

Challenges in International Arbitration for Non-Signatories

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Introduction

Given the magnitude and the consequences of the many international arbitral awards, even signatories to the underlying arbitral agreement can face challenges to the enforcement of such an award. However, persons or entities that are non-signatories to an underlying arbitration agreement face challenges over and above those of willing participants in an arbitral agreement.

Parent companies, subsidiaries, contract assignees, governmental and quasi-governmental entities, and other non-signatories to an underlying arbitration agreement may find themselves bound by an arbitration agreement, and by the subsequent arbitral award.

This article explores the case law and rulings — primarily arising from courts of the United States — on these types of issues, and offers guidelines to entities wishing to avoid the impact of agreements they did not sign.

International Conventions on International Arbitration

While a foreign arbitral award rendered under either the New York Convention¹ or the Inter-American Convention² stands a high probability of being enforced by United States courts, not every foreign

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 UST 2517, United States Code, Title 9, Section 205.

² Inter-American Convention on Commercial Arbitration (entered into on 16 June 1976), 14 ILM 336, United States Code, Title 9, Section 301.

award will fall within the ambit of these two Conventions, either because of the reciprocity reservation or because the underlying dispute is not "commercial".

Besides the New York and Inter-American Conventions, the United States is a party to a multilateral convention, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (known as the ICSID Convention).³

The ICSID Convention created the International Center for Settlement of Investment Disputes, which is charged with the limited task of resolving disputes between contracting states and nationals of other contracting states, arising out of investments by the latter in the former (primarily dealing with compensation following the expropriation of property). Article 54 of the ICSID Convention binds contracting states to enforce awards made under the Convention. The Federal Arbitration Act⁴ does not apply to such awards; United States district courts have exclusive jurisdiction over enforcement actions and ICSID awards are treated as final judgments.⁵

Non-Signatories to Arbitration Agreements under Domestic Laws in the United States

Generally, "arbitration is a matter of contract". A "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit".⁶

A party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause. Well-established common law principles dictate that, in an appropriate case, a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties. For example, in *JJ. Ryan & Sons vs. Rhone Poulenc Textile*, the Court noted that when allegations against "a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not

³ 17 UST 1270, TIAS Number 6090, 5-75 UNTS 159.

⁴ Federal Arbitration Act, United States Code, Title 9, Sections 1 *et seq.*

⁵ United States Code Annotated, Title 22, Section 1650.

⁶ *United Steelworkers vs. Warrior & Gulf Navigation Co.*, 363 US 574, 582, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960); *AT&T Technologies, Inc. vs. Communications Workers*, 475 US 643, 648, 106 S.Ct. 1415, 89 L.Ed. 2d 648 (1986).

formally a party to the arbitration agreement".⁷ The "same result has been reached under a theory of equitable estoppel".⁸

Law Governing Arbitrability of Non-Signatory Claims or Claims against Non-Signatories

United States federal and state courts have recognized that:

" . . . [i]t does not follow . . . that under the [Federal Arbitration Act] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision";

instead, under certain circumstances, principles of contract law and agency may bind a non-signatory to an arbitration agreement.⁹

Although state law determines the validity of an arbitration agreement, courts have applied both federal and state law to determine the related, but distinct issue of whether non-signatory plaintiffs should be compelled to arbitrate their claims.¹⁰ The Federal Arbitration Act

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- ⁷ *JJ. Ryan & Sons vs. Rhone Poulenc Textile, SA*, 863 F.2d 315, 320–21 (4th Cir., 1988).
- ⁸ *JJ. Ryan & Sons vs. Rhone Poulenc Textile, SA*, 863 F.2d 315, 320–21 (4th Cir., 1988); *Sunkist Soft Drinks, Inc. vs. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir., 1993), holding that because claims against a non-signatory parent were "intimately founded in and intertwined with" a contract containing an arbitration clause, the signatory was estopped from refusing to arbitrate those claims; *Hughes Masonry Co. vs. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 840–41 (7th Cir., 1981), finding the signatory equitably estopped from repudiating the arbitration clause in an agreement on which the suit against the non-signatory was based.
- ⁹ *Fisser vs. Int'l Bank*, 282 F.2d 231, 233 (2d Cir., 1960), quoted in *Int'l Paper Co. vs. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir., 2000), and *Thomson-CSF, SA vs. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir., 1995); *Washington Mutual Finance Group, LLC vs. Bailey*, 364 F.3d 260, 267 (5th Cir., 2004), quoting *Thomson-CSF, SA vs. Am. Arbitration Ass'n*, 64 F.3d 776; *In re FirstMerit Bank*, 52 SW.3d 755 (Tex., 2001), citing *Nationwide of Bryan, Inc. vs. Dyer*, 969 SW.2d 518, 520 (Tex. App., Austin 1998, no pet.); *SW. Tex. Pathology Assocs. vs. Roosth*, 27 SW.3d 204, 208 (Tex. App., San Antonio 2000, pet. dismissed w.o.j.).
- ¹⁰ *Washington Mutual Finance Group, LLC vs. Bailey*, 364 F.3d 267–68 (5th Cir., 2004), applying federal law; *Bridas S.A.P.I.C., et al vs. Government of Turkmenistan*, 345 F.3d 347, 355–63 (5th Cir., 2003), (applying federal law); *Fleetwood Enters., Inc. vs. Gaskamp*, 280 F.3d 1069, 1074–77 (5th Cir., 2002), (applying state law); *SW. Tex Pathology Assocs. vs. Roosth*, 27 SW.3d 208–09 (Tex. App., San Antonio 2000, pet. dismissed w.o.j.) (applying state law); *Nationwide of Bryan, Inc. vs. Dyer*, 969 SW.2d 520 (Tex. App., Austin 1998, no pet.), (applying state law); *Lakeland Anesthesia, Inc. vs. United Healthcare of La., Inc.*, 871 So.2d 380, 392–95 (La. Ct. App., 2004), (applying federal and state law).

does not specify whether state or federal law governs, and the United States Supreme Court has not directly addressed the issue.

Federal courts of appeals, however, have frequently applied federal substantive law when deciding whether a non-signatory must arbitrate.¹¹ The Fourth and Fifth Circuits have reasoned that "federal substantive law of arbitrability . . . resolve[s] this question", because the determination of whether a non-signatory is bound "presents no state law question of contract formation or validity".¹² The Texas Supreme Court has held: "We are not convinced that state law plays no role in making this determination".¹³ It also states:

"Nevertheless, we are mindful of the extensive body of federal precedent that has explored the extent to which non-signatories can be compelled to arbitrate. Moreover, we recognize that it is important for federal and state law to be as consistent as possible in this area, because federal and state courts have concurrent jurisdiction to enforce the FAA."¹⁴

Rules

United States federal courts have recognized six theories arising out of common principles of contract and agency law that may bind non-signatories to arbitration agreements:

- (1) Incorporation by reference;
- (2) Assumption;
- (3) Agency;
- (4) Alter ego;

¹¹ *Washington Mutual Finance Group, LLC vs. Bailey*, 364 F.3d 267 n. 6 (5th Cir., 2004); *Bridas S.A.P.I.C. vs. Government of Turkmenistan*, 345 F.3d 355–63 (5th Cir., 2003); *InterGen NV vs. Grina*, 344 F.3d 134, 142–50 (1st Cir., 2003); *Dominium Austin Partners vs. Emerson*, 248 F.3d 720, 728 (8th Cir., 2001); *Int'l Paper Co. vs. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, at p. 417, n. 4 (4th Cir., 2000); *Thomson-CSF, SA vs. Am. Arbitration Ass'n*, 64 F.3d 778–79 (2d Cir., 1995).

¹² *R.J. Griffin & Co. vs. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160 n. 1 (4th Cir., 2004), quoting *Int'l Paper Co. vs. Schwabedissn Maschinen & Anlagen GMBH*, 206 F.3d 417 n. 4; *Washington Mutual Finance Group, LLC vs. Bailey*, 364 F.3d 260, 267 n. 6 (5th Cir., 2004).

¹³ *SW. Tex. Pathology Assocs. vs. Roosth*, 27 SW.3d 208-09 (applying state law); *Nationwide of Bryan, Inc. vs. Dyer*, 969 SW.2d 518, at p. 520 (Tex. App. Austin, 1998) (applying state law).

¹⁴ *Moses H. Cone Mem'l Hosp. vs. Mercury Constr. Corp.*, 460 US 1, 25, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983).

- (5) Equitable estoppel, ("Direct benefits estoppel" is a type of equitable estoppel that federal courts apply in the arbitration context);¹⁵ and
- (6) Third-party beneficiary.¹⁶

Most federal courts, however, list only five of these theories, omitting "third-party beneficiary" as a separate ground.¹⁷ Each of these theories has been addressed in a number of cases and the case law in this area is well developed.¹⁸

¹⁵ *Washington Mutual Finance Group, LLC vs. Bailey*, 364 F.3d, 364 F.3d 268 (5th Cir., 2004); *Bridas S.A.P.I.C. vs. Government of Turkmenistan*, 345 F.3d 361–62 (5th Cir., 2003); *E.I. DuPont de Nemours & Co. vs. Rhone Poulenc Fiber & Resin Intermediates, SAS*, 269 F.3d 187, 199–201 (3d Cir., 2001); *Int'l Paper Co. vs. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 418 (4th Cir., 2000); *Thomson-CSF, SA vs. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir., 1995) [citing cases]; *Bel-Ray Co. vs. Chemrite (Pty) Ltd.*, 181 F.3d 435, 440–43 (3d Cir., 1999); *Amoco Transport Co. vs. Bugsier Reederei & Bergungs, AG (In re Oil Spill by the Amoco Cadiz)*, 659 F.2d 789, 795–96 (7th Cir., 1981).

¹⁶ *Bridas, S.A.P.I.C., et al vs. Government of Turkmenistan*, 345 F.3d 356 (5th Cir., 2003); *Thomson-CSF, SA vs. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir., 1995); *E.I. DuPont de Nemours & Co. vs. Rhone Poulenc Fiber & Resin Intermediates, SAS*, 269 F.3d 195–97 (3d Cir., 2001); *Javitch vs. First Union Securities, Inc.*, 315 F.3d 619, 629 (6th Cir., 2003).

¹⁷ *Local Union Number 38, Sheet Metal Workers' Int'l Ass'n vs. Custom Air Sys., Inc.*, 357 F.3d 266, 268 (2d Cir., 2004); *Javitch vs. First Union Securities, Inc.*, 315 F.3d 619, 629 (6th Cir., 2003); *Fleetwood Enterprises Inc. vs. Gaskamp*, 280 F.3d 1076; *Employers Ins. of Wausau vs. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1322 (11th Cir., 2001); *Bel-Ray Co. vs. Chemrite (Pty) Ltd.*, 181 F.3d 435, 446 (3d Cir., 1999); *Int'l Paper Co. vs. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 417 (4th Cir., 2000); *Thomson-CSF, SA vs. American Arbitration Ass'n*, 64 F.3d 776 (2d Cir., 1995).

¹⁸ Such cases have spawned a burgeoning array of secondary authorities: Knight *et al*, "Arbitration By and Against Non-Signatories", *California Practice Guide: Alternative Dispute Resolution* (1998), at Sections 5:261–288; Stewart, *The Equitable Estoppel Argument for and Against Commercial Arbitration: from Hughes Masonry Co., Inc. vs. Clark County School Building Corp. to Northern, Ltd. vs. RE. James*, 103 *Com. LJ* 336 (1998); Sawrie, Special Project, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51 *Vand. L. Rev.* 721 (1998); DeArman, Comment, *Resolving Arbitration's Non-Signatory Issue: A Critical Analysis of the Application of Equitable Estoppel in Alabama Courts*, 29 *Cumb. L. Rev.* 645 (1998–1999); McKinnis, Note, "Enforcing Arbitration with a Non-Signatory: Equitable Estoppel and Defensive Piercing of the Corporate Veil", (1995) *J. Disp. Resol.* 197; Welch, Comment, "Arbitration Agreements: Standard of Review, Interpretation and Who is Bound", (1997) *J. Disp. Resol.* 271.

Incorporation by Reference

Under basic rules of contract, courts have compelled non-signatories to arbitrate when they are parties to agreements that either incorporate the arbitral agreement into their agreements, or when the arbitral agreement incorporates the non-signatory by reference.

For example, in *JS & H Const. Co. vs. Richmond County Hospital Authority*,¹⁹ the Court found a provision in a subcontract that incorporated by reference the "general conditions" of a prime contract. It explicitly provided that the subcontractor assume toward the prime contractor those responsibilities and obligations that the prime contractor assumed toward the hospital authority in the prime contract. That provision also would subject the subcontractor to the provision in the prime contract that stated the parties would submit contract disputes to arbitration. Similarly, sureties and guarantors have been compelled to arbitrate, unless their underlying performance bonds incorporated those surety agreements by reference.²⁰

On the other hand, when the non-signatory agreement is not clearly incorporated by reference, courts will be reluctant to compel the non-signatory to arbitrate.²¹

Assumption

When a non-signatory either assumes a contract containing an arbitration clause, or receives the assignment of such a contract, the

¹⁹ *JS & H Const. Co. vs. Richmond County Hospital Authority*, 473 F.2d 212 (5th Cir., 1973).

²⁰ *Hoffman vs. Fidelity and Deposit Co. of Maryland*, 734 F.Supp. 192 (D.N.J., 1990), addressing incorporation by reference of a construction subcontract, which contained an arbitration clause and required the surety to arbitrate a dispute arising out of the subcontract, even though the surety was not a party to the subcontract; *Cianbro Corp. vs. Empresa Nacional de Ingenieria y Tecnologia, SA*, 697 F.Supp. 15 (D. Me., 1988); *Kvaerner ASA vs. Bank of Tokyo-Mitsubishi, Ltd., New York Branch*, 210 F.3d 262 (4th Cir., 2000), in which an arbitration clause in a construction contract, to which the project owner and guarantors' joint venturer were parties, was incorporated into the guaranties executed by the guarantors to secure lending for the project, thus requiring the bank, as a party to the guaranties, to arbitrate its disputes.

²¹ *Grundstad vs. Ritt*, 106 F.3d 201 (7th Cir., 1997), in which a phrase in a guaranty, whereby the guarantor agreed to "guarantee all of the provisions of [the underlying agreement]" did not specifically incorporate the underlying agreement's arbitration provision into the guaranty for purposes of determining whether the guarantor was bound by the provision. The Court held that because the phrase did not specifically refer to "incorporation," incorporation could not be assumed.

courts may compel the non-signatory assignee to arbitrate. To compel arbitration, however, the courts will generally require some conduct evidencing an intent by the non-signatory to be bound by the assumed or assigned arbitral agreement.²² In *Caribbean SS. Co., SA vs. Sonmez Denizcilik Ve Ticaret AS*,²³ the Court held that by assigning the cargo owner's claim to a charterer after it had been determined that the cargo owner's claim was non-arbitrable, the charterer could not force the ship owner to arbitrate the cargo owner's claim against the ship owner since there was no intent by the charterer to be bound by the arbitration clause.

In *Thomson-CSF, SA vs. American Arbitration Ass'n*,²⁴ the Second Circuit Court of Appeals held that a corporate parent that had only recently purchased a subsidiary did not assume the obligation, in an agreement between its subsidiary and its subsidiary's supplier, to arbitrate disputes with that supplier, even though the parent was aware that the agreement purported to bind the parent as an affiliate of the subsidiary. Here, the Court held that the parent did not manifest an intention to be bound by the agreement and explicitly disavowed any obligations arising out of that agreement.

Agency

Agency is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act".²⁵

An agency relationship may be demonstrated by:

". . . written or spoken words or conduct, by the principal, communicated either to the agent (actual authority) or to the third party (apparent authority)".²⁶

²² *Fyrnetics (Hong Kong) Ltd. vs. Quantum Group, Inc.*, 293 F.3d 1023 (7th Cir., 2002), in which a non-signatory who was an affiliate of the licensee, was not bound by the arbitration provision of the license agreement under the doctrine of assumption absent evidence that the non-signatory directly paid royalties to the licensor pursuant to an agreement, or other evidence of assumption.

²³ *Caribbean SS. Co., SA vs. Sonmez Denizcilik Ve Ticaret AS*, 598 F.2d 1264 (2d Cir., 1979).

²⁴ *Thomson-CSF, SA vs. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir., 1995).

²⁵ Restatement (Second) of Agency, Section 1(1) (1958).

²⁶ *Hester Intern. Corp. vs. Federal Republic of Nigeria*, 879 F.2d 170, 181 (5th Cir., 1989); *Arriba Limited vs. Petroleos Mexicanos*, 962 F.2d 528, 536 (5th Cir., 1992).

If a party signs an agreement in the capacity of a non-signatory's agent, the non-signatory may be bound by the agreement's arbitration requirement.²⁷

In *Bridas, S.A.P.I.C., et al vs. Government of Turkmenistan*,²⁸ Bridas, an Argentinean corporation, entered into a joint venture agreement (JVA) with a production association, Turkmenneft. The association was formed and owned by the Government of Turkmenistan (referred to as "the Government") at the time the JVA was signed. The Government itself was not a signatory to the JVA. The JVA designated Bridas as the "Foreign Party" and Turkmenneft as the "Turkmenian Party". Over time, the Government substituted various other entities to serve as the "Turkmenian Party" (collectively referred to as "Turkmenneft").

The JVA created a joint venture entity called Joint Venture Keimir (JVK). JVK was established:

". . . for the purpose of conducting hydrocarbon operations in an area in southwestern Turkmenistan, known generally as Keimir".

The relevant part of Article XXIV of the JVK stipulated that:

". . . [a]ny dispute, controversy or claim arising out of or in relation to or in connection with th[e] [a]greement . . . shall be exclusively and finally settled by arbitration, and any Party may submit such a dispute, controversy or claim to arbitration, . . . conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce (the 'ICC')".

The law governing the interpretation of the agreement was the law of England.

When the government ordered Bridas to suspend further work in Keimir, and prohibited Bridas from "making imports and exports in or from Turkmenistan", Bridas initiated arbitration proceedings before the ICC.

Even though the Government did not sign the JVA, the ICC Tribunal held that the Government was bound to arbitrate the dispute with Bridas because the Government had not taken any steps to extricate itself from the proceedings and its evaluation of the evidence revealed at least 22 commitments in the JVA "that only the Government could

²⁷ *Srivastava vs. Commissioner*, 220 F.3d 353, 369 (5th Cir., 2000).

²⁸ *Bridas, S.A.P.I.C., et al vs. Government of Turkmenistan*, 345 F.3d 347 (5th Cir., 2003).

give or fulfill". The parties, including the Government, filed a challenge to the ICC award in a United States district court.

Whether a party is bound by an arbitration agreement is generally considered an issue for the courts, not the arbitrator, "[u]nless the parties clearly and unmistakably provide otherwise".²⁹ As it did not find "clear and unmistakable" evidence that the parties agreed that the ICC Tribunal would determine its own jurisdiction, the district court undertook an independent review of whether the Government was bound to arbitrate with Bidas.³⁰ The district court concluded that despite the Government's non-signatory status, principles of agency and equitable estoppel bound the Government to the JVA. The Government then appealed to the Fifth Circuit Court of Appeals.

On appeal, the Fifth Circuit Court of Appeals held that the Government could not be compelled to arbitrate on the basis of several theories, and that the contracting oil company was not an agent of the Government. The Court said:

"Bidas [as] a party wishing to bind a non-signatory country should be aware of the risks inherent in investing in countries of the former Soviet Union in 1993, and the possibility that its investment would be swept away in political turmoil. Courts may not hold non-signatory and government entities to an arbitral agreement, simply because a party has lost a gamble that it was willing to take on the basis that do otherwise would 'vitiate the predictability of the legal backdrop against which the parties voluntarily agreed to do business'".³¹

With regard to the agency argument, the Fifth Circuit found that a court may find agency from a variety of factors, including: correspondence that confirms, during negotiations of the underlying agreement, that:

". . . all . . . rights . . . established in the organization documents are fully and completely guaranteed by the [non-signatory]".

²⁹ *AT&T Technologies, Inc. vs. Communications Workers*, 475 US 643, 649, 106 S.Ct. 1415, 89 L.Ed. 2d 648 (1986).

³⁰ *First Options of Chicago, Inc. vs. Kaplan*, 514 US 938, 944-47, 115 S.Ct. 1920, 131 L.Ed. 2d 985 (1995); *AT&T Technologies, Inc. vs. Communications Workers*, 475 US 642, 649, 106 S.Ct. 1415, 89 L.Ed. 2d 648 (1986).

³¹ *Bidas, S.A.P.I.C., et al vs. Government of Turkmenistan*, 345 F.3d 358 (5th Cir., 2003); *Westmoreland vs. Sadoux*, 299 F.3d 462, 467 (5th Cir., 2002).

A court may refer to the arbitral agreement for declarations of authority involving the non-signatory and its relationship to the parties.³²

A court may also rely on statements of authority made by the non-signatory in separate documents. However, a court should analyze indicia of agency strictly in determining whether a non-signatory may be compelled to arbitrate.³³ The Court found that the statements of representation in the midst of a provision regarding oral modifications of the agreement are not remarkable. "All corporations to some degree represent their owners",³⁴ but that does not subject all owners to the agreements of their corporations. Such statements do not automatically establish an agency relationship.³⁵ On the other hand, agreements that pre-date communications denying the agency of a signatory for a non-signatory principal may not be persuasive to deny the agency relationship.

In *Thomson-CSF, S.A. vs. American Arbitration Ass'n*,³⁶ similar considerations — mutual benefits derived from affiliation — were rejected as insufficient to bind a non-signatory to an arbitration agreement signed by an affiliate, on the basis of agency principles.

The district court had compelled Thomson-CSF to arbitrate with Evans & Sutherland Computer Corporation (E&S) on the basis of an arbitration agreement between E&S and Rediffusion Simulation Limited (Rediffusion), a Thomson-CSF subsidiary. The district court applied a "hybrid" approach to compel arbitration by Thomson-CSF, a non-signatory to the arbitration agreement, relying on the following factors:

- (1) Thomson's common ownership of Rediffusion;
- (2) Thomson's actual control of Rediffusion;
- (3) Thomson's notice of the Working Agreement (the agreement containing the arbitration clause) prior to purchasing Rediffusion;

³² *Bridas, S.A.P.I.C., et al vs. Government of Turkmenistan*, 345 F.3d 358 n. 6. (5th Cir., 2003).

³³ *Interwoven Shipping Co. vs. Nat'l Shipping & Trading Co.*, 523 F.2d 527, 539 (2d Cir., 1975); *Hester Int'l Corp. vs. Federal Republic of Nigeria*, 879 F.2d 176, 180–81 (5th Cir., 1989), holding that an instrumentality of Nigeria was not the government's agent for purposes of an agreement between the instrumentality and an American corporation, despite a guarantee by the Nigerian government for all loans necessary for offshore financing.

³⁴ *Hester Int'l Corp. vs. Federal Republic of Nigeria*, 879 F.2d 170, 180 (5th Cir., 1989).

³⁵ *Hester Int'l Corp. vs. Federal Republic of Nigeria*, 879 F.2d 180 (5th Cir., 1989).

³⁶ *Thomson-CSF, SA vs. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir., 1995).

- (4) E&S's express intention to bind Thomson to the Working Agreement;
- (5) Thomson's incorporation of Rediffusion into its own organizational and decision-making structure; and
- (6) Thomson's benefit from that incorporation.³⁷

The Second Circuit Court of Appeals held that the district court had improperly extended the limited theories on which "this Court is willing to enforce an arbitration agreement against a non-signatory". It also stated:

"The district court's hybrid approach dilutes the safeguards afforded to a non-signatory by the ordinary principles of contract and agency and fails to adequately protect parent companies, the subsidiaries of which have entered into arbitration agreements. Anything short of requiring a full showing of some accepted theory under agency or contract law imperils a vast number of parent corporations. This Court did not intend such an outcome in [prior opinions] and does not adopt such an approach here."

A non-signatory cannot compel arbitration merely because he is an agent of one of the signatories.³⁸ Courts, however, differentiate between whether one signatory may compel the principal of another signatory agent to arbitrate under an agreement that the agent signed as an authorized representative of its principal:

"The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and, like a railroad crossing, suggests the duty to stop, look, and listen, and he who would bind the principal is bound to ascertain, not only the fact of agency, but the nature and extent of the authority."³⁹

In *Merrill Lynch Investment Managers vs. Optibase*,⁴⁰ Merrill Lynch Investment Managers (MLIM) protested its inclusion in an arbitration

³⁷ *Thomson-CSF, SA vs. American Arbitration Ass'n*, 64 F.3d 780 (2d Cir., 1995).

³⁸ *Westmoreland vs. Sadoux*, 299 F.3d 466 (5th Cir., 2002).

³⁹ *Standard Acc. Ins. Co. vs. Simpson*, 64 F.2d 583, 589 (4th Cir., 1933); *Racicky vs. Farmland Indus. Inc.*, 328 F.3d 389, 393 (8th Cir., 2003).

⁴⁰ *Merrill Lynch Investment Managers vs. Optibase, Ltd.*, 337 F.3d 125 (2d Cir., 2003).

over investment losses incurred by Optibase on the ground that there was no basis for compelling MLIM to arbitrate since they were not parties to the arbitration agreement with the customer Optibase. The New York Stock Exchange (NYSE) arbitration panel denied MLIM's request that it decline the use of its facilities for the arbitration of Optibase's claims against MLIM. The NYSE instructed MLIM to answer the Amended Statement of Claims filed by Optibase. MLIM then filed an action in a United States district court, seeking to enjoin Optibase from pursuing its claims against MLIM in the NYSE arbitration. The Court granted the motion enjoining Optibase from proceeding against MLIM in the arbitration.

On appeal to the Second Circuit Court of Appeals, Optibase relied principally on an agency theory to argue that MLIM should be compelled to arbitrate. Optibase tried to argue that their involvement with MLIM, the investment adviser for the fund in which they invested, was essentially one and the same as Merrill Lynch, the broker-dealer, arguing there was an agency relationship between Merrill Lynch (the broker-dealer) and MLIM. The Second Circuit declined to find that MLIM was the agent of the contracting parties.

The Second Circuit made a distinction between cases in which the non-signatory seeks to arbitrate against a signatory but later invokes its non-signatory status to avoid counter-claims, and cases where a willing signatory seeks to arbitrate against a non-willing non-signatory who does not seek affirmative relief against a signatory. In the latter case, the Court said that the signatory would have to establish a theory other than a general agency theory in order to compel the non-signatory to arbitrate.

Alter Ego

Occasionally, courts will apply the alter ego doctrine and agency principles as if they were interchangeable.⁴¹ The two theories are, however, distinct. Under the alter ego doctrine, a corporation may be bound by an agreement entered into by its subsidiary, regardless of the agreement's structure or the subsidiary's attempts to bind itself alone to its terms, "when their conduct demonstrates a virtual abandonment of separateness".⁴² This is due to the doctrine's strong link

⁴¹ *House of Koscot Dev't Corp. vs. American Line Cosmetics, Inc.*, 468 F.2d 64 (5th Cir., 1972).

⁴² *Thomson-CSF, SA vs. Am. Arbitration Ass'n*, 64 F.3d 777 (2d Cir., 1995).

to equity.⁴³ The laws of agency, on the other hand, are not equitable in nature, but are, rather, contractual. Thus, when considering whether an alter ego finding is warranted, "courts are thus comparatively free from the moorings of the parties' agreements".⁴⁴

"Courts do not lightly pierce the corporate veil to apply the alter ego doctrine even in deference to the strong policy favoring arbitration."⁴⁵ The corporate veil may be pierced to hold an alter ego liable for the commitments of its instrumentality only if the owner exercised complete control over the corporation with respect to the transaction at issue and such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil.⁴⁶

Alter ego determinations are highly fact-based, and require consideration of the totality of the circumstances.⁴⁷ No single factor is determinative. The courts have developed extensive lists of circumstances to guide alter ego determinations.⁴⁸ In determining whether a non-signatory is the alter ego of a signatory, a district court failing to take into account all of the aspects of the relationship between the non-signatory and the signatory commits an error of law.

Once it has been determined that the corporate form was used to effect fraud or another wrong on a third party, alter ego determinations then revolve around issues of control and use.⁴⁹ The court should explore the totality of the environment in which the party and non-signatory operate.

⁴³ *Harrell vs. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir., 1992); *McCarthy vs. Azure*, 22 F.3d 351, 362–63 (1st Cir., 1994), holding that the alter ego doctrine can be invoked "only where equity requires the action to assist a third party".

⁴⁴ *Bridas SAPIC, et al vs. Government of Turkmenistan*, 345 F.3d 359 (5th Cir., 2003).

⁴⁵ *ARW Exploration Corp. vs. Aguirre*, 45 F.3d 1455, 1461 (10th Cir., 1995).

⁴⁶ *American Fuel Corp. vs. Utah Energy Dev't Co., Inc.*, 122 F.3d 130, 134 (2d Cir., 1997); *First Nat'l City Bank vs. Banco Para El Comercio Exterior de Cuba*, 462 US 611, 629–30, 103 S.Ct. 2591, 77 L.Ed. 2d 46 (1983); *Gardemal vs. Westin Hotel Co.*, 186 F.3d 588 (5th Cir., 1999); *Matter of Sims*, 994 F.2d 210 (5th Cir., 1993), holding that an element of fraud must be present before courts will pierce the corporate veil in a case based on a contract.

⁴⁷ *Estate of Lisle vs. Commissioner*, 341 F.3d 364, 375–76, 2003 WL 21752801, 8 (5th Cir., 2003).

⁴⁸ *Estate of Lisle vs. Commissioner*, 341 F.3d 364, 375-76, 2003 (5th Cir., 2003); *Markow vs. Alcock*, 356 F.2d 194, 197–98 (5th Cir., 1966); *American Fuel Corp. vs. Utah Energy Dev. Co.*, 122 F.3d 134 (2d Cir., 1997); *MAG Portfolio Consultant, GMBH vs. Merlin Biomed Group LLC*, 268 F.3d 58, 63 (2d Cir., 2001).

⁴⁹ *Estate of Lisle vs. Commissioner*, 341 F.3d 368, 2003 WL 21752801 8 (5th Cir., 2003).

This includes those factors normally explored in the context of parent-subsidary alter ego claims, such as whether:

- (1) The parent and subsidiary have common stock ownership;
- (2) The parent and subsidiary have common directors or officers;
- (3) The parent and subsidiary have common business departments;
- (4) The parent and subsidiary file consolidated financial statements;
- (5) The parent finances the subsidiary;
- (6) The parent caused the incorporation of the subsidiary;
- (7) The subsidiary operates with grossly inadequate capital;
- (8) The parent pays salaries and other expenses of the subsidiary;
- (9) The subsidiary receives no business except that given by the parent;
- (10) The parent uses the subsidiary's property as its own;
- (11) The daily operations of the two corporations are not kept separate; and
- (12) The subsidiary does not observe corporate formalities.⁵⁰

Additional factors to consider in an alter ego determination include:

- (1) Whether the directors of the "subsidiary" act in the primary and independent interest of the "parent";
- (2) Whether others pay or guarantee debts of the dominated corporation; and
- (3) Whether the alleged dominator deals with the dominated corporation at arm's length.⁵¹

Other factors which may be considered in determining whether a state agency is the "alter ego" of a state for "sovereign immunity" purposes are:

- (1) Whether state statutes and case law view the entity as an arm of the state;
- (2) The source of the entity's funding;
- (3) The entity's degree of local autonomy;
- (4) Whether the entity is concerned primarily with local, as opposed to statewide, problems;

⁵⁰ *Estate of Lisle vs. Commissioner*, 341 F.3d 375, 2003 WL 21752801 n. 16 (5th Cir., 2003), citing *Oxford Capital Corp. vs. United States*, 211 F.3d 280, 284 n. 2 (5th Cir., 2000).

⁵¹ *Markow vs. Alcock*, 356 F.2d 197-98 (5th Cir., 1966); *American Fuel Corp. vs. Utah Energy Dev. Co.*, 122 F.3d 134 (2d Cir., 1997).

- (5) Whether the entity has the authority to sue and be sued in its own name; and
- (6) Whether the entity has the right to hold and use property.⁵²

The Foreign Sovereign Immunities Act⁵³ and its case law interpretations also should be consulted in determining whether a foreign government relationship to a state-owned or controlled entity may create alter ego compulsion to arbitration for a foreign government or governmental entity.

Equitable Estoppel Theory

The use of equitable estoppel to bind a non-signatory to arbitration is within a district court's discretion.⁵⁴ Equitable estoppel precludes a party from asserting rights "he otherwise would have had against another" when his own conduct renders the assertion of those rights to be contrary to equity.⁵⁵

In the arbitration context, the equitable estoppel doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him:

"To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."⁵⁶

A signatory to a contract may be equitably estopped from asserting that it is not bound by an arbitration agreement when the signatory

⁵² *Perez vs. Region 20 Educ. Service Center*, 307 F.3d 318, 326–27 (5th Cir., 2002); *Vogt vs. Bd. of Com'rs of Orleans Levee Dist.*, 294 F.3d 684, 688–89 (5th Cir., 2002).

⁵³ The Foreign Sovereign Immunities Act, United States Code Annotated, Title 28, Section 1605.

⁵⁴ *Grigson vs. Creative Artists Agency, LLC*, 210 F.3d 524, 528 (5th Cir., 2000); *Hill vs. GE. Power Systems, Inc.*, 282 F.3d 343, 348 (5th Cir., 2002).

⁵⁵ *First Union Commercial Corp. vs. Nelson, Mullins, Riley & Scarborough (In re Varat Enters., Inc.)*, 81 F.3d 1310, 1317 (4th Cir., 1996); *Lowery vs. Stovall*, 92 F.3d 219, 223 (4th Cir., 1996).

⁵⁶ *Avila Group, Inc. vs. Norma J of California*, 426 F.Supp. 537, 542 (S.D.N.Y., 1977).

raises allegations of substantially interdependent and concerted misconduct against the non-signatory and one or more of the signatories to the contract.⁵⁷

In *Grigson*, a signatory plaintiff was estopped from relying on the defendants' status as a non-signatory to prevent the defendants from compelling arbitration under the agreement.⁵⁸ Equitable estoppel was justified by the *Grigson* Court, in part, because "to do otherwise would permit the signatory plaintiff to have it both ways".⁵⁹

"... [The plaintiff] cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny the arbitration's applicability because the defendant is a non-signatory."⁶⁰

The Second Circuit has stated that the *Grigson* version of estoppel applies only to prevent "a signatory from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with an agreement that the estopped party has signed".⁶¹

"... [B]ecause arbitration is guided by contract principles, the reverse also is not true: a signatory may not estop a non-signatory from avoiding arbitration regardless of how closely affiliated that non-signatory is with another signing party."⁶²

The Third Circuit reached the same conclusion⁶³ in *DuPont*:

"It is more foreseeable, and thus more reasonable that a party who has actually agreed in writing to arbitrate claims

⁵⁷ *Grigson vs. Creative Artists Agency, LLC*, 210 F.3d 524, 527 (5th Cir., 2000).

⁵⁸ *Grigson vs. Creative Artists Agency, LLC*, 210 F.3d 527 (5th Cir., 2000).

⁵⁹ *Grigson vs. Creative Artists Agency, LLC*, 210 F.3d 528 (5th Cir., 2000); *Hill vs. G.E. Power Systems, Inc.*, 282 F.3d 349 (5th Cir., 2002).

⁶⁰ *Grigson vs. Creative Artists Agency, LLC*, 210 F.3d 528 (5th Cir., 2000).

⁶¹ *Thomson-CSF, SA vs. Am. Arbitration Ass'n*, 64 F.3d 779 (2d Cir., 1995).

⁶² *MAG Portfolio Consult, GMBH vs. Merlin Biomed Group LLC*, 268 F.3d 62 (2d Cir., 2001).

⁶³ *E.I. DuPont de Nemours & Co. vs. Rhone Poulenc Fiber & Resin Intermediates, SAS*, 269 F.3d 202 (3d Cir., 2001) (holding that, when a signatory seeks to compel a non-signatory to arbitrate, absent the non-signatory seeking benefits from the arbitration agreement, the court has no authority to mandate the non-signatory to arbitrate). In *Grigson* and similar cases, the parties resisting arbitration had expressly agreed to arbitrate claims under the very agreement that they asserted against the non-signatory.

with someone might be compelled to broaden the scope of his agreement to include others."⁶⁴

Another type of estoppel has been referred to as "direct benefits" estoppel. Direct benefits estoppel applies when a non-signatory "knowingly exploits the agreement containing the arbitration clause".⁶⁵ A non-signatory is estopped from refusing to comply with an arbitration clause "when it receives a 'direct benefit' from a contract containing an arbitration clause".⁶⁶

Some courts have, at the non-signatory's instance, required a signatory to an arbitral agreement to arbitrate with the non-signatory because of:

". . . the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and [the fact that] the claims were 'intimately founded in and intertwined with the underlying contract obligations'".⁶⁷

The Second Circuit has held, however, that a "close relationship" and "intimate" factual connection provide no independent basis to require a non-signatory of an arbitration agreement to arbitrate with a signatory, and therefore a non-signatory cannot be bound without

⁶⁴ Uloth and Rial, "Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?", 21 *Review of Litigation* (2002), at pp. 593 and 633.

⁶⁵ *E.I. DuPont de Nemours & Co. vs. Rhone Poulenc Fiber & Resin Intermediates, SAS*, 269 F.3d 199 (3rd Cir., 2001); *Deloitte Noraudit A/S vs. Deloitte Haskins & Sells, US*, 9 F.3d 1060, 1064 (2d Cir., 1993), holding that non-signatory local affiliate, who used a trade name pursuant to an arbitral agreement that it had ratified, was estopped from relying on its non-signatory status to avoid arbitrating under the agreement; *American Bureau of Shipping vs. Tencara Shipyard SPA*, 170 F.3d 349, 353 (2d Cir., 1999), binding a non-signatory to a contract under which it received direct benefits of lower insurance and the ability to sail under the French flag.

⁶⁶ *American Bureau of Shipping vs. Tencara Shipyard SPA*, 170 F.3d 349, 353 (2d Cir., 1999), citing *Thomson-CSF, SA vs. Am. Arbitration Ass'n*, 64 F.3d 778–79; *Deloitte Noraudit A/S vs. Deloitte Haskins & Sells*, 9 F.3d 1060, 1064 (2d Cir., 1993), (holding that a non-signatory is bound to arbitrate when it knew of the arbitration agreement and "knowingly accepted the benefits of" that agreement); compare with *Hughes Masonry Co. vs. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 838–39 (7th Cir., 1981), holding that "[I]t would be manifestly inequitable to permit Hughes to both claim that J.A. is liable to Hughes for its failure to perform the contractual duties described in the [arbitrable agreement] and at the same time deny that J.A. is a party to that agreement to avoid arbitration of claims clearly within the ambit of the arbitration clause".

⁶⁷ *Sunkist Soft Drinks, Inc. vs. Sunkist Growers, Inc.*, 10 F.3d 757 (11th Cir., 1993), quoting *McBro Planning & Dev. Co. vs. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir., 1984).

receiving a "direct benefit" from or pursuing a "claim . . . integrally related to the contract containing the arbitration clause".⁶⁸

There is a distinction between cases where the courts seriously consider applying direct benefits estoppel, and cases involving general equitable estoppel. In the former, a non-signatory usually brings suit against a signatory trying to obtain a direct benefit from the arbitration agreement, premised, in part, on the agreement.⁶⁹

However, when the agreement sued upon by the non-signatory does not incorporate the arbitral agreement but is merely related to the arbitral agreement, a different result may be appropriate. In *In Re Kellogg Brown & Root, Inc.*,⁷⁰ MacGregor (USA), Inc., the United States subsidiary of a Finnish parent company (MacGregor FIN), contracted with Ingalls Shipbuilding, Inc. (Ingalls), *inter alia*, to build elevator shafts or "trunks" for two cruise ships. MacGregor USA assigned the contract to MacGregor FIN.

In August 2000, MacGregor FIN subcontracted part of the Ingalls job to Unidynamics (UDI), a Texas-based company, which agreed to fabricate a set of elevator trunks for one of the ships. In June 2001, UDI entered into a second-tier subcontract with Kellogg, Brown & Root (KBR), under which KBR agreed to furnish labor, equipment, and facilities and storage assistance to UDI for the fabrication and pre-assembly of the elevator trunks.

In the fabrication subcontract between MacGregor FIN and UDI, the parties had agreed that:

"Any disputes arising from the interpretation or application of this contract including any document pertaining thereto, shall be settled by arbitration in accordance with General Conditions (ECE 188), (Appendix 10)."

The second-tier subcontract between UDI and KBR (a materials and labor contract) did not contain an arbitration provision. When Ingalls cancelled its primary contract with McGregor FIN, McGregor FIN, in

⁶⁸ *Thomson-CSF, SA vs. Am. Arbitration Ass'n*, 64 F.3d 778–80 (2d Cir., 1995).

⁶⁹ *E.I. DuPont de Nemours & Co. vs. Rhone Poulenc Fiber & Resin Intermediates, SAS*, 269 F.3d 187, at p. 199 (3rd Cir., 2001); *Deloitte Noraudit A/S vs. Deloitte Haskins & Sells, US*, 9 F.3d 1064 (2d Cir., 1993); *Int'l Paper Co. vs. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir., 2000); *American Bureau of Shipping vs. Tencara Shipyard S.P.A.*, 170 F.3d 351 (2d Cir., 1999). In *Tencara*, the non-signatory did not attempt to obtain a direct benefit from the arbitral agreement, and was truly an unwilling participant in the arbitration.

⁷⁰ *In Re Kellogg Brown & Root, Inc.*, 166 SW.3d 732 (Tex., 2005).

turn, cancelled their subcontract with UDI. KBR, who had possession of the trunks, sought to enforce the terms of its fabrication subcontract with UDI by suing both UDI and McGregor, contending that McGregor in a state court in Texas, was the intended beneficiary of KBR's work and therefore should be liable to it in *quantum meruit* and for their statutory and constitutional liens. McGregor sought to compel KBR to arbitrate their claims before the ICC. The Texas Court of Appeals held that KBR could be compelled to arbitrate its claims before the ICC.

KBR was not a signatory to the fabrication subcontract between MacGregor FIN and UDI; therefore, the scope of that subcontract's arbitration clause did not answer whether KBR must arbitrate.

To advance its direct benefits estoppel theory, and compel KBR to arbitrate, MacGregor FIN contended that KBR's *quantum meruit* claim was "based on" MacGregor's subcontract with UDI, in the sense that KBR's labor and services were linked inextricably to the MacGregor/UDI subcontract. McGregor argued that its subcontract with UDI was at the core of the second-tier subcontract KBR was working under and, in performing the work, KBR relied on the subcontract's specifications.

However, as the court noted, under direct benefits estoppel a non-signatory plaintiff cannot be compelled to arbitrate on the sole ground that, but for the main contract containing the arbitration provision, it would have no basis to sue:

"The work to be performed under a second-tier subcontract will inherently be related to and, to a certain extent, be defined by contracts higher in the chain (166 S.W. 3d 740, citing *Black's Law Dictionary* 1464 (8th Ed., 2004), defining subcontractor as '[o]ne who is awarded a portion of an existing contract by a contractor, esp. a general contractor'). If this were a sufficient basis for binding a non-signatory subcontractor, arbitration agreements would become easier to enforce than other contracts, counter to the FAA's purpose."⁷¹

The Texas Supreme Court held that, under direct benefits estoppel, although a non-signatory's claim may relate to a contract containing an arbitration provision, that relationship does not, in itself, bind the non-signatory to the arbitration provision. Instead, a non-signatory

⁷¹ *InterGen NV vs. Grina*, 344 F.3d 140–141 (1st Cir., 2003), noting that federal courts have "been hesitant to estop a non-signatory seeking to avoid arbitration".

should be compelled to arbitrate a claim only "if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision".⁷² In overruling the Court of Appeals which compelled KBR to arbitrate its claims before the ICC, the Court noted that if a non-signatory's claim can stand independently of the underlying contract of the signatories, arbitration should not be compelled under the direct benefit estoppel theory.⁷³

Third-Party Beneficiary

While very similar to estoppel, the third-party beneficiary doctrine is distinct. Under a third-party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. While under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed, under third-party beneficiary analysis, a court will examine, what the parties intended at the time of contracting:

"[T]he fact that a person is directly affected by the parties' conduct, or that he may have a substantial interest in a contract's enforcement, does not make him a third-party beneficiary."⁷⁴

Parties are presumed to be contracting for themselves only.⁷⁵ This presumption may be overcome only if the intent to make someone a third-party beneficiary is "clearly written or evidenced in the contract".⁷⁶

⁷² *Washington Mutual Finance Group, LLC vs. Bailey*, 364 F.3d 268 (5th Cir., 2004); *MAG Portfolio Consultant, GMBH vs. Merlin Biomed Group LLC*, 268 F.3d 58, 61 (2d Cir., 2001), holding that "[t]he benefits must be direct — which is to say, flowing directly from the agreement"; *Int'l Paper Co. vs. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 417–18 (4th Cir., 2000); *Thomson-CSF, SA vs. Am. Arbitration Ass'n*, 64 F.3d 778–79 (2d Cir., 1995); *In re FirstMerit Bank*, 52 SW.3d 755 n. 9 (Tex., 2001).

⁷³ *In Re Kellogg Brown & Root, Inc.*, 166 SW.3d 739–740 (Tex., 2005).

⁷⁴ *E.I. DuPont de Nemours & Co. vs. Rhone Poulenc Fiber & Resin Intermediates, SAS*, 269 F.3d at 196–97 (3rd Cir., 2001), noting the fact that a parent derived benefits from a contract executed by its subsidiary is insufficient to make it a third-party beneficiary.

⁷⁵ *Fleetwood Enterprises, Inc. vs. Gaskamp*, 280 F.3d 1069, 1075–76 (5th Cir., 2002).

⁷⁶ *Fleetwood Enterprises, Inc. vs. Gaskamp*, 280 F.3d 1069, 1075–76 (5th Cir., 2002); *McCarthy vs. Azure*, 22 F.3d 351, 362 (1st Cir., 1994), holding that "[t]he crux in third-party beneficiary analysis . . . is the intent of the parties"; *Lester vs. Basner*, 676 F.Supp. 481, 484–85 (S.D.N.Y., 1987), refusing to find a third-party beneficiary relationship generating an obligation to arbitrate when the contract itself "is silent as to whether [its] terms" apply to the purported third-party beneficiaries.

A primary indicia of a third-party beneficiary interest will be whether the non-signatory files a claim against one of the signatory parties.⁷⁷

General Rules Regarding Enforcement of International Arbitral Awards

Non-signatories wishing to avoid involvement in an international arbitration before and during an arbitration have the above avenues available to them in United States courts. Similar arguments may be made in civil-law-based countries if the challenge is being made in the courts of a country other than the United States. However, the options available to non-signatories narrow considerably once an award is rendered.

While the New York Convention and the Inter-American Convention contain exceptions to the enforceability of an international arbitral award, generally, these conventions authorize the direct enforcement of a foreign arbitral award in the courts of any country. To enforce a foreign arbitral award in the United States, a party need only furnish an authenticated original or certified copy of the award and of the arbitration agreement (together with necessary translations) within three years after the award. Section 207 of the Federal Arbitration Act explicitly requires that a:

" . . . federal court shall confirm [an international arbitral] award unless it finds one of the grounds for refusal or deferral of . . . enforcement of the award specified in the [New York] Convention".⁷⁸

Regardless of whether the award is the product of an institutional or *ad hoc* arbitration, United States district courts, as well as state courts of the fifty states, have jurisdiction to hear applications to confirm, challenge, or vacate a foreign arbitral award.⁷⁹

⁷⁷ *E.I. DuPont de Nemours & Co. vs. Rhone Poulenc Fiber & Resin Intermediates, SAS*, 269 F.3d 192 (3d Cir., 2001); *Industrial Electronics Corp. of Wisconsin vs. iPower Distribution Group, Inc.*, 215 F.3d 677 (7th Cir., 2000); *TAAG Linhas Aereas de Angola vs. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir., 1990).

⁷⁸ United States Code, Title 9, Section 207 (1997 Supp.).

⁷⁹ *Industrial Risk Insurers vs. M.A.N. Gutehoffnungshütte*, 141 F.3d 1434, 1446 (11th Cir., 1998).

Article 4 of the Inter-American Convention tracks New York Convention Article III, which provides that an arbitration agreement is generally enforceable. The Inter-American Convention is even clearer than the New York Convention, in stating that an arbitral award is not appealable and has the force of a final judicial judgment. The limited grounds intended for refusing to enforce an arbitral award under Article 5 of the Inter-American Convention are comparable to those in the New York Convention.

The New York and Inter-American Conventions require national courts of signatory countries to refer parties to arbitration when they have entered into a valid agreement to arbitrate an international commercial dispute and, subject to certain exceptions, to recognize and enforce foreign arbitral awards.⁸⁰

Exceptions to Enforceability of Arbitration Agreements

Despite the general rule of enforceability of arbitration agreements under the New York Convention, Article II(3) of the Convention expressly excepts disputes from referral to arbitration when the arbitration agreement is "null and void, inoperative, or incapable of being performed".

Under the New York Convention, an arbitration agreement is "null and void" only when it is subject to one of the internationally recognized defenses addressing the consensual nature of the agreement itself, such as duress, mistake, fraud, or waiver, or when the arbitration agreement contravenes the fundamental policies of the forum nation.

Grounds for Refusing to Enforce Foreign Arbitral Award and Treatment of Challenges

In General

In the United States, the enforcement of foreign arbitral awards is subject to a different body of law from that applicable to the enforcement of foreign country judgments. Whereas enforcement of foreign country judgments is governed almost exclusively by principles of state law, the principle sources of federal law governing the enforcement of foreign arbitral awards are the Federal Arbitration Act, the New York Convention, and the Inter-American Convention.

⁸⁰ New York Convention, Articles II(3) and III; Inter-American Convention, Article I; United States Code Annotated, Title 9, Sections 303 and 304.

Article V of the New York Convention and Article 5 of the Inter-American Convention enumerate seven grounds under which the courts of signatory countries should refuse to enforce a foreign arbitral award.

The enumerated grounds are:

- (1) Party incapacity or agreement invalidity;
- (2) Lack of notice of the arbitral proceeding or appointment of arbitrators;
- (3) The award is outside the scope of the submission to arbitrate;
- (4) Selection of the arbitration was contrary to the parties' agreement;
- (5) The arbitration award is not final;
- (6) Non-arbitrability of the subject-matter of the dispute; and
- (7) The award is void for public policy reasons.⁸¹

While a non-signatory's challenge to being compelled to arbitrate is usually (and advisedly) raised in a state or federal court before the international arbitration itself proceeds, there are cases in which the arbitration has already commenced or when an award has already been rendered before the non-signatory raises a challenge to the process or to the award. At this stage, a non-signatory wanting to challenge an award, to avoid the enforcement of the award, may be relegated to the same remedies that are otherwise available to any signatory party that may challenge an award.

Below is a brief summary of the recognized exceptions to enforcement and case law applicable to challenges brought under the exceptions by non-signatories.

Party Incapacity or Agreement Invalidity

Article V(1)(a) of the New York Convention and Article 5(1)(a) of the Inter-American Convention set out the first situation in which an award need not be enforced: The parties lacked capacity to make such an agreement or the agreement itself was invalid. In *Prima Paint Corp. vs. Flood & Conklin Mfg. Co.*,⁸² the Supreme Court held that the validity of the contract containing an arbitration clause and whether that contract was fraudulently induced was itself a matter for the arbitrator to decide in the first instance.

⁸¹ New York Convention, 9 United States Code, Section 207, Article V (1) and (2); *Yusuf Ahmed Alghanim & Sons vs. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir., 1997).

⁸² *Prima Paint Corp. vs. Flood & Conklin Mfg. Co.*, 388 US 395 (1967).

In *La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et la Commercialisation Des Hydrocarbures vs. Shaheen Natural Resources Co., Inc.*,⁸³ the Court rejected a signatory party's argument that it should not be bound by the award because it acted merely as an agent for its subsidiary, the buyer under the contract. The court rejected the argument, stating that the non-signatory had an obligation to raise this argument earlier and did not, and therefore it waived the argument.

In the same case, the Court held that the record did not support the contention of a non-signatory party opposing confirmation of the award (based on Article V(1)(a) of the New York Convention) the party was not liable under the contract because it signed the contract as agent for a disclosed principal. The arbitral contract was signed by an officer of the non-signatory party, but the principal was not disclosed in the contract. The Court stated that the party claiming that it is an agent for a principal has the burden of proving it, and generally the self-serving statements of the purported agent are insufficient to do so. Here, by signing for the "buyer" without distinguishing its status, the agent became the buyer and was properly subject to the arbitration award.

Lack of Notice of the Arbitral Proceeding

The second recognized ground for denying enforcement of an arbitration award is that the losing party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise prevented from presenting its case.⁸⁴ This ground for denying enforcement, although frequently raised, has seldom proved successful.

*Consortio Rive, SA de CV vs. Briggs of Cancun, Inc.*⁸⁵ involved a dispute between a lessor and lessee. The lessor filed a criminal complaint in Mexico against the lessee after the arbitration proceeding began there. The principal of the lessee and the lessee failed to appear personally in the arbitration proceedings, allegedly for fear of arrest. An award was subsequently entered against the lessee. The Fifth

⁸³ *La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et la Commercialisation Des Hydrocarbures vs. Shaheen Natural Resources Co., Inc.*, 585 F. Supp. 57 (SDNY, 1983), judgment aff'd *per curiam*, 733 F.2d 260 (2d Cir., 1984).

⁸⁴ New York Convention, Article V(1)(b); Inter-American Convention, Article 5(1)(b).

⁸⁵ *Consortio Rive, SA de CV vs. Briggs of Cancun, Inc.*, 134 F. Supp. 2d 789 (E.D. La., 2001), aff'd on other grounds, 82 Fed. App. 359 (5th Cir., 2003).

Circuit held that it would nevertheless recognize and enforce the award. The Court rejected a claim that the lessee was wrongfully precluded from presenting its case due to the filing of the criminal complaint. The Court pointed out that the lessee could have participated in the arbitration by means other than by its physical presence. For instance, it could have sent a company representative or an attorney to attend, or it could have attended by telephone.

Moreover, the evidence indicates that the lessee did participate, to the extent that it designated an arbitrator and filed more than eighty pages of legal arguments and documentation in support of its position. Because the lessee brought forward no additional information or evidence that it would have presented at the arbitration had it been physically present, the Court found that the lessee did have an opportunity to meaningfully participate in the arbitration, and therefore the award was enforceable.

Award Is outside Scope of Submission to Arbitrate

Article V(1) of the New York Convention and Article 5(1) of the Inter-American Convention provide that an arbitration award need not be enforced if the arbitral award deals with a dispute that is not contemplated by, or does not fall within, the terms of the submission to arbitrate.

In *Parsons & Whittemore Overseas Co. vs. Société Generale de l'Industrie du Papier*,⁸⁶ the Second Circuit gave this defense a narrow construction by enforcing the arbitration award of damages for loss of production, even though a clause in the parties' contract provided that neither party "shall have any liability for loss of production".

Although the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitration's jurisdiction, it does not sanction second-guessing the arbitrators' construction of the parties' agreement.

In *Fiat S.p.A. vs. Ministry of Finance and Planning of Republic of Suriname*,⁸⁷ the court, applying the provision of Article V(1)(c) of the New York Convention, held that enforcement of an award may be refused on proof that the award deals with a difference not contemplated by, or not falling within the terms of the submission to arbitration, or it contains decisions on matters which are beyond the scope of the

⁸⁶ *Parsons & Whittemore Overseas Co. vs. Société Generale du l' Industrie du Papier*, 508 F.2d 969 (2d Cir., 1974).

⁸⁷ *Fiat S.p.A. vs. Ministry of Finance and Planning of Republic of Suriname*, 1989 WL 122891 (S.D.N.Y., 1989).

submission to arbitration. The New York District Court found that although the arbitration panel did exceed its authority when it purported to bind a non-signatory who was not expressly covered by the arbitration agreement, this defect did not require vacatur of the entire award against the signatory, as Article V(1)(c) of the New York Convention permits a court to enforce that part of the award that contains decisions or matters submitted to arbitration when they can be separated from those matters not submitted to arbitration.

In *CBS Corp. vs. WAK Orient Power & Light Ltd.*,⁸⁸ the court rejected a challenge to a foreign arbitral award as improper under the New York Convention, Article V(1)(c). In this case, a Pakistani company claimed that it had not agreed to arbitrate its dispute with a successor to the American corporation that had signed the original arbitral agreement. The terms of reference signed by the Pakistani company expressly gave the arbitration tribunal the authority to decide whether the tribunal had authority to settle the dispute with the successor entity.

The tribunal decided that it did have such authority. The Pennsylvania District Court pointed out that in the terms of reference, the Pakistani company had agreed that the procedural rules governing this arbitration should be the 1998 Rules of Arbitration of the International Chamber of Commerce. Those rules stated that if any party raises one or more pleas concerning the existence, validity, or scope of the arbitration agreement, any decision as to the jurisdiction of the arbitral tribunal should be taken by the arbitral tribunal itself.

Therefore, the court concluded, the Pakistani company knew and agreed that if it raised a question about the scope of the arbitration agreement, the arbitral tribunal would determine whether it had jurisdiction to answer it. The court rejected a contention that a recital by the arbitration tribunal that no party accepted any other party's statement of its own position showed that the terms of reference were disputed, and enforced the tribunal ruling regarding the enforceability of the Pakistani corporation agreement with the successor entity.

Selection of Arbitrators or Conduct of Arbitration Proceeding Contrary to Parties' Agreement

The New York and Inter-American Conventions also permit a challenge to an award based on a failure to adhere to agreed procedures for

⁸⁸ *CBS Corp. vs. WAK Orient Power & Light Ltd.*, 168 F.Supp.2d 403 (E.D. Pa., 2001).

conducting the arbitration.⁸⁹ If the composition of the arbitration tribunal or its procedures violated either the parties' agreement or, in the absence of such agreement, the law of the arbitral forum, the award may be denied recognition and enforcement. It is usually not within the discretion of an arbitral tribunal to determine whether a non-signatory to an arbitration agreement should be bound by the arbitrators when that issue is not before the panel.

The plaintiff in *Orion Shipping and Trading Co. vs. Eastern States*⁹⁰ had contracted with the defendant, Eastern States, to transport oil. That obligation was guaranteed by the defendant's parent corporation, Eastern American. Following an alleged breach of the contract, the parties submitted the dispute to arbitration, pursuant to an agreement that was signed by Eastern States, but which was not signed by Eastern American. The arbitrators found Eastern American liable on the guarantee, even though it had not submitted to the arbitration.

Reviewing that award, the Second Circuit held:

". . . the arbitrator exceeded his powers in determining the obligations of a corporation which was clearly not a party to the arbitration proceeding . . .".⁹¹

Nevertheless, authority also exists to support the proposition that "any issue that is 'inextricably tied up with the merits of the underlying dispute' may properly be decided by the arbitrator". In *Sarhank Group vs. Oracle Corp.*,⁹² a federal court rejected an argument that the arbitrators lacked authority to render an award against an affiliate of the respondent company that signed the arbitration agreement. The Court pointed out that the agreement between the parties defined the scope of arbitration to include "all disputes in relation to the interpretation or application of the agreement" or "any matter relating to the agreement".

The arbitrators determined that this contractual arbitration clause between the two signatories was binding on the non-signatory affiliate of one of them because the affiliate was: "a consolidated partner with" the signatory in the relation with the other signatory. Specifically, the arbitrators found that this partnership was facilitated by a provision of the agreement that granted the signatory affiliate the right to assign its

⁸⁹ New York Convention, Article V(1)(d); Inter-American Convention, Article 5(1)(d).

⁹⁰ *Orion Shipping and Trading Co. vs. Eastern States*, 312 F.2d 299, 301 (2nd Cir., 1963).

⁹¹ *Orion Shipping and Trading Co. vs. Eastern States*, 312 F.2d 300 (2nd Cir., 1963).

⁹² *Sarhank Group vs. Oracle Corp.*, 2002 WL 31268635 (S.D.N.Y., 2002).

rights and obligations under the agreement to "an affiliated company" without the prior written approval of the other signatory.

Arbitration Award Is Not Final

The fifth ground for denying recognition and enforcement turns on the status of the award. If the arbitral award is either not yet binding, or has been set aside or suspended in the arbitral forum, it may be denied recognition and enforcement.⁹³

This provision was a response to concerns that an arbitral award should not be given binding effect in one country when it is not binding under the laws of the country where it was made. Although United States courts generally refuse to enforce an "interim" arbitral award, if an "interim" award definitely disposes of severable issues, a court may still enforce it.⁹⁴

Non-Arbitrability of Subject Matter of Dispute

The sixth ground for refusing to recognize or enforce an arbitral award is closely related to the seventh ground, the public policy defense. Article V(2)(a) of the New York Convention and Article 5(2)(a) of the Inter-American Convention provide that if the subject matter of the parties' dispute is not capable of settlement by arbitration under the laws of the enforcing country, enforcement of the award may be refused.

This ground also is related to two other defenses previously discussed, one relating to the scope of the arbitration agreement, and the other to the parties' submission to arbitrate. For example, the parties may have included an arbitration clause in their contract under which they agreed to arbitrate every kind of dispute arising out of their agreement. One party may, nevertheless, resist enforcement of the arbitration award on the ground that the dispute was not within the scope of the parties' arbitration agreement. An enforcing court might disagree with a narrow construction of the parties' arbitration clause, but still refuse to enforce the award because it dealt with a subject matter that is non-arbitral under forum law.

The Supreme Court has instructed that "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration".⁹⁵

⁹³ New York Convention, Article V(1)(e); Inter-American Convention, Article 5(1)(e).

⁹⁴ *Eurolines Shipping Co vs. Metal Transport Co.*, 491 F.Supp. 590 (S.D.N.Y., 1980).

⁹⁵ *Moses H. Cone Memorial Hospital vs. Mercury Constr. Corp.*, 460 US 1 (1983).

That principle was prominent in *DiGhello vs. Busconi*.⁹⁶ DiGhello had been a signatory to the arbitration agreement. The arbitrators awarded damages against four non-signatory corporations. On a motion to vacate the award at the district court level, DiGhello argued, among other arguments, that the four non-signatories could not be bound by the award, and thus the arbitrators had exceeded their authority by including rulings against these entities.

According to the Court, the arbitrators had already found that the four corporations "executed or directly benefited" from the parties' agreements, that they were "clearly owned, dominated and controlled" by DiGhello, and that they were DiGhello's "alter egos".⁹⁷

More important, the Court found that the arbitration agreement itself purported to bind not only DiGhello, but also any entities owned by DiGhello.⁹⁸ The Court also rejected arguments that the award was incomplete and beyond the terms of submission. The ruling of the district court was affirmed by the Second Circuit Court of Appeals.⁹⁹

Public-Policy Defense

The final ground for denying enforcement, as mentioned in the New York and Inter-American Conventions, is that the award is contrary to the public policy of the enforcing country. Of the seven defenses to recognition and enforcement of a foreign arbitral award provided in the two Conventions, the public policy defense is the one most commonly invoked.

To avoid making this defense a major loophole to enforcement of arbitral awards, United States courts, however, have given it a narrow construction.¹⁰⁰ It "should apply only where enforcement would violate our 'most basic notions of morality and justice'".¹⁰¹

In *Sarhank vs. Oracle*,¹⁰² Oracle, a non-signatory, complained that the arbitral award would violate its right to due process, in contravention of United States public policy since it was not a party to the

⁹⁶ *DiGhello vs. Busconi*, 673 F.Supp. 85, 87 (D. Conn., 1987), quoting *McAllister Bros. vs. A & S Transportation Co.*, 621 F.2d 519, 522–23 (2d Cir., 1980), aff'd, 849 F.2d 1467 (2d Cir., 1988).

⁹⁷ *DiGhello vs. Busconi*, 673 F.Supp. 89 (D. Conn., 1987).

⁹⁸ *DiGhello vs. Busconi*, 673 F.Supp. 88 (D. Conn., 1987).

⁹⁹ *Busconi vs. DiGhello*, 849 F.2d 1467 (2d Cir., 1988).

¹⁰⁰ *Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985).

¹⁰¹ *Waterside Ocean Navigation Co. vs. International Navigation Ltd.*, 737 F.2d 150, 152 (2d Cir., 1984), quoting *Fotochrome vs. Copal Co.*, 517 F.2d 512, 516 (2d Cir., 1975).

¹⁰² *Sarhank Group vs. Oracle Corp.*, 2002 WL 31268635 (S.D.N.Y., 2002).

agreement containing the arbitration clause, nor a party to the arbitration. The reviewing district court held that Oracle had:

" . . . ample notice [of the arbitration proceedings], was represented by counsel and by pleadings in the arbitration Oracle has failed to demonstrate a violation of its right to due process of law. Moreover, the court held that the imposition of joint and several liability against Oracle comports with United States public policy under general contract principles, thus justifying imposition of liability upon Oracle via an agreement made by its wholly-owned subsidiary, Oracle Systems".¹⁰³

Conclusion

Non-signatories to arbitration agreements are often unwilling subjects in the disputes of signatory parties. The courts have fashioned sophisticated and fact-intensive tests to determine when a non-signatory should and should not be compelled to arbitrate with signatories to international arbitral agreements. Given the limited bases, under the New York Convention and similar international conventions on arbitration, for denying the enforcement of an award, non-signatories are advised to raise their challenges to inclusion within an international arbitration, at the earliest possible notice that they may be subjected to such an arbitration.

The theories available to non-signatories prior to the conclusion of arbitration and the issuance of an award provide non-signatories a fair opportunity, under proper circumstances, to be excluded from the arbitration. However, once the relevant arbitration commences and, particularly, after an arbitration award is rendered, non-signatory challenges to enforcement of an arbitral award affecting them must then fit within one of the limited enumerated grounds under the New York Convention and similar conventions — a considerable challenge, not only for non-signatories, but also for signatories, as well. A non-signatory's status as a non-signatory alone will not relieve them from meeting the heavy burdens required under the specifically enumerated exceptions under international conventions otherwise requiring enforcement of awards.

¹⁰³ *Sarhank Group vs. Oracle Corp.*, 2002 WL 31268635 7 (S.D.N.Y., 2002).