." *Kingdomware Technologies v. United States*, 579 U.S. 162, 172 (2016).

1. Jia-Sobota's refusal from the start to nominate anyone to the arbitral panel caused the specified procedures for appointing the panel to fail. There can be no disputing that Jia-Sobota, whatever his reasons, "fail[ed] to avail himself of [the] method" for selecting an arbitral panel set by the agreed arbitration rules, or that—four years into this dispute—there has been "a lapse" in the constitution of the panel. 9 U.S.C. § 5. Likewise, it is beyond cavil that "the agreed method [has] fail[ed]" and "is not [being] followed." N.Y. CPLR § 7504. The initial reason for the failure is equally undisputable: Jia-Sobota objected to the method and thus consistently refused to participate in the process of constituting a panel. In these circumstances, the FAA requires that "the court shall designate and appoint an arbitrator or arbitrators" in place of the objected-to panel. 9 U.S.C. § 5.

New York courts often have invoked the FAA Section 5 and N.Y. CPLR § 7504 to appoint arbitrators when practical circumstances have frustrated the parties' initial method for selecting an arbitrator. In *Brower v. Gateway 2000*, 246 A.D.2d 246 (N.Y. App. Div. 1998), for example, a consumer arbitration agreement called for the appointment of an arbitral panel under the rules of the International

Chamber of Commerce (ICC). The plaintiffs refused to comply because they asserted that the costs of arbitrating before the ICC were greater than the value of their claims. *Id*. at 254. The court thus remanded to the trial court "so that the parties have the opportunity to seek appropriate substitution of an arbitrator pursuant to the Federal Arbitration Act, which provides for such court designation of an arbitrator upon application of either party, where, for whatever reason, one is not otherwise designated." *Id*. at 255 (citations omitted).

Much the same happened in *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, 689 F.3d 481 (5th Cir. 2012). There, the parties had entered into an agreement with an arbitration clause that "provide[d] a method to appoint three arbitrators." *Id*. at 492. The parties reached an "impenetrable deadlock" with respect to naming the panel. They "attempted to resolve the impasse for months," but the court recognized that "[a]bsent judicial intervention, the breakdown in the parties' appointment process 'might indefinitely delay arbitration proceedings,' the exact scenario Congress sought to avoid in enacting § 5 by providing parties recourse to the courts." *Id*. at 492-93. The Fifth Circuit thus affirmed that the district court was "authoriz[ed] . . . to intervene and exercise appointment power" under the circumstances. *Id*. at 493. Similar circumstances were present here, and the trial court was wrong not to appoint the AAA.

2. Even supposing Jia-Sobota had not refused to participate in the naming of an arbitral panel, Section 5 was independently triggered by BDO's waiver of its contractual right to enforce the panel-selection provision of the arbitration clause.

Jia-Sobota's argument all along was that the arbitration clause was unconscionable because it allowed BDO partners to resolve the dispute, creating a perceived conflict of interest. When the case returned to the trial court, BDO thus offered to forego the element of the clause that called for BDO partners to sit on the arbitral panel; it offered, instead, to arbitrate before the AAA, which would have solved (and mooted) Jia-Sobota's position with respect to unconscionability.

New York law allows parties to waive elements of arbitration agreements when those elements are challenged as unconscionable; and when such waivers are made, the enforceability of the agreements must be evaluated according to the waivers. This rule reflects the limits of a court's power to grant relief in equity: "Because unconscionability is an equitable defense to the enforcement of harsh or unreasonable contract terms, a party cannot complain when the defendant through its waivers declines to enforce any potentially unconscionable term." *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 124 (2d Cir. 2010).

Several cases demonstrate the point. *In re Currency Conversion Fee Antitrust Litigation*, 265 F. Supp. 2d 385 (S.D.N.Y. 2003), for example, involved a defendant's offer to "forgo any right to" require the plaintiff to pay the selected forum's arbitration fees, which had been characterized by the plaintiff as unconscionably high. *Id*. at 412. As a result of this waiver, the court held that the plaintiffs "cannot possibly" rely on arbitration costs as a ground for finding the arbitration agreement unconscionable. *Id*. at 411-12; *cf. Schreiber v. K–Sea Transportation Corp.*, 879

N.E.2d 733, 739 (N.Y. 2007) (compelling arbitration, but only "conditioned on K-Sea's agreement to bear any costs not waived by the AAA").

The Northern District of Illinois took a similar approach in a case related to *Brower—Filias v. Gateway 2000*, 1998 U.S. Dist. LEXIS 20358 (N.D. Ill. Jan. 15, 1998). As in *Brower*, the plaintiffs there had objected to arbitration before the ICC because of its cost. In response, Gateway "offered all of its customers, past, present and future, the option of arbitrating before the American Arbitration Association" instead. *Id*. at *4. It argued that even if the arbitrator-selection provision is "unconscionable because of the ICC cost, the remedy is not to strike [the arbitration clause] altogether, but rather to appoint a different arbitrator pursuant to the court[']s equitable powers and Section 5 of the Federal Arbitration Act." *Id*.

The court agreed: Although the court was concerned that "selection of the ICC as arbitrator renders the arbitration clause unconscionable," it held that Gateway's voluntary "agreement to arbitrate before the American Arbitration Association (which has offices across the country) renders [the] argument moot." *Id*. at *5. And to ensure that Gateway did "not renege on that agreement, the Court [simply] appoint[ed] the American Arbitration Association as arbitrator in lieu of the ICC" pursuant to its authority under 9 U.S.C. § 5. *Id*.

Again, each of these cases recognizes that "unconscionability is an equitable defense" and that a party asserting unconscionability cannot object when a counter-party responds to such a defense by simply waiving its right "to enforce [the] potentially unconscionable term." *Ragone*, 595 F.3d at 124. And when the allegedly

unconscionable term is the identity of the selected arbitrator, the appropriate course is a court-appointed substitute under Section 5 of the FAA. *E.g.*, *Filias*, 1998 U.S. Dist. LEXIS 20358, at *5.

3. Even if we were wrong about the need to appoint a substitute arbitrator in light of Jia-Sobota's refusal to cooperate and BDO's resulting waiver (we are not) a substitute arbitrator still would be warranted because the literal terms of the parties' arbitration clause no longer can be followed. That is because BDO no longer has "partners" to appoint.

The arbitration clause specifies the rules for nominating individuals to serve on the arbitral panel identified by the clause. In the partnership agreement as written, those rules required appointing "Partners" to the arbitral panel. App. 90a. But as of July 1, 2023, BDO USA took the form of a closely held corporation. The original terms for selecting an arbitral panel therefore cannot be implemented as a practical matter because there are no longer "Partners" who can be appointed.

Among the situations that Section 5 of the FAA was intended to address are those in which there is a "mechanical breakdown in the arbitrator selection process." *Gutfreund v. Weiner (In re Salomon Inc. Shareholders' Derivative Litig.)*, 68 F.3d 554, 560 (2d Cir. 1995). And among the kinds of "breakdown[s]" that courts have found sufficient to invoke Section 5 have been when the "agreement's procedure for selecting arbitrator [is] no longer in effect" as a practical matter because they cannot be followed. *Id.* at 560 (citing *Chattanooga Mailers Union, Local No. 92 v. Chattanooga News–Free Press Co.*, 524 F.2d 1305, 1315 (6th Cir. 1975)).

That is the situation here. The agreement between BDO and Jia-Sobota provided a method for selecting an arbitral panel, but that method has become factually and logically unavailable due to the change in BDO's corporate structure. Courts confronting cases like this have generally held that that agreement to arbitrate is not voided because the agreed-upon method of arbitration is unavailable. Instead, 9 U.S.C. § 5 "provides a solution to this problem" in the form of a court-appointed arbitrator. *PoolRe Ins. Corp. v. Organizational Strategies, Inc*., 783 F.3d 256, 264 n.12 (5th Cir. 2015) (holding that it was appropriate for the court to appoint an arbitrator where "no arbitrator could be appointed in accordance with the [parties'] agreement" in light of changed circumstances).

This rule accords with FAA Section 5 and the intent of the parties. BDO and Jia-Sobota agreed to arbitrate disputes when Jia-Sobota joined the partnership. Arbitration before *some* arbitral panel is plainly more consistent with the parties' initial intent than would be no arbitration at all. Through FAA Section 5, the parties are still able to achieve the benefits of arbitration that they agreed to at the signing of the partnership agreement. Therefore, the trial court should have compelled the case to arbitration before the AAA.

B. The trial court's reasons for refusing to compel arbitration before a substitute arbitrator are wrong

The trial court wrongly rejected these arguments, reasoning that the arbitration agreement here identified an "exclusive arbitral forum" that was "integral to the parties' agreement to arbitrate." App. 527a, 536a. Relying on a bevy of cases that

Jia-Sobota never cited and that the parties did not have an opportunity to address even at oral argument, the trial court held in effect that the arbitration clause thus impliedly disclaimed application of Section 5.

The trial court began with what it dubbed the "*Marchant* rule." App. 534a. (citing *Marchant v. Mead-Morrison Manufacturing Co*., 169 N.E. 386, 390 (N.Y. 1929)). According to that supposed rule, courts may not appoint a substitute arbitrator under Section 5 or N.Y. CPLR § 7504 unless the court first perceives "a dominant intent to arbitrate," meaning that the arbitrator-selection provision is "merely modal and subordinate." *Marchant*, 169 N.E. at 390. In this case, the trial court reasoned, the arbitration agreement "contains pervasive mandatory language about a specific arbitral panel" and that a failure of the panel-selection process thus entails a "destruction" of the agreement to arbitrate altogether. App. 537a-538a. As a "particularly poignant" example of this rule in action, the trial court pointed to *Moss v. First Premier Bank*, 835 F.3d 260 (2nd Cir. 2016). That is wrong.

1. Take first *Marchant*, which offers less than advertised. To begin with, that case did not even cite, let alone grapple with Section 5 of the FAA or N.Y. CPLR § 7504. And it appears to have based its decision on Massachusetts state law. 169 N.E. at 390. It is therefore difficult to read *Marchant* as a construction or application of either Section 5 or N.Y. CPLR § 7504.

Even taking *Marchant* as precedent with respect to the statutes at issue here, the trial court was simply wrong to conclude that mere use of "mandatory language" in the definition of a method for selecting an arbitral panel in this case reflects an

implicit rejection by the parties of the applicability of those two provisions. App. 537a-538a.

The New York court's decision in *Crana Electric, Inc. v. Battery Park City Authority*, 153 A.D.3d 1206 (N.Y. App. Div. 2017)—a case cited by the district court (App. 534a) as an example of courts "faithfully follow[ing] the *Marchant* rule"—proves the point. The agreement in *Crana Electric* provided that disputes were to be arbitrated before the "vice president of internal audit." *Id*. at 1206. That provision was not optional. The court nonetheless held that "a vacancy in the arbiter position would not serve to frustrate [the] intention" to arbitrate as a general matter, because the parties specified broadly that all disputes were to be arbitrated. *Id*. at 1207. The court thus held that the trial court should have appointed a substitute arbitrator under N.Y. CPLR § 7504. *Id*. at 1206-07. The outcomes were the same in *Brower*, *Filias*, and *BP Exploration*, to name a few—in each of those cases, the mandatory method for naming an arbitrator failed, and the court appointed a substitute.

The same is warranted here. The agreement here, like the one in *Crana Electric*, provided broadly that "[a]ny controversy or dispute relating to this Agreement or the Partnership and its affairs . . . shall be considered and decided by an arbitration panel." App. 90a. Notwithstanding the specification of a mandatory method for constituting the panel, that language reflects a principal intent to arbitrate—an intent that is best respected by court-appointment of a substitute arbitrator in the event the specified method fails.

If the trial court's contrary view were correct—if mere use of mandatory language for the naming of members to the panel were enough to make Section 5 and N.Y. CPLR § 7504 inapplicable—both statutes would be rendered essentially inoperable. After all, every contract that includes an express "provision [specifying] a method of naming or appointing an arbitrator or arbitrators or an umpire" (9 U.S.C. § 5) will use mandatory language to that end. But if the mere use of mandatory language for panel selection operates as a disclaimer of "a dominant intent to arbitrate in general," never would there be a case in which a court could exercise its power to appoint a substitute arbitrator upon the failure of the method specified.

2. *Moss* does not support the trial court's decision, either. In that case, the parties' arbitration agreement identified a particular arbitrator before whom proceedings were to take place—the National Arbitration Forum. 835 F.3d at 263. When the defendant moved to compel arbitration, the district court granted the motion, expressly directing the parties to arbitrate before NAF. *Id*. NAF later declined the arbitration. *Id*.

The court there held that declination of the dispute by the named arbitrator does not trigger Section 5. *Moss*, 835 F.3d at 263. That makes sense in light of the plain language of Section 5, which provides for relief when a party refuses to participate in the method specified for "the *naming* of an arbitrator or arbitrators or umpire," in turn resulting in "a lapse in the *naming* of an arbitrator or arbitrators or umpire." 9 U.S.C. § 5 (emphasis added). *Moss* was a different scenario altogether: The parties there had unmistakably named NAF, and arbitration was ordered in that

forum. NAF, having been duly named, simply refused to hear the dispute.[2]

The same distinction holds true of *Gutfreund*, on which *Moss* based its reasoning. There, too, a particular arbitrator was named by the parties in the agreement itself, the district court compelled arbitration before that body, and that body then refused to resolve the dispute. 68 F.3d at 556-57. As in *Moss*, the Second Circuit held simply that Section 5's language did not apply in that scenario, because the arbitrator had in fact been named. As a counterexample, the court explained that Section 5 (and presumably N.Y. CPLR § 7504) *would* apply "when an arbitration agreement . . . specifies a procedure for selecting an arbitrator, and one of the parties refuses to comply, thereby delaying arbitration indefinitely." *Id*. at 560. The court recognized further that Section 5 covers cases where there is more generally a "lapse or breakdown in selecting the arbitrator." *Id*. Both of those circumstances describe this case.

The agreement here specifies broadly that "[a]ny controversy or dispute relating to this Agreement or the Partnership and its affairs . . . shall be considered and decided by an arbitration panel." App. 90a. It also specifies a method for naming

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[2] Some courts have disagreed even with that much, holding that Section 5 does apply in a case like *Moss*. These courts have appointed substitute arbitrators when the named arbitral forum refuses to hear the case. *See, e.g.*, *MoneyGram Payment Systems, Inc. v. Consorcio Oriental, S.A.*, 2006 WL 8461822, at *5 (S.D.N.Y. Nov. 9, 2006); *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1367, 1376 (N.D. Ill. 1990); *Astra Footwear Industry v. Harwyn International, Inc.*, 442 F. Supp. 907, 910 (S.D.N.Y. 1978). Because no arbitral panel was ever named in this case, the Court need not resolve that issue here.

individuals to an arbitral panel. The panel was not constituted according to the specified method because Jia-Sobota "fail[ed] to avail himself of" that method, and now because there are no partners to name, resulting in "a lapse in the naming of an arbitrator or arbitrators or umpire." 9 U.S.C. § 5. Unlike the different scenario presented in *Moss* and *Salomon*—and in the cases from the Third, Fifth, and Eleventh Circuits cited on page 14 of the trial court's opinion—this is a straightforward case calling for application of Section 5.

The trial court was wrong to hold otherwise. This Court thus should reverse and remand with instructions to compel arbitration before the AAA or another reputable national arbitral forum.

CONCLUSION

The Court should reverse the order denying BDO's motion to compel arbitration, and it should remand with instructions to compel the parties to arbitrate before the AAA.

May 10, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2024, I electronically filed the foregoing document using the Court's e-filing system, which will send notice of the filing to counsel of record.

/s/ Michael B. Kimberly