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**BLOGS**  
Arbitration

## Ninth Circuit Declines to Enforce Arbitration Clause After Finding Contract Containing the Clause Was Not Binding

The United States Court of Appeals for the Ninth Circuit recently ruled that an international arbitration clause was unenforceable because the agreement containing the clause was not binding on the parties. *Casa Del Caffè Vergnano S.P.A. v. ItalFlavors, LLC*, 2016 WL 1016779 (9th Cir. Mar. 15, 2016). The court reversed the district court's finding that the question of arbitrability was for an arbitrator to decide, finding instead that the threshold issue of whether the parties had agreed to submit their dispute to arbitration through a binding agreement, in the first place, was for the court to decide. The Ninth Circuit then undertook the inquiry.

Applying federal common law—because the Federal Arbitration Act governed—the court looked to whether the words and acts of the parties, rather than their unarticulated beliefs, expressed a mutual intent to be bound by the agreement containing the arbitration clause. It found that they did not because the parties agreed in a contemporaneously signed agreement that the agreement containing the arbitration clause “d[id] not have any validity or effectiveness between the parties[.]” The court found that the outward expressions of the parties demonstrated that the agreement containing the arbitration clause was a “mere sham” by the parties to skirt regulations and that they intended to enter into a binding agreement in the future. In reaching this conclusion, the court noted that the parol evidence rule does not apply to determinations of the enforceability of a contract; thus, the court was permitted to consider the parties’ contemporaneously signed agreement. A dissenting member of the panel agreed with the district court’s holding that the question of arbitrability was for the arbitrator to decide.

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