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BROWNSTONE EXPLORATION & DISCOVERY PARK, LLC *v.* DIANE BORODKIN
(AC 45127)

Alvord, Moll and Seeley, Js

Syllabus

The plaintiff filed an application to compel arbitration in a separate personal injury action that had been brought by the defendant for personal injuries that she allegedly sustained when she slipped and fell on an unmarked tree root while walking in a park owned by the plaintiff. Prior to entering the park, the defendant signed an agreement that provided, inter alia, that any claims arising out of participation in aquatic and quarry adventure activities would be submitted to arbitration and that the question of whether a claim is subject to arbitration would be decided by the arbitrators. After an evidentiary hearing, the trial court found that, although parties can agree to arbitrate the issue of arbitrability by means of an express provision to that effect, the agreement, taken as a whole, was ambiguous, and, because the court found that the question of arbitrability was not expressly reserved for the arbitrator by the language of the agreement, it was up to the court, not the arbitrators, to decide whether the claim was arbitrable. In determining arbitrability, the court determined that the defendant's claim was not arbitrable because the agreement could be interpreted as requiring arbitration only for claims related to inherently hazardous aquatic and quarry adventure activities, not ordinary negligence, which is what the court determined was alleged in the personal injury action. Last, the court concluded, sua sponte, that the application to compel arbitration had to be denied on additional procedural grounds, finding that it was improper for the plaintiff to have filed an independent proceeding to compel arbitration pursuant to statute (§ 52-410), rather than filing a motion in the pending personal injury action to stay that proceeding, as provided for by statute (§ 52-409). *Held:*

1. The trial court incorrectly concluded that the question of arbitrability was not expressly reserved to the arbitrators and erroneously made the arbitrability determination itself: although the general rule in Connecticut is that the court is responsible for deciding whether a dispute is arbitrable in the absence of the parties' contrary intent, parties to an arbitration agreement may provide in their agreement that the arbitrating body, rather than a court, shall interpret the arbitration agreement to determine whether the issue in dispute is within the purview of the parties' undertaking to arbitrate, either by including in their arbitration agreement an express provision to that effect or, alternatively, through the use of broad terms to describe the scope of arbitration, and, in the present case, there was clear and unmistakable evidence that the parties agreed to arbitrate the issue of arbitrability; moreover, even if the agreement were ambiguous as to whether the personal injury claim was arbitrable, the agreement was not ambiguous as to who decides that question but, rather, expressly provided that the arbitrators decide arbitrability; furthermore, contrary to the defendant's argument, whether a claim falls within the language of the arbitration agreement in the present case is the very issue of arbitrability, not a condition precedent to arbitration that must first be satisfied by the court.
2. The trial court incorrectly denied the plaintiff's application to compel arbitration on procedural grounds without first providing the parties with the opportunity to address the procedural issue: the defendant did not, at any point, argue to the trial court that the plaintiff's application was procedurally defective, and the trial court did not, at any point, notify the parties that it was considering this procedural issue or provide the parties with an opportunity to brief it or otherwise be heard on it; accordingly, it was improper for the court, sua sponte, to raise and address this issue in denying the plaintiff's application.

Argued March 9—officially released August 1, 2023

Procedural History

Application to compel arbitration, brought to the Superior Court in the judicial district of Hartford, where the court, *M. Taylor*, *J.*, denied the plaintiff's application, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Karen L. Dowd, with whom were *Kenneth J. Bartschi* and *Rachel M. Bradford* and, on the brief, *Christopher M. Vossler*, for the appellant (plaintiff).

Elisabeth M. Swanson, for the appellee (defendant).

Opinion

SEELEY, J. The plaintiff, Brownstone Exploration & Discovery Park, LLC (Brownstone), appeals from the judgment of the trial court denying its application to compel arbitration of a dispute involving the defendant, Diane Borodkin, who previously had filed an action against Brownstone for personal injuries (personal injury action) that she allegedly sustained when she slipped and fell on an unmarked tree root while walking on a path just past the entrance to a park owned and operated by Brownstone. Brownstone filed its application pursuant to General Statutes § 52-410 seeking to compel arbitration of the dispute in accordance with an agreement that Borodkin signed when she entered the park, which was titled "Release and Waiver of Claims Arising From Inherent Risks, Indemnity and Arbitration Agreement" (agreement). The trial court found the language of the arbitration provision in the agreement to be ambiguous and, as a result, concluded that the issue of arbitrability was a matter for the court to decide. The court further determined that the claim was not arbitrable because it did not fall within the scope of the agreement. Finally, the court concluded, sua sponte, that Brownstone's application also must be denied on procedural grounds.

On appeal, Brownstone claims that (1) the court erred by concluding that the issue of arbitrability was a matter for the court, not the arbitrators, to decide, and (2) the court erred in denying its application to compel arbitration on procedural grounds. We agree with both of these claims[1] and, thus, reverse the judgment of the court.[2]

The record reveals the following facts and procedural history. The park owned and operated by Brownstone consists of a twenty-seven acre quarry with zip lines, a waterslide, rock climbing activities, cliff jumping, and inflatables. On July 14, 2019, Borodkin went to the park with her husband and two of their grandchildren. Although Borodkin and her husband did not plan on participating in the activities at the park themselves, they nonetheless were required to purchase their own tickets to enter. Soon after Borodkin entered the park, she tripped over a tree root. On January 6, 2021, Borodkin commenced a personal injury action against Brownstone seeking damages for injuries she allegedly sustained due to her fall.

On February 24, 2021, Brownstone commenced the present proceeding seeking to compel arbitration pursuant to the agreement that Borodkin signed before she entered the park, which provides in relevant part: "I, [Borodkin], in consideration for being allowed by [Brownstone] to use its facilities, use its equipment and to participate in aquatic and quarry adventure activities, *hereby release it . . . from any and all claims involv-*

ing injury, damage or death resulting from risks inherent in the activities in which I am about to engage in. RELEASOR acknowledges that these inherent risks include, but are not limited to: climbing; slipping; falling; jumping; collisions with objects and other people; artificial and natural surfaces, including slippery surfaces; aerial activities; rough or uneven terrain, including trails, rocks and tree roots . . . . RELEASOR knows that aquatic challenge and adventure activities can be inherently hazardous, and that participants can injure themselves as a result of these inherent risks. *RELEASOR freely assumes the risk for all injuries, damages or death caused by, or related to, risks inherent to the activity in which I am about to engage*." (Emphasis in original.)

The next paragraph of the agreement contains the arbitration clause at issue, which provides in relevant part: "The parties hereby agree that any claim by any party arising out of my participation in this activity, except indemnification claims, shall be submitted for arbitration to the American Arbitration Association, and not by way of civil lawsuit filed in either the state or federal courts. Three arbitrators, including one neutral, shall be utilized. *They* shall decide: (1) if the claim is subject to arbitration under this agreement; and (2) whether the injuries and damages claimed by RELEASOR arise out of risks inherent to this activity. . . ." (Emphasis in original.)

The matter was set for an evidentiary hearing before the trial court, *M. Taylor, J.*, on July 28, 2021, during which the court heard testimony from Thomas Loring, the director of guest services for Brownstone, and Borodkin. Loring explained that every guest is required to sign the same agreement in order to enter the park and that Borodkin did so on the date of the incident. Borodkin confirmed that the signature on the agreement was hers but testified that she did not read it and that she "didn't understand most of it." After the hearing, the parties submitted briefs to the court. In short, Borodkin argued that arbitration should not be compelled because the agreement as a whole was a contract of adhesion and unenforceable as a matter of public policy. Brownstone dedicated most of its posthearing brief to refuting Borodkin's argument that the agreement in its entirety was unenforceable. Brownstone, however, also countered that the parties should be compelled to arbitrate, arguing that both the issue of arbitrability, that is, whether the claim is subject to arbitration under the agreement, and the merits of the claim should be arbitrated.

On September 15, 2021, the court issued its memorandum of decision. The court first concluded that it was up to it, not the arbitrators, to determine arbitrability. The court reasoned that, although case law provides that parties can agree to arbitrate the issue of arbitrabil-

ity by means of "an express provision" to that effect, "[i]n the present matter, the question of arbitrability is *not* expressly reserved for the arbitrator by the language of the agreement . . . ." (Emphasis added.) The court focused its analysis on the language at the beginning of the arbitration clause, which states that the parties agree that "any claim by any party arising out of [Borodkin's] participation in this activity . . . shall be submitted for arbitration . . . ." The court reasoned that, because "participation in this activity" refers to "aquatic and quarry adventure activities," which does not necessarily include walking on an entrance path, the language of the agreement could be interpreted in favor of either party. As a result, the court concluded that the agreement, "taken as a whole," was ambiguous. It therefore reasoned that, because the agreement was ambiguous, it was up to the court, not the arbitrators, to decide whether the claim was arbitrable.

In determining arbitrability, the court relied on several principles, including that (1) ambiguity in the language of a contract should be construed against the drafter; see *Flaherty* v. *Flaherty*, 120 Conn. App. 266, 273, 990 A.2d 1274 (2010); and (2) "[t]he law does not favor contract provisions which relieve a person from his own negligence . . . ." (Internal quotation marks omitted.) *Hanks* v. *Powder Ridge Restaurant Corp.*, 276 Conn. 314, 319, 885 A.2d 734 (2005). Applying these principles, the court determined that Borodkin's claim was not arbitrable. The court specifically reasoned that, pursuant to *Hanks*, the agreement can be interpreted as requiring arbitration only for claims related to the "inherently hazardous aquatic and quarry adventure activities," not ordinary negligence, which is what the court determined was alleged in the personal injury action. Because the court concluded that the claim was not arbitrable, it therefore reasoned that it need not reach Borodkin's argument that the agreement as a whole was a contract of adhesion, which would thereby render it unenforceable as a matter of public policy.

Last, the court concluded, sua sponte, that the application to compel arbitration had to be denied on additional procedural grounds. Specifically, the court concluded that it was improper for Brownstone to have filed an independent proceeding to compel arbitration pursuant to § 52-410, rather than filing a motion in the pending personal injury action to stay that proceeding, as provided for by General Statutes § 52-409.[3]

Brownstone subsequently filed a motion to reargue and for reconsideration (motion to reargue). It first argued that the court erred by assessing the issue of arbitrability because the agreement expressly reserves that question for the arbitrators. In making this argument, Brownstone cited the portion of the agreement that states that "*they*," referring to the arbitrators, "shall decide . . . if the claim is subject to arbitration under

this agreement . . . .” (Emphasis in original.) It further argued that the court's conclusion that the application must be denied on procedural grounds was incorrect and that it was improper for the court to raise the procedural issue sua sponte without affording the parties the opportunity to brief it or address it during the hearing. The court denied Brownstone's motion to reargue in a one sentence order, which stated that “[t]he subject of arbitration is ‘this activity,’ which the court found ambiguous and construed against the drafter.” This appeal followed.

I

Brownstone first claims on appeal that the court erred by concluding that the question of “arbitrability was not expressly reserved to the arbitrators” and by making the arbitrability determination itself. We agree.

Because the issue of whether the court correctly concluded that it was up to it, not the arbitrators, to decide arbitrability is a question of law, our standard of review is de novo. See *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 205 Conn. App. 299, 315, 258 A.3d 711 (2021), aff'd, 346 Conn. 391, 291 A.3d 64 (2023).

It is well settled that “[a party] can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which, [it] has agreed so to do. . . . Because arbitration is based on a contractual relationship, a party who has not consented cannot be forced to arbitrate a dispute.” (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, 331 Conn. 524, 541, 205 A.3d 552 (2019). The threshold issue concerning an arbitration agreement is the question of arbitrability. Arbitrability refers to “whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). Two distinct issues arise when addressing the question of arbitrability: “(1) whether the parties agreed to arbitrate the underlying merits of the case, i.e., whether the matter is arbitrable; [and] (2) who has the primary authority to decide that question—the arbitrator or the court . . . .” (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, supra, 541. Generally, the second question—*who* is to decide whether a dispute is arbitrable—must be examined prior to the question of *whether* the dispute is arbitrable. See *New Britain* v. *AFSCME, Council 4, Local 1186*, 304 Conn. 639, 647 n.8, 43 A.3d 143 (2012) (“[a]lthough these . . . inquiries are inextricably linked . . . most cases . . . require appellate courts to examine them out of order”).

In Connecticut, the general rule is that the court is responsible for deciding whether a dispute is arbitrable “absent the parties' contrary intent . . . .” Id., 647. However, “the language of the contract controls . . . .”

(Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, supra, 331 Conn. 542. "Parties to an arbitration agreement may provide in their agreement that the arbitrating body, rather than a court, shall interpret the arbitration agreement to determine whether the issue in dispute is within the purview of the parties' undertaking to arbitrate." *Levine* v. *Advest, Inc.*, 244 Conn. 732, 749, 714 A.2d 649 (1998). They can do so by including in their arbitration agreement an "express provision" to that effect or, alternatively, "through the use of broad terms to describe the scope of arbitration, such as all questions in dispute and all claims arising out of the contract or any dispute that cannot be adjudicated." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, supra, 542. In *Lupone* v. *Lupone*, 83 Conn. App. 72, 76, 848 A.2d 539, cert. denied, 270 Conn. 910, 853 A.2d 526 (2004), for example, this court concluded that the arbitration agreement at issue contained both. We reasoned that, "[i]n addition to defining broadly the scope of arbitration by use of the expansive prefatory phrase, '[a]ny dispute, difference, disagreement, or controversy among the [parties],' the clause expressly reserves to the [arbitration] panel the authority to decide any dispute arising out of 'the interpretation of the meaning or construction of the [a]greement . . . .' The issue of arbitrability arises directly from the interpretation of the meaning of the arbitration clause contained in the parties' agreement. The terms of the clause, therefore, mandate that the issue of arbitrability be determined by the panel." Id.

If "there is clea[r] and unmistakabl[e] evidence" that the parties have agreed to arbitrate the issue of arbitrability; (internal quotation marks omitted) *Board of Education* v. *New Milford Education Assn.*, supra, 331 Conn. 542; then the court must "issue an order compelling arbitration without further consideration of the scope of the agreement to arbitrate." *Levine* v. *Advest, Inc.*, supra, 244 Conn. 750. Conversely, if the "agreement is ambiguous as to *who*, i.e., the arbitrating body or the court, is to interpret the arbitration agreement to determine whether the agreement provides for arbitration of the issue in dispute . . . [then] the court, not the arbitrating body, initially interprets the arbitration agreement to make that determination." (Emphasis in original.) Id.

Exercising our plenary review, we conclude that, in the present case, there is clear and unmistakable evidence that the parties agreed to arbitrate the issue of arbitrability. As stated earlier in this opinion, the agreement first states: "The parties hereby agree that any claim by any party arising out of [Borodkin's] participation in this activity . . . shall be submitted for arbitration . . . ." "This activity" refers to Borodkin's participation in the aquatic and quarry activities offered by the park. The arbitration provision then states: "Three

arbitrators . . . shall be utilized. *They* shall decide: (1) if the claim is subject to arbitration under this agreement . . . .'' (Emphasis in original.) Whether the claim is subject to arbitration under the agreement is synonymous with whether the claim is arbitrable. Hence, the agreement expressly reserves the right to the arbitrators to decide arbitrability. See *Lupone* v. *Lupone*, supra, 83 Conn. App. 76 (concluding that arbitration agreement mandated that arbitrators determine arbitrability by expressly reserving for arbitrators authority to decide issues arising out of interpretation and construction of agreement, which necessarily included issue of arbitrability); see also *Considine* v. *Brookdale Senior Living, Inc.*, 124 F. Supp. 3d 83, 90 (D. Conn. 2015) (concluding that language in arbitration agreement providing that it includes ''any dispute concerning the arbitrability of any such controversy or claim'' clearly and unmistakably indicated intent to have arbitrator decide matter of arbitrability (internal quotation marks omitted)). Accordingly, the issue of arbitrability should have been decided by the arbitrators, not the court.

In support of her argument that we should affirm the judgment of the trial court, Borodkin counters that the question of arbitrability was not expressly reserved for the arbitrators because the language of the arbitration clause is limited to claims arising out of participation in the aquatic and quarry activities at the park. She maintains that because it is unclear whether her claim, which stemmed from injuries she sustained when she tripped on a tree root while entering the park, constitutes a claim arising out of participation in those activities, the agreement is therefore ambiguous. In light of that ambiguity, she argues that it was proper for the court to determine arbitrability itself. We disagree. Borodkin is conflating the two distinct issues of *whether* the claim is arbitrable and *who* decides that question. It is up to the court to determine arbitrability when the agreement is ambiguous as to *who* is to determine arbitrability—the arbitrators or the court—not *whether* the claim is arbitrable. See *Levine* v. *Advest, Inc.*, supra, 244 Conn. 750. The agreement in the present case is not ambiguous as to who decides that question; rather, it expressly provides that the arbitrators decide that question.

Borodkin next argues that it was proper for the court to assess the issue of arbitrability itself because ''a condition precedent must be met in order for the arbitration clause to be triggered: the claim must arise from participation in inherently dangerous aquatic and quarry adventure activities,'' and ''[w]hen arbitration is dependent upon meeting a condition precedent, the question of arbitrability is for the court.'' She specifically relies on *White* v. *Kampner*, 229 Conn. 465, 641 A.2d 1381 (1994), as support for her argument. Brownstone argues that *White* is not applicable and that the present case does not contain a condition precedent. We agree with Brownstone.

In *White*, the arbitration agreement at issue contained a mandatory negotiation provision that required the parties to negotiate prior to submitting any dispute to arbitration. Id., 468. Our Supreme Court determined that "[t]he trial court correctly interpreted the contractual language to require satisfaction of the provisions of the mandatory negotiation clause as a condition precedent to arbitration, and correctly determined that this arbitrability issue was one for the courts to determine, not the arbitrator." Id., 473. The arbitration provision at issue in *White*, however, is distinguishable from the provision in the present case. In *White*, the provision began with "broad language that generally grant[ed] jurisdiction to the arbitrator to determine the issue of arbitrability" but also contained "express language in the contract [that] restrict[ed] the breadth of that clause." Id. Specifically, the provision made arbitrable " '[a]ny dispute or question arising under the provisions of [the agreement],' " but only that " '*which* [*had*] *not been resolved under*' the mandatory negotiation provision." (Emphasis in original.) Id. Thus, before the arbitrators could decide arbitrability, the court in *White* had to first determine whether the dispute was subject to mandatory negotiation as required under the contract. Id.

Conversely, in the present case, the arbitration provision does not have any express language attached to it that restricts its breadth. Rather, it is similar to the broad language in the beginning of the clause in *White*—it states that "any claim by any party arising out of [Borodkin's] participation in this activity" shall be submitted to arbitration. Put simply, whether a claim falls within the language of the arbitration agreement in the present case is the very issue of arbitrability, not a condition precedent to arbitration that must first be satisfied by the court. Thus, we are not persuaded by Borodkin's argument that, pursuant to *White*, it was the court's "job" to decide the issue of arbitrability.[4]

II

Brownstone next claims that the court erred by, sua sponte, denying its application to compel arbitration on procedural grounds. Specifically, the court concluded that it was improper for Brownstone to have filed an independent proceeding to compel arbitration pursuant to § 52-410, rather than filing a motion in the pending personal injury action to stay that proceeding, as provided for by § 52-409.[5] On appeal, Brownstone argues that it was improper for the court to have raised this procedural issue sua sponte without first providing the parties with the opportunity to address it. We agree.[6]

"As our Supreme Court has explained, due to the adversarial nature of our judicial system, [t]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented

and applying appropriate procedural sanctions on motion of a party." (Emphasis in original; internal quotation marks omitted.) *Somers* v. *Chan*, 110 Conn. App. 511, 528, 955 A.2d 667 (2008). Additionally, it is axiomatic that parties should be afforded "adequate notice of the issues the court intend[s] to address . . . ." (Internal quotation marks omitted.) Id., 529. Thus, a trial court generally acts in excess of its authority when it raises and considers, sua sponte, issues not raised or briefed by the parties. See id. (concluding that court improperly raised and decided issues in its memorandum of decision of which parties were not afforded adequate notice); see also *Greene* v. *Keating*, 156 Conn. App. 854, 861, 115 A.3d 512 (2015) ("we conclude, under the facts of this case, that the court acted in excess of its authority when it raised and considered, sua sponte, a ground for summary judgment not raised or briefed by the parties").

In *Haynes Construction Co.* v. *Cascella & Son Construction, Inc.*, 36 Conn. App. 29, 647 A.2d 1015, cert. denied, 231 Conn. 916, 648 A.2d 152 (1994), for instance, this court concluded that the trial court had erred by resolving the dispute on a claim not presented to it. In that case, the trial court granted the plaintiff's amended application to vacate an arbitration award because, in part, the arbitrator had failed to disclose fully that he had an ongoing attorney-client relationship with the in-laws of a principal of the defendant company at the time of the arbitration. Id., 31. However, although the plaintiff had claimed at the hearing on the motion to vacate that there was "evident partiality on the part of the arbitrator which was not fully disclosed"; (internal quotation marks omitted) id., 33; it was "obvious [to this court] from a review of the transcript of the hearing . . . that the plaintiff was concerned with a possible previously undisclosed social or personal relationship between the arbitrator and [the principal's] in-laws, *not* with their attorney-client relationship." (Emphasis added.) Id., 36. In fact, any potential conflict arising out of that attorney-client relationship had been expressly waived at the arbitration hearing. Id. Therefore, this court concluded that it was improper for the trial court to base its decision on this ground because it was not raised as an issue by the parties. See id., 36–37. We reasoned: "When the trial court surprises a party by deciding a case on a claim that was not presented to it, that party obviously is no longer in a position to counter the claim. By its ruling, the trial court deprived the defendant of its right to put on evidence regarding the disclosure of the attorney-client relationship by the arbitrator." Id., 37.

Similarly, in *Jackson* v. *Pennymac Loan Services, LLC*, 205 Conn. App. 189, 191, 257 A.3d 314 (2021), the trial court granted the defendant's motion to dismiss after it concluded, sua sponte, that the plaintiffs did not meet their burden of establishing that they complied

with the relevant statutory notice requirement. The defendant had not made this argument to the court, and the parties were not notified by the court that it was considering this issue, nor were they afforded an opportunity to be heard on it. Id. As a result, on appeal, this court concluded that it was improper for the court to rely on the notice issue "without first providing the plaintiffs with notice or a reasonable opportunity to submit evidence of their compliance with those requirements." Id., 196. We therefore reversed the judgment of the trial court. Id., 205.

In the present case, the record reveals that Borodkin did not, at any point, argue to the trial court that Brownstone's application was procedurally defective. The record further reveals that the court did not, at any point, notify the parties that it was considering this procedural issue or provide the parties with an opportunity to brief it or otherwise be heard on it. Accordingly, we agree with Brownstone that it was improper for the court, sua sponte, to raise and address this issue in denying Brownstone's application.

In summary, for the foregoing reasons, we agree with Brownstone that the court erred by determining the issue of arbitrability itself, as opposed to allowing the arbitrators to do so. We also agree that the court erred by, sua sponte, denying Brownstone's application to compel arbitration on procedural grounds.[7]

The judgment is reversed, and the case is remanded with direction to grant Brownstone's application to compel arbitration so that the arbitrators can decide the issue of arbitrability.

In this opinion the other judges concurred.

[1] Brownstone also claims on appeal that, even if it were proper for the court to determine the issue of arbitrability, its determination that the claim was not arbitrable under the agreement was incorrect. Because we agree with Brownstone's first claim that it was improper for the *court* to address arbitrability, we need not reach its claim that the court's ultimate arbitrability conclusion was improper.

[2] Prior to oral argument, we issued the following order to the parties: "Effective October 1, 2018, the legislature adopted part I of Chapter 909, referred to as the Revised Uniform Arbitration Act, General Statutes §§ 52-407aa through 52-407eee. It appears from the record that the agreement at issue here was entered into after October 1, 2018. See General Statutes § 52-407cc. At oral argument . . . counsel shall be prepared to address whether the Revised Uniform Arbitration Act applies and, if so, whether that has any effect on the issues in this appeal." In light of our ultimate conclusions, however, we need not address the applicability of the act.

[3] General Statutes § 52-410 provides in relevant part: "A party to a written agreement for arbitration claiming the neglect or refusal of another to proceed with an arbitration thereunder may make application to the superior court . . . for an order directing the parties to proceed with the arbitration in compliance with their agreement. . . ."

General Statutes § 52-409 provides in relevant part: "If any action for legal or equitable relief or other proceeding is brought by any party to a written agreement to arbitrate, the court in which the action or proceeding is pending, upon being satisfied that any issue involved in the action or proceeding is referable to arbitration under the agreement, shall, on motion of any party to the arbitration agreement, stay the action or proceeding until an arbitration has been had in compliance with the agreement . . . ."

[4] Borodkin also argues that Brownstone did not preserve its claim that

the arbitrators, not the court, should have decided the issue of arbitrability. We disagree. "[B]ecause the sine qua non of preservation is fair notice to the trial court . . . the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Internal quotation marks omitted.) *Overley* v. *Overley*, 209 Conn. App. 504, 513, 268 A.3d 691 (2021), cert. denied, 343 Conn. 901, 272 A.3d 657 (2022).

Throughout the proceeding, Brownstone sought arbitration of the issue of arbitrability. Although the parties' posthearing briefs to the court primarily addressed the issue of whether the agreement was an unenforceable contract of adhesion and, to a lesser extent, whether the claim was arbitrable, Brownstone did assert in its posttrial brief that "the parties have agreed to arbitrate (1) *whether the claim is subject to arbitration under the agreement*; and (2) whether the injuries and damages claimed arise out of risks inherent to the activities." (Emphasis added.) Moreover, when the court rejected the contract of adhesion argument, Brownstone filed a motion to reargue in which it fully set forth its claim that the issue of arbitrability should have been decided by the arbitrators. It subsequently filed a motion for articulation of that issue, which the court denied, as well as a motion for review with this court of the denial of its motion for articulation, which this court granted but denied the relief requested. Accordingly, we conclude that this claim was articulated before the trial court with sufficient clarity to put the court on notice and, therefore, was preserved adequately.

[5] See footnote 3 of this opinion.

[6] Brownstone also argues that (1) the court's logic was flawed because its interpretation of § 52-410 and its interplay with § 52-409 was incorrect, and (2) it misconstrued the facts, as Brownstone did file a motion pursuant to § 52-409 in the personal injury action. Because we agree with Brownstone that it was improper for the court to raise this procedural issue sua sponte, we need not consider these claims. We note, however, that it appears that Brownstone did in fact file a motion to stay the personal injury action pursuant to § 52-409. See *Nowak* v. *Environmental Energy Services, Inc.*, 218 Conn. App. 516, 523 n.5, 292 A.3d 4 (2023) ("[t]here is no question . . . concerning . . . [the] power [of appellate courts] to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise").

Borodkin commenced the personal injury action on January 6, 2021. Soon after, in February, 2021, Brownstone brought this proceeding under § 52-410. On March 9, 2021, Brownstone filed a motion pursuant to § 52-409 to stay proceedings in the underlying personal injury action. *Borodkin* v. *Brownstone Exploration & Discovery Park, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-21-6137485-S (March 9, 2021). That motion was granted by the court, *Hon. Robert B. Shapiro*, judge trial referee, on March 25, 2021, and the matter was stayed.

[7] Even though the trial court, in its memorandum of decision, did not address Borodkin's argument that the agreement as a whole is an unenforceable contract of adhesion, we nonetheless conclude that it is appropriate for us to direct that court to order the parties to proceed with arbitration, including a determination of arbitrability. It is well settled that "an arbitration provision is severable from the remainder of the contract . . . [and], unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." (Internal quotation marks omitted.) *Stack* v. *Hartford Distributors, Inc.*, 179 Conn. App. 22, 30, 177 A.3d 1201 (2017). Thus, even if the agreement in its entirety is a contract of adhesion, the arbitration provision within it is severable, and the contract's validity is a question for the arbitrators.