Non-Signatories and International Arbitration in the United States: the Quest for Consent

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I. Introduction

For many years arbitration practitioners have grappled with the problem of what to do with a 'non-party' – or more particularly a 'non-signatory' (1) – to the arbitration agreement that is nevertheless integral to the resolution of the dispute that has arisen. To take a simple example, what of the corporate affiliate that has been assigned certain rights and obligations under a subsequently disputed contract: can the affiliate assignee be compelled to arbitrate; can it commence arbitration itself and can it somehow intervene in an arbitration initiated between the original contracting parties? At the heart of these questions lies the widely-accepted principle that arbitration is by its nature consensual. However, in the absence of an agreement containing an arbitration clause and bearing the affiliate assignee's signature, where does one look to find evidence of such consent to arbitration?

Far from being merely theoretical, the questions raised by the aforementioned scenario are in fact highly relevant to the contemporary practice of international commercial arbitration. Disputes involving non-signatories are inevitable in the context of modern international business transactions that typically involve complex webs of interwoven agreements, multilayered legal obligations and the interposition of numerous, often related, corporate and other entities. Accordingly, while the non-signatory 'problem' has long been associated with disputes arising out of bills of lading and construction sub-contracts, it is today to be found in such diverse contexts as arbitrations concerning reinsurance agreements, Internet-based software licences and investment treaties.

page "289"
Perhaps reflecting an increased awareness of this issue, there is a growing body of commentary on the topic. (2) Bearing in mind the volume and breadth of these writings, this article does not attempt to produce an exhaustive analysis of all aspects of the treatment of non-signatories in international arbitration. Rather, focusing largely on the current position in the United States, it seeks to sketch the broad contours of the debate, with particular emphasis on identifying the legal principles and procedural mechanisms relied upon to justify binding a non-signatory to the arbitration agreement. First, the article briefly discusses some of the major substantive domestic law theories by which it is argued that non-signatories are bound to the arbitration agreement. Secondly, it touches on certain international law and transnational norms asserted to support extending the arbitration agreement to non-signatories. Thirdly, it identifies some of the procedural initiatives employed to bind non-signatories or to mitigate the effects of not being able to bind non-signatories. Finally, it lists some of the issues that cause non-signatories to be particularly problematic in the context of international arbitration. The article concludes by suggesting that an over-zealous approach to 'extending' the arbitration agreement to non-signatories may undermine the fundamental touchstone of arbitration – consent.

II. Reliance on the 'Ordinary Principles of Contract and Agency'

In the United States, the Federal Arbitration Act (FAA) applies to any arbitration, the subject matter of which touches or concerns interstate commerce. (3) In the absence of any guidance in the FAA, courts have developed a voluminous (if not always consistent) jurisprudence on when a non-signatory may be bound to an arbitration agreement. The following oft-cited quote summarises the US approach: page "290"

Arbitration is contractual by nature … It does not follow, however, that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. This court has made clear that a non-signatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency'. (4)

Of course, the real debate centres on what are these 'ordinary principles' and how are they applied. The court in *Thomson* identified five principles. (5) The author's own research has identified approximately 12: assignment; subrogation; third party beneficiary; novation; incorporation by reference; agency; estoppel/equitable estoppel; assumption of obligation; succession; 'group of companies' doctrine; 'single economic transaction' doctrine; and general reliance on 'equity'. The following is a very brief description of some aspects of the most common (and also most controversial) of these principles, focusing primarily on their application in the United States.

a. Assignment

In most states in the United States, where the rights and obligations under a contract are validly assigned and the assigned contract contains an arbitration provision, that arbitration provision is binding on all parties including the original contracting parties (both promisor and promisee) and the assignee. (6) However, US courts considering this matter tend also to analyse closely the arbitration provision and the assignment agreement to ensure this result is consistent with the parties' intention. (7) This is in contrast to the position in France, where, in the context of international commerce, there is a 'presumption' of 'automatic' transmission of the arbitration agreement as part of the assignment of the contract. (8)

b. Incorporation by Reference

In this situation a contract does not specifically include the arbitration clause but rather includes a term referring to another document (such as a standard contract) which includes the arbitration clause. This issue has long been associated with bills of lading, construction/engineering chains of contract and guarantees. In general, US courts treat this as essentially a factual matter of whether or not *page "291"*the parties intended to create a binding agreement. (9) Other jurisdictions such as the United Kingdom have struggled with conflicting views on whether or not there must be 'distinct and specific words' specifically referring to the arbitration clause in order for it to be incorporated by reference. (10)

c. Third Party Beneficiary

Broadly speaking, the third party beneficiary doctrine provides that in certain circumstances a non-signatory who has received benefits under the main contract is entitled to demand performance of those benefits. Where that main contract contains an arbitration provision, is the third party bound by it? US case law is surprisingly inconsistent, however in general 'the mere status of the third party beneficiary imposes no duty to arbitrate … [however] doing so is a condition to the third party beneficiary's enforcing its rights' under that contract, (11) *i.e.*, the third party beneficiary is only bound to arbitrate where it is the claimant in a claim relying on the main agreement. (12) In keeping with the general US contract approach, the third party must be an *intended* beneficiary, although evidence of this may be drawn from the writing itself and the surrounding circumstances. (13) In 1999 the United Kingdom enacted legislation recognising the third party beneficiary doctrine and, after much equivocating, explicitly extending this doctrine to arbitration agreements. (14) Interestingly, the drafters moved from an initial position of considering it inappropriate for the statute to apply to arbitration provisions as this would impose 'duties and burdens' (15) on a third party, to instead viewing the arbitration agreement as a 'condition' to enforcing the 'benefit' conferred by the doctrine. (16) The new legislation has so far attracted little judicial attention and it remains to be seen to what extent, if any, the US model will be followed.

d. Agency

Where an agreement containing an arbitration clause has been entered into by a person who expressly or impliedly did so as a representative of a principal, that non-signatory principal may be bound to the arbitration agreement. (17) An agent that executes a contract on behalf of a disclosed principal generally will not be held compelled to arbitrate against its wishes. (18) However, in some US circuits, a non-signatory agent may be permitted to compel arbitration based on an arbitration agreement contained in the contract the agent signed in his or her capacity as a corporate director, officer or employee where he or she would otherwise be required to defend the claim in court. (19) This is most common where the agent is named as a co-defendant and is apparently justified on the theory that if a signatory 'can avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties as [defendants] in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified'. (20) This highly pragmatic approach to agency theory sometimes also becomes expressed in terms of other theories, *e.g.*, that the signatory is estopped from denying that the arbitration provision applies to the non-signatory agent (21) or that the agent has by his or her behaviour assumed the duty to arbitrate. (22)

e. Estoppel/Equitable Estoppel

In general, this theory applies where a party by its own conduct is prevented from denying that the other party at issue is entitled to rely on an arbitration agreement. *page "293"*US courts have recognised at least two distinct versions of this. (23) First, courts have compelled a non-signatory to arbitrate where the non-signatory knowingly exploits or directly receives a 'benefit' from the agreement containing the arbitration clause. (24) In such instances, courts have allowed estoppel to be used as a proverbial 'sword' rather than 'shield,' *i.e.*, empowering the signatory to demand arbitration of a claim. (25) Secondly, courts have compelled arbitration based on an analysis of (1) the relationship between the claim and the contract containing the arbitration clause and (2) the existence of a 'nexus between the parties'. (26) The broad language of this latter test has been especially fertile ground for arguments that in effect use merely the close relationship of the signatory and the non-signatory as the basis for implied consent to arbitration. (27) The concern with both these variations of the estoppel doctrine is that they often result in highly fact-specific decisions and sometimes appear to be used as an 'easy option' rather than applying a more rigorous legal analysis using traditional principles of contract and agency law.

f. 'Group of Companies' Doctrine

For the purpose of this article, the 'group of companies' doctrine refers to the common situation where an agreement containing an arbitration provision was signed by one company but is sought to be enforced against, or relied upon by, other members of the related group of companies or the signatory company's shareholders or its officers and directors. (28) Although not always explicitly *page "294"* analysed in this way, such situations in fact involve applying different legal theories, including ‘piercing the corporate veil’, (29) ‘alter ego’, (30) agency, (31) fraud (32) and estoppel. (33) Ignoring these distinctions, some US courts have asserted a more general principle that ‘when the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the [non-signatory] parent to arbitration … If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted’. (34) Generally, courts are less willing to ‘allow the person who is trying to blur the line between corporations and the party who controls the corporation to be advantaged’. (35) While US courts' application of this broad general doctrine is not dissimilar to the position in certain civil law jurisdictions, (36) to the extent such an approach goes beyond the applicable law's principles for respecting corporate personality, this may undermine the business certainty required in typical complex multicorporate transactions. Question whether it would be preferable to subject the facts to a conflict of law analysis to identify the applicable corporate law and then determine on the basis of that law whether the arbitration agreement should be extended to corporate affiliates.

page "295"

III. Reliance on International Law/Transnational Norms

The status of the non-signatory is generally left to be considered by application of the relevant domestic law. However, practitioners should not overlook assistance from relevant international agreements or statements of general principles of international law. In terms of the former, a US court has relied on certain provisions of the United Nations Convention on Contracts for the International Sale of Goods in holding a non-signatory manufacturer bound to arbitrate. (37) In terms of the latter, both the United Nations Compensation Commission to Administer Claims Arising out of the Gulf War (38) and the Iran-US Claims Tribunal (39) have recognised certain ‘international usages’ and ‘general principles of law’ applicable to third parties, including subrogation, (40) third party beneficiary (41) and equitable estoppel. (42)

Similarly, it could be argued that where the parties have manifested consent to do so, binding a non-signatory to an arbitration agreement is consistent with the principle of 'good faith' that is embedded in the *lex mercatoria*. (43) More boldly, in extending an arbitration provision to a non-signatory, the Paris Court of Appeals has suggested the existence of a transnational norm generally applicable to international arbitration law: 'In international arbitration law, the effects of the arbitration clause extend to parties directly involved in the performance of the contract, provided that their respective situations and activities raise the presumption that they were aware of the existence and scope of the arbitration clause so that the arbitrator can consider all economic and legal aspects of the dispute'. (44)

IV. Reliance on Procedural Mechanisms

There are also various relevant 'procedural' initiatives that have been introduced in treaties, statutes, court rules and the rules of arbitral institutions. The rationale for these procedural mechanisms is not to permit arbitration with non-signatories *page "296"* but rather to overcome the practical disadvantages occasioned by contemporaneous arbitration proceedings or litigation concerning the same issues of law or fact as in the instant arbitration. In short, such mechanisms are employed to avoid unnecessary duplication, save time and money and avoid the possibility of conflicting decisions. (45) The following provides an overview of some of the more important devices. (46)

a. Joinder of a Third Party Non-Signatory

Generally, in the absence of agreement between all parties or the application of one of the legal theories discussed *supra*, there is no power for a tribunal or supervisory court to compel joinder of a non-signatory. However, consent to permit joinder may be inferred from consent to a particular institution's rules. In this respect, an important initiative is found in the LCIA Rules 1988, Rule 22.1(h), empowering (unless otherwise excluded by the parties) the tribunal to order 'upon the application of a party, [that] one or more third persons … be joined in the arbitration as a party, provided any such third person and the applicant party have consented thereto in writing'. Thus, consent of the party being joined and the applicant is still required. In contrast, Rules of the Court of Arbitration for Sport, Rule 41.2 provides a broader power, more similar to that enjoyed in litigation, permitting a tribunal to compel a third party to be joined (although the third party must still be bound by the arbitration agreement or have consented to joinder).

b. Consolidation of Proceedings

Closely related to the issue of joinder is the concern relating to disputes arising under separate agreements (or even the same agreement), whereby parties may be obliged to conduct separate arbitration proceedings with different parties (or even the same parties) concerning what may be essentially the same or closely related issues of fact and law. The question arises whether an arbitral panel or institution or the courts of the forum are permitted to 'consolidate' such proceedings.

In the United States, the majority of the federal circuits apply a straightforward rule that a court may not order consolidation of arbitration proceedings unless the underlying agreement contains an *explicit* provision authorising consolidation. (47) In a recent case, the Seventh Circuit indirectly rejected that *page "297"*notion. (48) The court agreed it had 'no power to order such consolidation if the parties' contract does not authorize it … [b]ut in deciding whether the contract does authorize it the court may resort to the usual methods of contract interpretation'. (49) The court then analysed the textual context, drafting history (and also mentioned practical considerations of efficiency and possible conflicting results) to conclude that the contract *implicitly* allowed the multiple retrocessionaires to demand a single arbitration provided there was a common dispute. (50)

This has been the subject of recent statutory reform at state level in the United States. (51) The Revised Uniform Arbitration Act (RUAA) 2000, (52) s. 10, authorises the court at the seat of the arbitration, in its discretion, to order consolidation of separate arbitrations where the claims 'arise in substantial part from the same transaction or series of related transactions' and there is a 'common issue of law or fact' that creates the possibility of conflicting decisions and the 'prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice' to the other party or parties. (53) Similar reforms empowering courts (and in some cases tribunals) to order consolidation have been introduced in many other countries, such as the Netherlands, (54) New Zealand (55) and Hong Kong. (56)

c. Other Procedural Mechanisms

Generally, intervention of a third party in the arbitration (in the true litigation sense) is impermissible. Some limited right of intervention is expressly permitted in certain circumstances where the third party may be a signatory to the treaty or *page "298"*agreement providing jurisdiction to the tribunal but where its interest in the particular dispute is more tangential. (57)

Under the former UK Arbitration Act 1975, there was some scope for indirect relief for third party non-signatories who claimed ‘through or under’ a party to an arbitration agreement. In *Roussel-Uclaf* v. *G.D. Searle & Co. Ltd*, (58) the court granted a stay of litigation to a subsidiary whose parent company was a party to a licence agreement containing an arbitration provision. The court applied an indirect veil-piercing argument to hold that the parent and subsidiary were ‘so closely related on the facts in this case’ that the subsidiary was ‘within the purview of the arbitration clause’ and could thereby claim ‘through or under’ the parent. The UK Arbitration Act 1996 contains a similar provision of potentially broader application. (59) This indirect method of treating a non-signatory as claiming ‘through or under’ a party to the arbitration agreement has been considered elsewhere in the Commonwealth. (60)

Various statutory provisions and court rules may also be used to lessen the procedural difficulty faced by the non-party, *e.g.*, in certain circumstances in the United States a non-signatory may seek a stay of litigation pending the outcome of a related arbitration to which it is not a party. (61)

V. Some Special Problems Associated with Non-Signatories in International Arbitration

a. New York Convention: Agreement in Writing Signed by the

Parties

Attempts to bind a non-signatory to arbitration may be challenged on the basis of the New York Convention requirement of an 'agreement in writing' and that this agreement be 'signed by the parties or contained in an exchange of letters or telegrams'. (62) This aspect of the non-signatory issue may arise as part of a motion to compel arbitration and/or stay litigation, as part of the substantive argument *page "299"*before the tribunal, in an application to set aside an award or as a defence to enforcement thereof. There is a vast body of literature on this topic. (63) For present purposes, it suffices to say that the US jurisprudence is inconsistent on how New York Convention, Article II(2), applies in the context of non-signatories to the arbitration agreement. For example, a line of Second Circuit authority has taken a strict approach, *e.g.*, refusing to compel arbitration based on an arbitration clause in a series of unsigned purchase orders. (64) However, other courts have interpreted Article II(2) more leniently (65) and, in the context of award enforcement, the Southern District of New York has refused to consider such 'formality' issues. (66) Many jurisdictions have now implemented arbitration laws with a less 'formalistic' requirement of what constitutes an arbitration agreement, (67) although their relationship to the New York Convention remains a matter of debate. (68)

b. Subsequent Challenge to Award: Setting Aside and Enforcement

Of course, even if successful in compelling a non-signatory to arbitrate, there is still the risk that a losing non-signatory may 're-litigate' the issue in seeking to set aside the resulting award or in defending against enforcement thereof. Thus, in the well-known *Westland Helicopters* case, the Swiss courts set aside an interim award (69) with respect to certain respondents on the basis that the arbitration agreement *page "300"*could not be extended to the Arab states that controlled the signatory trading entity. (70) More recently, a New York federal court rejected a similar argument and enforced an award rendered by an Egyptian arbitral tribunal that had found a US parent non-signatory bound by the arbitration agreement and therefore jointly and severally liable with its subsidiary for damages. (71) The court refused to revisit the tribunal's finding that the parent was bound by the agreement and held that none of the parent company's arguments constituted grounds on which enforcement could be denied under New York Convention, Article V. (72) In particular, it found that the proposition that non-signatories could be bound to an arbitration agreement did not contravene US public policy for the purpose of Article V(1)(e). (73)

Conversely, some parties have saved their 'third party' arguments until after an award has been obtained against the signatory. Thus, in *Diners Club*, the successful franchisee claimant, having had its award against the franchisor recognised and reduced to a judgment, was able to enforce the judgment against the insolvent franchisor's solvent parent company. (74) However, clearly, an arbitration panel will have exceeded its authority if its award seeks directly to vest legal rights or obligations in a third party. (75)

c. Who Decides Whether a Non-Signatory is Properly a Party to the Arbitration?

In the United States, contrary to the position in many jurisdictions, '[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator'. (76) This general principle has been recently reaffirmed by the US Supreme Court. (77) *page "301"*Thus, commencing arbitration involving a non-signatory has the potential to result in pre-arbitration litigation and thereby add expense and delay.

d. Applicable Law

Especially in the international context, the issue is further complicated by the question of the law applicable to determining whether the non-signatory is bound to arbitrate. 'From a methodological point of view, it seems that in many cases, the arbitral tribunal determines separately the law applicable to the various contracts, even if it reaches the conclusion that the applicable law is the same for all of them'. (78) Thus, for example, the effect of assignment may be construed according to the law applicable to the original contract assigned, the assignment agreement, the arbitration agreement or the law of the forum. (79) To confuse matters even more, the decision-maker may reach a different conclusion as to what law is to govern the question of whether the formality requirements of New York Convention, Article II have been met. (80) The decision-maker may also apply different conflict of law rules depending on whether the non-signatory issue is considered to involve a procedural or a substantive matter or, by default, may rely simply on the parties' expectations in this respect. (81)

e. Separability of the Arbitration Agreement: Where Does One Look for Consent?

The generally-accepted notion of the arbitration agreement being ‘separable’ from the main agreement gives rise to the question of whether the parties must have consented to the non-signatory being bound by the arbitration agreement itself or whether this can be inferred from consent to be bound by the contract as a whole. Generally in the United States, the focus is heavily on the wording of the arbitration agreement and whether that itself evidences an intent to bind the non-signatory; (82) however, the ‘factual and conceptual nexus between the arbitration clause and the principal contract is … sometimes difficult to overlook’. (83) By contrast, at least in the context of assignment, the French courts have ‘consistently rejected’ the notion that one must prove a separate intent to be bound by the arbitration agreement. (84)

f. Consequences of Adding an Extra ‘Party’

Finally, as a practical matter, where the ‘extension’ of an arbitration provision to include a non-signatory results in an extra party being added to a proceeding, it *page "302"*is likely to interfere with such issues as appointment of the tribunal and sharing of arbitration costs. Absent agreement by the parties, this may necessitate intervention by the arbitral institution or courts. Indeed, some arbitral institution rules specifically address joint nominations and/or in the absence of agreement reserve the right to make appointments in these unexpected multiparty situations. (85)

VI. Conclusion

A review of the theories, principles and procedures employed to bind non-signatories, reveals – perhaps unsurprisingly – that the ‘touchstone’ for this determination is whether or not the relevant entities *consented* to arbitrate with one another. Indeed, from a comparative law perspective, what might at first appear to be distinctions between jurisdictions, are often simply a matter of how far a decision-maker is willing to go to find evidence of such consent. Must it be explicit in the original agreement or is it sufficient to find it implicit within the language of the agreement? Can one infer it from the conduct of the parties or perhaps from an economic analysis of the benefits of the transaction? Should it be measured at the time of contracting or can it be assessed on the basis of subsequent acts?

While the case law generally shows a deference to consent, especially in the United States one finds that it sometimes takes a backseat to such notions as ‘the need for efficiency’ or upholding the ‘presumption of arbitrability’. One also finds instances of sweeping and fact-intensive application of such principles as equitable estoppel and piercing the corporate veil, that are beyond the normal reach of those doctrines. Indeed, sometimes even where consent is insufficiently manifested to permit ‘extension’ of the agreement to bind the non-signatory, procedural mechanisms are employed to achieve the same result.

A commentator once observed that ‘justice would not seem to be done if the only criterion’ used in denying consent to arbitration were ‘that a particular third party did not itself sign … the arbitration clause’. (86) Certainly, many of the scenarios outlined in this article in which a non-signatory has been compelled or permitted to arbitrate involve an indisputably ‘just’ outcome. However, ultimately, arbitration is not litigation and it has inherent limitations on the extent to which it can accommodate non-signatories. Accordingly, while this area is ripe with opportunities for creative advocacy, one should be vigilant not to damage the legitimacy of arbitration by undermining the essential requirement of consent.

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[1] The term 'non-signatory' is used to refer to an entity that has not physically signed the agreement containing the arbitration provision. On some theories a non-signatory may in fact be a 'party' to the agreement, *e.g.*, where a principal is bound by the signature of his or her agent. To avoid confusion this article generally refers to the broader class of 'non-signatories' rather than 'non-parties'.

[2] The author first investigated this topic in a comparative law research project undertaken in 1999/2000. *See* J.M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Arbitration: Doing Justice Without Destroying Consent* (LLM research paper, Harvard Law School, 19 May 2000) (to appear under the same title in 2004 in the Pepperdine Dispute Resolution Law Journal). At that time, the general issue (rather than specific aspects thereof) had apparently received only limited critical attention. Two notable exceptions are the papers collected in *The Arbitration Agreement: Its Multifold Critical Aspects*, ASA Special Series No. 8 (December 1994) and 'L'Arbitrage et les tiers' in (1988) 3 *Revue de l'Arbitrage* 429 (July/September). *See also* J. Townsend, 'Arbitration and Identity: The Non-Signatory Problem' in (1998) 3 *ADR Currents* 19. More recently, the topic has been the subject of many articles. *See especially* the very comprehensive treatment in B. Hanotiau, 'Problems Raised by Complex Arbitrations Involving Multiple Contracts: Parties – Issues' in (2001) 18(3) *J Int'l Arb.* 251. *See also e.g.*, C.B. Lamm and J.A. Aqua, 'Defining the Party: Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions' in (2003) 34 *Geo. Wash. Int'l L Rev.* 711; J. Savage and T.A. Leen, 'Family Ties: When Arbitration Agreements Bind Non-Signatory Affiliate Companies' in (2003) 16 *Asian Disp. Rev.* 16; M.H. Bagot Jr. and D.A. Henderson, 'Not Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration' in (2002) 26 *Tul. Mar. LJ* 413; C.L. Eisen, 'What Arbitration Agreement? Compelling Non-Signatories to Arbitrate' in (2001) *Disp. Resol. J* 40 (May/July).

[3] Most of the US cases discussed in this article are in the context of an international (as opposed to domestic) arbitration. However, even

where the subject matter is a purely domestic arbitration, the same general approach would apply as in an international dispute.

4 *Thomson-CSF, S.A.* v. *American Arbitration Assoc. and Evans & Sutherland Computer Corp.*, 64 F.3d 773, 776 (2d Cir. 1995) (internal citations omitted).

5 The five theories are: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. *ibid.*

6 *See e.g., Bell-Ray Co., Inc.* v. *Chemrite (Pty.) Ltd and Lubritene (Pty)*, 181 F.3d 435 (3d Cir. 1999) (compelling arbitration of the claimant promisor's dispute against both the original promisee (assignor) and the assignee who had been assigned a series of trade agreements).

7 *See e.g., Britton* v. *Co-op Banking Group*, 4 F.3d 742, 746 (9th Cir. 1993) (purported assignment in sale contract was insufficient to assign obligation to arbitrate).

8 E. Gaillard and J. Savage (eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (1999), § 716. Another commentator has justified this as indicative of civil law systems that are more willing than their common law counterparts 'to analogize arbitration agreements to security interests or accessory rights which attach to the claim they relate to'. D. Girsberger and C. Hausmaninger, 'Assignment of Rights and Agreement to Arbitrate' in (1992) 8 *Arbitration International* 121 at p. 138.

9 *See e.g., Progressive Casualty Insurance Co.* v. *C.A. Reasuguradora Nacional de Venezuela*, 991 F.2d 42 (2d Cir. 1993) (compelling arbitration where a policy stated that it was 'subject to Facultative Reinsurance Agreement' and that agreement in turn contained an arbitration clause and where this was consistent with standard industry usage); *cf. Cargill, Inc.* v. *Golden Chariot MV*, 31 F.3d 316 (5th Cir. 1994) (refusing to compel arbitration where a bill of lading failed to refer specifically to the charterparty containing the arbitration provision).

10 *Aughton Ltd* v. *M.F. Kent Services Ltd* (1991) 57 Building Law Rep. 1. While UK Arbitration Act 1996, s, 6(2), now makes it clear that an arbitration agreement may be incorporated by reference, the question of whether 'the reference is such as to make that clause part of the agreement' is left to be determined on a case by case basis.

11 I.R. Macneil, R.E. Speidel and T.J. Stipanowich, *Federal Arbitration Law: Agreements, Awards and Remedies Under the Federal Arbitration Act* (1994, cumulative), § 18.7.214.

12 *See also Collins* v. *Int'l Dairy Queen Inc. and American Dairy Queen Corp.*, 2 F. Supp. 2d 1465 (M.D. Ga. 1998) (permitting certain non-signatory defendants to compel arbitration of claims against them as

third party beneficiaries).

13 In fact this requirement has been very loosely applied. *See e.g., Spear Leeds & Kellogg* v. *Central Life Assurance Co.*, 85 F.3d 21 (2d Cir. 1996) (permitting insurance company to compel arbitration against brokerage house under the NYSE Rules as third party beneficiary of the policy-holder).

14 *See* UK Contracts (Rights of Third Parties) Act 1999, s. 8 (where a third party wishes to enforce a substantive term of the original contract and that term is subject to an arbitration provision then the third party shall be treated as a party to the arbitration provision for the purposes of the Arbitration Act 1996).

15 *Hansard*, House of Lords, col. 1059 (27 May 1999) (per Lord Wilberforce).

16 UK Contracts (Rights of Third Parties) Act 1999, Explanatory Note, § 34.

17 *See e.g., Interbras Cayman Co.* v. *Orient Victory Shipping Co., SA*, 663 F.2d 1, 6–7 (2d Cir. 1981) (remanding on the basis that an arbitration agreement in a charterparty could be enforced by an undisclosed principal even though the other signatory was unaware thereof).

18 *Lerner* v. *Amalgamated Clothing & Textile Workers Union*, 938 F.2d 2, 5 (2d Cir. 1991).

19 *See e.g., Pritzker* v. *Merrill Lynch, Pierce, Fenner and Smith*, 7 F.3d 1110 (3d Cir. 1993) (permitting agent broker to compel arbitration); *Roby* v. *Corporation of Llyoyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993) (permitting individual chairs of Lloyd's syndicates to compel arbitration of securities claims even where individuals were sued for ‘controlling persons’ liability). However, this general proposition has been rejected in other circuits. *See e.g., Westmoreland* v. *Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002) (refusing to permit the non-signatories to compel arbitration based on agency principles or equitable estoppel and warning ‘courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable backdrop of legal rules – the cardinal prerequisite to all dispute resolution’); *McCarthy* v. *Azure*, 22 F.3d 351, 357–61 (1st Cir. 1994) (corporate officer not permitted to invoke arbitration clause in purchase agreement signed by him as corporate representative).

20 *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990), *citing Arnold* v. *Arnold Corp.*, 668 F. Supp. 625, 629 (N.D. Ohio 1987).

21 *See e.g., Usina Costa Pinto SA Acucar e Alcool* v. *Louis Dreyfus*

Sugar Co., Inc., 933 F. Supp. 1170, 1179 (S.D.N.Y. 1996) (permitting non-signatory agent to compel arbitration where the 'close relationship' between agent and its disclosed signatory principal as well as the 'integral link' between the plaintiffs' fraud claims and the contract estopped the signatory from denying the applicability of the arbitration provision, even though the principal was not a party to the action).

22 *See e.g., AHTNA Gov't Servs Corp.* v. *52 Rausch, LLC*, No. C 03-00130 SI, 2003 US Dist. LEXIS 2460, at *11 (N.D. Cal. Feb. 19, 2003) (compelling arbitration where non-signatory assumed liability under a construction contract which included an arbitration agreement and where assumption of liability was premised on a joint venture arising out of an agency relationship).

23 Apart from these two variants of estoppel, courts have also applied a similar analysis to require a non-signatory to arbitrate based on so-called 'assumption' of the obligation. *See e.g., Gvozdenovic* v. *United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991) (union representatives' involvement in an arbitration amounted to assumption of the obligation to arbitrate such that they were bound by the resulting award).

24 'Generally these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.' *E.I. DuPont de Nemours & Co.* v. *Rhone Poulenc Fiber and Resin Intermediates, SAS*, 269 F.3d 187, 200 (3d Cir. 2001).

25 *See e.g., American Bureau of Shipping* v. *Tencara Shipyard, SPA*, 170 F.3d 349 (2d Cir. 1999) (non-signatory bound to arbitrate dispute arising under contract under which it had received certain collateral benefits such as lower insurance premiums and right to sale under French flag); *Int'l Paper Co.* v. *Schwabedissen Maschinen and Anlagen GmBH*, 206 F.3d 411 (4th Cir. 2000) (non-signatory buyer compelled to arbitrate claim against signatory manufacturer-distributor because buyer alleged a breach of the manufacturing/distribution agreement containing an arbitration provision).

26 *See e.g., Sunkist Softdrinks, Inc. and Del Monte Corp.* v. *Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993) (permitting non-signatory parent corporation to compel arbitration of claim brought against it and its subsidiary arising out of licensing agreement between claimant and subsidiary). Interestingly, the parent acquired its interest in the subsidiary after execution of the licensing agreement so at the time of execution there was no intention for it to be a party to any

arbitration.
27 *See e.g., Sam Reisfeld & Son Imp. Co.* v. *S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976) (compelling non-signatory successor parent company to arbitrate claim brought under agency agreement between agent and subsidiary); *McBro Planning and Development Co.* v. *Triangle Electronic Construction Co., Inc.*, 741 F.2d 342 (11th Cir. 1984) (compelling arbitration of claims between two construction contractors where each operated pursuant to independent contracts with the owner (one of which explicitly denied the existence of a contractual relationship between the contractors) on the basis that the claim was 'intimately founded in and intertwined with' the underlying contracts each of which contained an arbitration clause).
28 *See e.g., Long* v. *Silver*, 248 F.3d 309, 320 (4th Cir. 2001) (permitting non-signatory shareholders to compel arbitration where 'the shareholders are all officers and members of the board of directors and, as the only shareholders, control all of the activities of the corporation').
29 *See e.g., Smith/Enron Co-Generation Ltd Partnership, Inc.* v. *Enron Devp't Corp.*, 198 F.3d 88, 97 (2d Cir. 1999) (permitting non-signatory related companies to compel arbitration where 'all the circumstances here justify piercing the corporate veil').
30 *See e.g., A.R.W. Exploration Corp.* v. *Aguirre*, 45 F.3d 1455, 1461 (10th Cir. 1995) (remanding to district court to determine whether sole shareholder was *alter ego* of corporation and therefore bound to the arbitration agreement).
31 *See e.g., I-Link Inc.* v. *Red Cube International, AG*, No. 2:01CV049K, 2001 WL 741315, at *5 (D. Utah Feb. 5, 2001) (wholly-owned US non-signatory subsidiary of Swiss parent signatory could compel arbitration of dispute where it acted as signatory parent's 'agent in the U.S. for all purposes' and its relationship with parent was sufficiently close and the claims sufficiently intertwined).
32 *See e.g., T.N.S. Holdings, Inc.* v. *MKI Securities Corp.*, 703 N.E.2d 749, 751 (N.Y. 1998) (refusing to pierce the corporate veil on the basis of 'inextricably interwoven' agreements alone as 'there is no showing that through its domination [the non-signatory] misused the corporate form for its personal ends so as to commit fraud or wrongdoing or avoid any of its obligations').
33 *See e.g., In re Currency Conversion Fee Antitrust Litigation*, Nos MDL 1409, M 21-95, 2003 WL 21523989 (S.D.N.Y. Jul. 7, 2003) (estopping plaintiffs from denying that arbitration agreement also applied to parents of signatory subsidiaries where the issues the non-signatories were seeking to arbitrate were intertwined with the contract

containing the arbitration clause).

34 *J.J. Ryan & Sons* v. *Rhone Poulenc Textile, SA*, 863 F.2d 315, 320–21 (4th Cir. 1988), quoting *Sam Reisfeld*, 530 F.2d at 681. *See also Burlington Ins. Co.* v. *Trygg-Hansa Insurance Co., AB*, No. 00-1373, 2001 WL 543221 (4th Cir. May 23, 2001) (applying *J.J. Ryan* to compel a parent non-signatory to arbitrate its disputes relating to reinsurance agreements to which its subsidiary was a signatory).

35 *Minera Alumbrera Ltd* v. *Fluor Daniel, Inc.*, No. 98 CIV.5673AGS, 1999 WL 269915, *3 (S.D.N.Y. May 4, 1999) ('it would be inequitable to permit [non-signatory parent] to take advantage of any blurring of the line between it and [subsidiary signatory], and we decline to mandate arbitration based upon that rationale'); *cf. Smith/Enron Co-Generation*, 198 F.3d at 97–98 (although the same result was justified on the basis of equitable estoppel).

36 *See e.g., Dow Chemical* v. *Isover Saint Gobain*, ICC Case No. 4131, Interim Award (1982), reported in (1984) 9 *ICC Yearbook* 131 at p. 136; affirmed Court of Appeal Paris (21 October 1983), reported in (1984) 9 *ICC Yearbook* 131 at p. 132 (the Interim Award records that an 'arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been genuine parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise').

37 *Filanto* v. *Chilewich*, 789 F. Supp. 1229 (S.D.N.Y. 1992), *app. dis. on procedural grounds*, 984 F.2d 58 (2d Cir. 1993) (holding that a reference in the manufacturing agreement to a separate but related distribution agreement containing an arbitration clause was sufficient to bind the non-signatory, referring to Convention, Art. 8(3) (permitting consideration of negotiations and trade usages) and Art. 18(1) (acknowledging that acceptance of an offer can be communicated by conduct alone)).

38 *See e.g.*, B.G. Affaki, 'The United Nations Compensation Commission' in (1993) *J Int'l Arb.* 10 at p. 21.

39 *See e.g., Ocean-Air Cargo Claims Inc.* v. *Islamic Republic of Iran*, Award in Case No. 11429 (15 December 1989), (1991) 16 *ICCA Yearbook* 377.

40 Affaki, *supra* n. 38 at p. 21.

41 *Sea-Land Service, Inc.* v. *Islamic Republic of Iran*, Award in Case No. 135-331-1, 16-7, (1984) 6 Iran-US Cl. Trib. Rep. 160 (22 June).

42 *Woodward Clyde Consultants* v. *Islamic Republic of Iran*, Award in Case No. 73-67-3, (1983) 3 Iran-US Cl. Trib. Rep. 239 at 247 (2 September).

43 *See generally* Gaillard and Savage, *supra* n. 8 at §§ 1460 and 1470.

44 *V2000 (formerly Jaguar France)* v. *Renault*, Court of Appeal Paris (7 December 1994) (1996) *Revue de l'Arbitrage* 245; affirmed Cass. 1e civ. (21 May 1997), (1997) *Revue de l'Arbitrage* 537. Although a commentator has suggested that the *Jaguar* court's reasoning usually applies only in the context of groups of companies and state-owned entities. *See* Gaillard and Savage, *supra* n. 8 at § 499.

45 A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (1999), pp. 174–175, §§ 3–69.

46 For a more comprehensive discussion *see, e.g.*, M. Platte, 'When Should an Arbitrator Join Cases?' in (2002) 18(1) *Arbitration International* 67.

47 *Del E. Webb Constr.* v. *Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *American Centennial Ins. Co.* v. *National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Protective Life Ins. Corp.* v. *Lincoln National Life Ins. Corp.*, 873 F.2d 281, 282, n. 1 (11th Cir. 1989). District court decisions in the Third Circuit also support the majority position. *Specialty Bakeries, Inc.* v. *Robhal, Inc.*, No. Civ.A.97-1057, 1997 WL 379184 (E.D. Pa. June 24, 1997). The position is generally the same in the Second Circuit: *United Kingdom* v. *Boeing Co.*, 998 F.2d 68 (2d Cir. 1993).

48 *Connecticut General Life Ins. Co.* v. *Sun Life Assur. Co. of Canada*, 210 F.3d 771 (7th Cir. 2000) (ordering three retrocessionaires and seven retrocedents who all reinsured the same overarching coverage to arbitrate their disputes together).

49 *ibid.* at 774.

50 *ibid.* at 776.

51 The impact of this reform on international arbitration remains uncertain as international arbitration will still be governed primarily by the FAA rather than state arbitration law. It is unclear to what extent recourse may be had to state law and whether § 10 may be preempted by the FAA. *See e.g., Garden Grove Comm. Church* v. *Pittsburgh-Des Moines Steel Co.*, 140 Cal. App. 3d 251, 262–63 (Cal. Ct. App. 1983) (California state law permitting consolidation not preempted by FAA); *cf. Home Ins. Co.* v. *New England Reins. Corp.*, No. 98 Civ. 5772JFK, 1999 WL 681388, at *7 (S.D.N.Y. Aug. 31, 1999) (*obiter* comment that

any New York state law permitting consolidation would conflict with existing federal law and be preempted).

52 RUAA has been adopted in Hawaii, Nevada, New Mexico and Utah and is being considered in at least 14 other states.

53 RUAA, § 10(a). The court may order consolidation of all or only some claims but may not order consolidation if prohibited by the agreement. RUAA, § 10(b) and (c).

54 Arbitration Act 1986, s. 1046 (Netherlands) (empowering the President of the District Court of Amsterdam to consolidate two connected proceedings where both are in the Netherlands).

55 Arbitration Act 1996, Sch. 2, para. 2 (New Zealand) (empowering an arbitral tribunal and in certain circumstances the High Court to consolidate arbitral proceedings on terms considered to be just) Provision is applicable to international arbitrations only by agreement).

56 Arbitration Ordinance 1996 (cap. 341), s. 6B (Hong Kong) and *see* Committee on Hong Kong Arbitration Law, *Report of the Committee on Hong Kong Arbitration Law* (30 April 2003), para. 23 (recommending that s. 6B of the Ordinance should be an opt-in provision).

57 *See e.g.*, North American Free Trade Agreement, Art. 1128 (permitting the other state parties to make submissions to a tribunal on questions of interpretation); Rules of the Court of Arbitration for Sport, Rule 41.3 (allowing a third party (also bound by the arbitration agreement) to file with the court a request to intervene in an extant arbitration).

58 *Roussel-Uclaf* v. *G.D. Searle & Co. Ltd* [1978] 1 Lloyd's Rep. 225 (Ch. D.); *cf. Grupo Torras SA* v. *L. Sabah* [1995] 1 Lloyd's Rep. 374, 451 (distinguishing *Roussel-Uclaf*).

59 UK Arbitration Act 1996, s. 82(2) ('references in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement').

60 *See e.g.*, in Australia, *Tanning Research Laboratories, Inc.* v. *O'Brien (Liq. of Hawaiian Tropic Ltd)* (1990) 64 ALJR 211 (High Ct of Australia); in New Zealand, *Mt Cook (Northland)* v. *Swedish Motors* [1986] 1 NZLR 720.

61 *See e.g., Harvey* v. *Joyce*, 199 F.3d 790 (5th Cir. 2000) (applying the mandatory stay in FAA, § 3 to a non-party 'because the issues presented in the non-party litigation would have rendered the arbitration redundant and thwarted the federal policy favoring arbitration'); *Cosmotek Mumessillik ve Ticaret Ltd Sirkketi* v. *Cosmotek USA, Inc.*, 942 F. Supp. 757, 760–61 (D. Conn. 1996) (stay may be granted where there are common issues in the arbitration and litigation and those

issues will be finally determined in the arbitration, where the non-arbitrating party can show it will not hinder the arbitration, where the arbitration will be resolved in a reasonable time, and where any delay will not cause undue hardship to the plaintiff; the court also imposed a timetable for reporting back on progress with the arbitration).

62 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), 330 UNTS 3, Art. II (10 June 1958). Implemented in the United States in FAA, Chapter 2. *See* 9 U.S.C. § 201.

63 *See e.g.*, for a recent and illuminating discussion T. Landau, 'The Requirement of a Written Form for an Arbitration Agreement' at 16th ICCA Congress, May 2002, London.

64 *Kahn Lucas Lancaster, Inc.* v. *Lark International Ltd*, 186 F.3d 210 (2d Cir. 1999). *See also Bothell* v. *Hitachi Zosen Corp.*, 97 F. Supp. 2d 1048, 1053 (W.D. Wash. 2000) ('in a series of documents where the words used to refer to a proposed arbitration agreement are so vague as to be meaningless and no further explanation is provided, either by attachment, discussion or otherwise, the totality of the documents exchanged … does not constitute a valid 'arbitration agreement' under the [New York] Convention').

65 *See e.g., Republic of Nicaragua* v. *Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991) ('the clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes'). *See also Sphere Drake Ins. Plc* v. *Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994) (interpreting the New York Convention, Art. II requirement of a signed writing as applying only to an 'arbitration agreement' as opposed to 'an arbitral clause in a contact'); *Standard Bent Glass Corp.* v. *Glassrobots OY*, No. 02-2169, 2003 WL 21419202 (3d Cir. Jun. 20, 2003) (rejecting the *Sphere Drake* interpretation of Art. II(2) but holding that the arbitral clause at issue was incorporated by reference into the parties' agreement in a series of letters and therefore enforceable for the purposes of that article).

66 *Sarhank Group* v. *Oracle Corp.*, No. 01 Civ 1285(DAB), 2002 WL 31268635, at *3 (S.D.N.Y. Oct. 9, 2002) (holding *Kahn Lucas* inapplicable as limited only to the context of a motion to compel arbitration); *cf. Int'l Paper Co.*, 206 F.3d at 418, note 7 (accepting that New York Convention, Art. II applies to an application to enforce an award but stating that this does not preclude enforcement of an award arising from a non-signatory situation).

67 *See e.g.*, UK Arbitration Act 1996, s. 5; Arbitration Act 1986

(Netherlands), s. 1021; Arbitration Act 1996 (New Zealand), Sch. 1, para. 7. In the United States, FAA, § 2 requires only a 'written provision' or an 'agreement in writing'. *See Realnetworks, Inc., Privacy Litigation*, No. 00C1366, 2000 WL 631341 (N.D. Ill. May 8, 2000) (enforcing an arbitration agreement as being 'in writing' for the purposes of the FAA where the clause was included in a licence accepted as a condition to downloading software from an Internet site).

68 For a discussion of the competing views *see* Landau, *supra* n. 63 at p. 60. In the United States, *see Chloe Z Fishing Co., Inc.* v. *Odyssey Re (London) Ltd*, 109 F. Supp. 2d 1236, 1246 (S.D. Cal. 2000) ('Article II of the [New York] Convention exhaustively defines what constitutes an "agreement in writing" under Chapter 2 of the FAA' but on the facts accepting that the parties' conduct in negotiating and purchasing the insurance policies constituted 'an exchange of letters or telegrams' for the purposes of Art. II(2)).

69 *Westland Helicopters Ltd* v. *Arab Organization for Industrialization*, ICC Case No. 3879, Interim Award (5 March 1984) (1984) 23 ILM 1071.

70 *Westland Helicopters Ltd* v. *Arab Organization for Industrialization*, Swiss Federal Tribunal (19 July 1988) (upholding a decision of the Court of Justice of Geneva) (the award was only set aside in respect to Egypt absent any challenge by the other state non-signatories).

71 *Sarhank Group* v. *Oracle Corp.*, No. 01 Civ 1285(DAB), 2002 WL 31268635 (S.D.N.Y. Oct. 9, 2002).

72 The tribunal's finding based on 'a theory of partnership akin to veil piercing' (*Sarhank, ibid.* at *7) had already been upheld by the Egyptian courts in an unsuccessful motion to set aside.

73 'The Second Circuit has repeatedly held that non-signatories to an arbitration agreement may nevertheless be bound' and the theory espoused by the Egyptian tribunal 'cannot be said to undermine our most basic notions of morality and justice'. *ibid.* Importantly, because the parent company 'had ample notice and was represented by counsel and by pleading at the arbitration … [it] failed to demonstrate a violation of its right to due process of law'. *ibid.*

74 *Carte Blanche (Singapore) Pte, Ltd* v. *Diners Club Int'l, Inc.*, 2 F.3d 24 (2d Cir. 1993) (relying *inter alia* on evidence that the subsidiary's obligations had already been assumed by Diner's Club at the time of the breach, that at that time the subsidiary had no indicia of independent existence and that Diners Club had paid counsel's fees in the arbitration). *See also Nauru Phosphate Royalties, Inc.* v. *Drago Daic Interests, Inc.*, 138 F.3d 160 (5th Cir. 1998) (creditor non-party to the arbitration bound by factual finding of liability in award where its

interests were in privity to those of the party that participated in the arbitration).

75 *See e.g., Nationwide Mutual Ins. Co.* v. *Home Ins. Co.*, 330 F.3d 843, 846–48 (6th Cir. 2003) (award requiring payment by insurer to reinsurer's partial successor's subsidiary (a non-party) vacated as being in excess of the tribunal's authority and in manifest disregard of law).

76 *A.T. & T. Tech., Inc.* v. *Communications Workers of America*, 475 U.S. 643, 649 (1986).

77 *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), *citing First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995). *See also Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003) (citing *A.T.&T., Inc.* and *Howsam* but deciding that the question of whether or not an arbitration agreement forbids a ‘class action’ is for the arbitrator to determine).

78 B. Hanotiau, *supra* n. 2 at p. 348.

79 *See e.g.*, the court's confusion in *Bell-Ray Co.*, 181 F.3d at 440–41 (applying the law of the forum (New Jersey) due to insufficient information concerning South African law).

80 *See e.g., Chloe Z Fishing Co.*, 109 F. Supp. 2d at 1249 (applying English law to determine the legal effect of the alleged manifestation of assent to arbitration as such conduct occurred in England).

81 For a comprehensive discussion of this topic in the context of assignment *see* Girsberger and Hausmaninger, *supra* n. 8 at pp. 149–161.

82 *See e.g., International Dairy Queen*, 2 F. Supp. 2d at 1468–71 (applying a close textual analysis).

83 J.J. Coe Jr, *International Commercial Arbitration: American Principles and Practice in a Global Context* (1997), p. 133.

84 Gaillard and Savage, *supra* n. 8 at § 427.

85 *See e.g.*, ICC Rules 1998, Rule 10; LCIA Rules 1998, Rule 8.1.

86 M. Blessing, ‘The Arbitration Agreement: Its Multifold Critical Aspects’ in *The Arbitration Agreement: Its Multifold Critical Aspects, supra* n. 2 at p. 19.

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