

Not Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration

Michael H. Bagot, Jr.*

Dana A. Henderson†

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* Partner, Wagner & Bagot, New Orleans, Louisiana. J.D. *with honors* 1980, University of Texas; B.A. *cum laude* 1977, Vanderbilt University.

† Associate, Cozen O'Connor, Seattle, Washington. J.D. *cum laude* 1997, Tulane Law School; B.A. 1994, University of Washington.

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I. INTRODUCTION

This Article came into being through the authors' handling of a matter in which their client, the purchaser of new vessels, was ordered to arbitrate a dispute regarding defective vessel construction. In that case, the arbitration clause was contained in a contract between the shipyard and a classification society. The vessel purchaser was not named in the shipyard-classification society contract, did not have notice of its terms, never signed nor negotiated the terms therein, had no prior dealings with the classification society, was an unsophisticated purchaser, and did not have the opportunity to review the documents containing the arbitration clause until well after delivery. Nevertheless, the owner was bound to arbitration as a third-party beneficiary of the classification agreement. This result was shocking and unconscionable both to the authors and to their client and prompted this query into circumstances in which nonsignatories are bound to arbitration. We write because maritime lawyers and their clients should be forewarned.

The Federal Arbitration Act (FAA)¹ applies to maritime transactions and interstate commerce and has been applied to compel arbitration even when all parties involved did not agree to it.² The authors submit that these decisions binding nonparty, nonsignatories to arbitration agreements, to which they did not agree and of which they had no knowledge, are unwarranted extensions of law, including the FAA. Moreover, the presupposition that arbitration ultimately saves expenses, judicial resources and time, or results in awards that are more fair or just than court judgments is, even if true, an inappropriate basis for compelling third parties to arbitrate.³ Certainly, arbitration should be ordered in

1. 9 U.S.C. §§ 1-14 (2000).

2. *Id.* §§ 1-4.

3. The management statistics prepared by the Administrative Office of the United States Courts suggest that while the number of cases pending in U.S. District Court increased from

cases in which the parties have actually agreed to arbitration. But to force a party who has not consented to arbitrate deprives that party of important constitutional and statutory rights and may result in a gross miscarriage of justice.

Formerly, under common law, there was no right to arbitration, and, prior to the enactment of the FAA, federal courts refused to enforce arbitration clauses.⁴ Public policy at the time supported open access to federal courts. An arbitration agreement's limitation of access to courts was dissuaded as against public policy.⁵ Beginning with the enactment of the FAA in 1922, Congress created what has developed into a strong federal and judicial policy of enforcing arbitration agreements.⁶

It seems axiomatic that in order for parties to be bound to an arbitration agreement, there must, in fact, be an agreement thereto. "Arbitration is contractual by nature—'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'"⁷ Despite a strong liberal policy favoring arbitration, "such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract."⁸ The clear intent of the FAA, as interpreted by the United States Supreme Court was, "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."⁹ In this regard, U.S. federal law is consistent with

199,019 in 1980 to 272,636 in 1990 and to 290,167 in 2000, the median from filing civil cases to trial ranged from 15 months in 1980 to 14 months in 1990 to 20 months in 2000. However, the median time from filing to disposition of civil cases varied very slightly from 8 months in 1980 to 9 months in 1990 and to 8.2 months in 2000. Despite the ever-expanding jurisdiction of federal courts, the number of cases pending per judge actually dropped slightly from 474 in 1990 to 443 in 2000. While it would be interesting to match the length of time to dispositions in arbitration with these figures, the authors have not been able to locate a source which compiled like records for arbitration in the United States. ADMIN. OFF. U.S. FED. CTS. MGMT. STAT. 2001-1997, available at <http://www.uscourts.gov/fcmstat> (last visited May 21, 2002). Older statistics are available by contacting the Administrative Office of United States Courts, Statistics Division, Washington, D.C., (202)502-1441.

4. *Int'l Union v. Benton Harbor Malleable Indus.*, 242 F.2d 536, 539 (6th Cir. 1957); *Albatross S.S. Co. v. Manning Bros., Inc.* 95 F. Supp. 459, 463, 1951 AMC 1126, 1131-32 (S.D.N.Y. 1951).

5. *Int'l Union*, 242 F.2d at 537-39.

6. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

7. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). In fact, the FAA was passed merely to ensure that parties adhere to their agreements to arbitrate. *Albatross*, 95 F. Supp. at 463, 1951 AMC at 1131-32 (quoting from the House Committee Report).

8. *Thomson-CSF*, 64 F.3d at 776.

9. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 22 (1983).

the law of many maritime nations.¹⁰ Nevertheless, there are exceptions. Parties who were not signators or parties to the original contract containing the arbitration agreement may be bound to arbitration if those parties fall within the exceptions to the signature or party agreement requirements as discussed below.

Proponents of arbitration claim that this method of dispute resolution pushes cases to resolution or finality in a manner that is quick, efficient, and less expensive for the parties.¹¹ Preservation of scarce judicial resources is a similar motivator.¹² “The prizes secured on our voyage—judicial economy and the promotion of arbitration—are recompense for the perils.”¹³ Arbitration often provides the parties with the choice of forum, law, and procedure, and the dispute may be determined by “commercial men” who are experts in maritime law or the marine industry.¹⁴ Further, many parties claim that international disputes are less burdensome in arbitration than litigation.¹⁵ Some arbitration awards also are not supported by written opinions, and some are less frequently published than litigated cases. Hence, parties may favor arbitration to keep their disputes or positions out of the public eye. However, arbitration is a procedural tool with significant effects on the parties’ rights, as it, by contract, “deprives a party of a jury trial and the right to appeal, substantial rights which should not be denied unless voluntarily and knowingly waived.”¹⁶

This Article will give an overview of the Federal Arbitration Act and other arbitration acts and examine the signature, writing, and agreement requirements for compelling arbitration as to parties who were not privy to the contract containing the arbitration clause. This Article will also

10. The laws of many maritime nations seem to require a written agreement to arbitrate or an exchange of documents manifesting such an agreement. See synopsis of arbitration laws of Australia, Canada, Hong Kong, Japan, Malaysia, People’s Republic of China, the Philippines, the Republic of Korea, Singapore, Taiwan, and the U.S.S.R. collected in 14 TUL. MAR. L.J. 263, 263-361 (1990); see also Johannes Trappe, *The Arbitration Clause in a Bill of Lading*, [1999] LMCLQ 337, 337-43 (discussing the UNCITRAL Model Law on Arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Model Law, the English Arbitration Act 1996, the Chinese Arbitration Law of 31 August 1994 and the German Code of Civil Procedure of 1 January 1998); see also North American Free Trade Agreement (NAFTA), ch. 11, §§ 1121-1122, 32 I.L.M. 289, 297 (entered into force Jan. 1, 1997); FAA, 9 U.S.C. § 2 (2000).

11. See generally *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co.*, 767 F.2d 1140, 1143-47, 1986 AMC 706, 708-716 (5th Cir. 1986).

12. *Id.*

13. *Id.* at 1143, 1986 AMC at 708.

14. *W.K. Webster & Co. v. Am. Pres. Lines*, 32 F.3d 665, 668, 1995 AMC 134, 139 (2d Cir. 1994).

15. *Id.* at 668-70, 1995 AMC at 138-40.

16. *George Engine Co. v. S. Shipbuilding Corp.*, 350 So. 2d 881, 885 (La. 1977).

review exceptions to the written agreement requirement in the hopes that those seeking to maintain their litigation rights will not inadvertently subject themselves to arbitration through the operation of these exceptions. There seems to be a disturbing trend towards expanding the application of arbitration clauses to those who had no notice or knowledge of the arbitral clause, as well as to transactions not covered by the arbitration contract. Parties to arbitration lose a number of important rights ordinarily protected by the litigation process and should not be forced to forfeit those rights absent an agreement to do so, and then to those disputes covered by the arbitration agreement.

II. FEDERAL AND STATE LAWS IMPACTING ARBITRATION

A. *The Federal Arbitration Act*

1. The FAA Generally

The FAA¹⁷ was enacted in 1922 and establishes a strong federal policy favoring the enforcement of arbitration agreements in interstate

17. 9 U.S.C. §§ 1-14 (2000). Selected Portions of the Act read:

“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce

Id. § 1.

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract

Id. § 2.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the

commercial matters and certain maritime transactions.¹⁸ Under the FAA, an arbitration agreement must be in writing and evidence a maritime transaction or involve interstate or international commerce.¹⁹ If the maritime or commerce conditions are met, the Act requires district courts to stay any actions that are subject to valid agreements to arbitrate, pending the outcome of arbitration.²⁰

2. Scope of the FAA, Limited to Maritime Transactions and Interstate Commerce

The FAA applies to “[m]aritime transactions,” defined as including “charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction.”²¹ The Act specifically excludes application to employment contracts involving seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.²² The scope of the Act’s application is practically limited, not just by the exclusion of employee claims, but also by the bounds of maritime transactions embraced by admiralty jurisdiction, which will, of course, exclude those contracts that are nonadmiralty in nature, such as mixed shipbuilding contracts.²³

3. Determining Whether the Dispute at Issue Is Subject to Arbitration

Analysis of arbitrability under the FAA is two pronged. First, courts must determine whether there is a written agreement to arbitrate and, secondly, whether the dispute at issue falls within the scope of the arbitration agreement.²⁴ Courts and federal public policy have created a strong presumption in favor of arbitration.²⁵

agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id. § 3.

18. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987).

19. 9 U.S.C. §§ 1-2.

20. *Id.* § 3.

21. *Id.* § 1.

22. *Id.*

23. *E.g.*, N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119, 126-27 (1919).

24. *See generally In re Hornbeck Offshore (1984) Corp.*, 981 F.2d 752, 1993 AMC 1248 (5th Cir. 1993).

25. *Id.* at 755, 1993 AMC at 1252. In fact, the FAA does not presume an agreement to arbitrate or mandate resolving disputes in favor of arbitration; it merely allows the courts to enforce arbitration clauses. This presumption has been judicially created. *See id.*, 1993 AMC at

Whether a contract is to be arbitrated is a decision left to courts on the basis of the contract entered into by the parties.²⁶ If there is disagreement as to whether an arbitration clause in a contract encompasses the dispute in question, doubts are generally resolved in favor of arbitration.²⁷ Denial of arbitration is appropriate when “it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.”²⁸ As such, the issues left to determination by district courts are whether the agreement to arbitrate was properly made between those being bound to arbitration and whether the agreement encompasses the dispute.²⁹

The United States Supreme Court has strongly endorsed arbitration, finding that “in enacting [the Federal Arbitration Act], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration.”³⁰ In so doing, the Court has declared the FAA supreme over any state laws limiting the power to enforce arbitration agreements.³¹ The preemptive effect of the FAA is, of course, limited to the substantive areas to which it applies, i.e.,

1251-52; *Volt Info. Sci., Inc. v. Bd. of Tr. of Leeland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989); *Life of Am. Ins. Co. v. Aetna Life Ins. Co.*, 744 F.2d 409, 412-13 (5th Cir. 1984) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

26. *Commerce Park at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334, 338 (5th Cir. 1984) (citing 9 U.S.C. § 3 (2000)); *see also Southland*, 465 U.S. 1 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 1969 AMC 222 (1967) (AMC reporter summarizing case).

27. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 22 (1983); *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (citing *AT&T Techs., Inc. v. Communication Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960))); *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633 (5th Cir. 1985).

28. *Neal*, 918 F.2d at 37 (citing *Commerce Park*, 729 F.2d at 338); *see Wick v. Atl. Marine*, 605 F.2d 166, 1980 AMC 2991 (5th Cir. 1979) (AMC reporter summarizing case).

29. *Commerce Park*, 729 F.2d at 338; *Prima Paint*, 388 U.S. at 404.

30. *Southland*, 465 U.S. at 10.

31. *Id.* In circumstances in which federal policies conflict as to favoring arbitration and preserving exclusive federal jurisdiction, such disputes are resolved in favor of litigation. *See Wilko v. Swan*, 346 U.S. 427, 435 (1953), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Cunningham v. Fleetwood Homes of Ga., Inc.*, 253 F.3d 611, 622 (11th Cir. 2001); *Smokey Greenhaw Cotton Co. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 720 F.2d 1446, 1448 (5th Cir. 1983); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976). Nevertheless, this resolution of conflicting federal policies is applied narrowly, and only in circumstances in which Congress has created an exception favoring arbitration under the Federal Arbitration Act, not in cases when there are state policies that prohibit it. *See also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1994); *Commerce Park*, 729 F.2d at 338 (citing *Moses H. Cone*, 460 U.S. at 24) (“Section 2 [of the Federal Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”); *Kroog v. Mait*, 712 F.2d 1148, 1149 (7th Cir. 1983).

maritime transactions within the bounds of admiralty jurisdiction and agreements involving interstate commerce.³² In other areas, state arbitration laws can and should apply.³³ When the clause at issue is subject to the FAA, the interpretation and the validity of the arbitration agreement is governed by federal law.³⁴ Under federal law, the interpretation of such agreements generally becomes a query into accepted principles of contract and agency law.³⁵ When applicable, state law is considered in shaping these general principles of contract and agency.³⁶

While the FAA governs the scope of an arbitration agreement, applicable state agency and contract law governs whether the parties entered into a binding agreement over the question of contract.³⁷ This reliance on state contractual and agency principles is, in part, the reason why this particular area of the law is muddy and the standards for binding third parties to arbitration are not uniform.

Fortunately for those forced into arbitration without knowledge of, or agreement to, the arbitral clause, under federal law,³⁸ an interlocutory appeal is available from an order compelling arbitration.³⁹ While a trial judge in state court may certify a nonappealable interlocutory judgment ordering arbitration for immediate review, such orders are not entered as a regular matter, and may be “reserved for the ‘infrequent harsh case.’”⁴⁰

32. See 9 U.S.C. § 1 (2000).

33. See Rules of Decision Act, 28 U.S.C. § 1652 (1994); *Howard Fields & Assocs. v. Grand Wailea Co.*, 848 F. Supp. 890, 893 (D. Haw. 1993).

34. *Prima Paint* 388 U.S. at 403-04; *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 n.5 (5th Cir. 1990) (citing *Moses H. Cone*, 460 U.S. at 24-25; *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062 (5th Cir. 1990)).

35. *Neal*, 918 F.2d at 37 n.5 (citing *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845 (2d Cir. 1987); *Valero Ref., Inc. v. M/T Lauberhorn*, 813 F.2d 60, 64, 1987 AMC 2100, 2106 (5th Cir. 1987)).

36. See *id.* at 38 n.5 (citing *Flink v. Carlson*, 856 F.2d 44, 46 n.2 (5th Cir. 1988); *Johnson Controls, Inc. v. City of Cedar Rapids, Iowa*, 713 F.2d 370, 373 (8th Cir. 1983)).

37. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45-46, 1993 AMC 2916, 2920 (2d Cir. 1993).

38. 9 U.S.C. § 16 (2000).

39. Decisions by a trial judge ordering arbitration in state court are not necessarily final judgments, subject to an immediate appeal. See generally *Collins v. Prudential Ins. Co. of Am.*, 752 So. 2d 825 (La. 2000). While in such cases, appellate options are not immediately available, aggrieved parties may apply for supervisory relief. *Id.* at 831, n.15 (citing *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 977 P.2d 769 (Ariz. 1999) (en banc); *Long v. Indus. Dev. Bd. of Vincent*, 619 So. 2d 1387 (Ala. 1993)). Unfortunately, if supervisory relief is not granted, the parties may have to complete the arbitration before obtaining real judicial review of any order compelling arbitration.

40. *Collins*, 752 So. 2d at 831, n.5 (citing *S. Cal. Edison*, 977 P.2d at 774).

4. Issuance of a Stay

Under § 3 of the FAA, district courts are to “stay proceedings if satisfied that the parties have agreed in writing to arbitrate an issue or issues underlying the district court proceeding.”⁴¹ However, a stay under § 3 is not available to nonparties to the arbitration agreement.⁴² Even if a nonparty seeks a stay of a proceeding, but would not be entitled to such relief under § 3 of the FAA, district courts hold inherent powers to stay matters pending before the court “to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”⁴³ Stays under the court’s inherent powers are appropriate when issues pending before the court may be determined in arbitration, and the court may exercise great discretion in determining whether to invoke its powers to stay the litigation.⁴⁴ The test for determining whether nonarbitral issues should be stayed is whether the issues involved in the arbitration and the litigation are common and whether the arbitral issues may be finally determined in arbitration.⁴⁵

Upon a filing of a motion to stay a district court action pending arbitration, the issues as to whether the parties are bound to arbitration and whether the dispute at issue falls within the scope of the arbitration

41. *McMahan Sec. Co. v. Forum Capital Mkts. L.P.*, 35 F.3d 82, 85 (2d Cir. 1994).

42. *Orange Chicken, L.L.C. v. Nambe Mills, Inc.*, No. 00 Civ. 4730, 2000 WL 1858556, at *8 (S.D.N.Y. Dec. 19, 2000) (citing *Citrus Mktg. Bd. of Isr. v. J. Lauritzen A/S*, 943 F.2d 220, 224-25, 1991 AMC 2705, 2711-12 (2d Cir. 1991) (citing *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 748 (2d Cir. 1991)); *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440, 441, 1965 AMC 177, 178 (2d Cir. 1964); *Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 725 F.2d 192, 195 (2d Cir. 1984) (“Since [plaintiff] has no present right to compel arbitration, [he] is not entitled to a stay under Section 3.”).

43. *Nederlandse*, 339 F.2d at 441, 1965 AMC at 178. The court stated:

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the clauses on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one [sic] else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.

Id. (citing *Landis v. North Am. Co.*, 299 U.S. 248, 254-255 (1936) (omission in original)).

44. *Orange Chicken*, 2000 WL 1858556, at *8 (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 19-21 (1983)); see also *Sierra Rutile*, 937 F.2d at 750.

45. *Orange Chicken*, 2000 WL 1858556, at *8, discusses whether matters squarely within an arbitration proceeding will impact the issues still in litigation, but does not discuss the effect of collateral estoppel or *res judicata*. *Id.* The implication therein, however, is that decisions with regard to particular parties’ liabilities or duties that are determined in arbitration will thereafter be dispositive when litigation resumes. *Id.* at *9 (citing *Am. Shipping Line v. Massan Shipping Indus., Inc.*, 885 F. Supp. 499, 502 (S.D.N.Y. 1995)).

agreement are matters for determination by the district court.⁴⁶ “If we recognize the settled rule that a party to a contract has no right to arbitrate a dispute under the contract unless the contract so provides, it seems to necessarily follow that he has no right to arbitrate the question of arbitrability unless the contract so provides.”⁴⁷ Whether an issue is arbitrable is a question of law appropriate for judicial determination rather than for adjudication by an arbitrator, particularly when it is questionable whether the arbitrator has authority to decide any matters in a case.⁴⁸ Under the FAA, the court should be “satisfied that the issue involved in such suit or proceeding is referable to arbitration” prior to issuance of a stay.⁴⁹

However, upon any party’s motion to stay, the FAA should operate to prevent undue delay of the nonparty’s claim that is not referable to arbitration.⁵⁰ This may arise in two circumstances. First, a third party may seek to invoke a § 3 stay as to the parties to the arbitral agreement.⁵¹ Conversely, a party in a suit who is also party to an arbitration agreement may seek to invoke a § 3 stay as to all parties or claims, even those not subject to arbitration, to halt the litigation pending the outcome of the arbitration.⁵² In both circumstances, a stay of the litigation under § 3 of the FAA may be inappropriate as it will, potentially, adversely affect the litigation rights of the nonparty to the arbitration agreement.⁵³ The main goal of enforcement of private arbitration agreements is “not advanced by forcing a litigant that has not agreed to arbitrate to delay the prosecution of its claims.”⁵⁴ This does not mean, however, that a stay would not be appropriate pursuant to a court’s inherent powers to manage its docket and enforce a stay when appropriate.⁵⁵

46. *Int’l Union v. Benton Harbor Malleable Indus.*, 242 F.2d 536, 539 (6th Cir. 1957).

47. *Id.* The court held that the question of liability under a no-strike provision in a collective bargaining agreement fell outside the scope of an arbitration agreement that was to “be used instead of a strike, not to determine whether the strike was justified after it had occurred.” *Id.* at 541.

48. *Id.* at 539-40.

49. *Id.* at 539 (quoting FAA, 9 U.S.C. § 3 (2000)).

50. *Id.* at 540.

51. *Id.*

52. *Id.* at 536. Parties asserting arbitration should be wary of the possibility that asserting alleged rights to arbitration in bad faith may prevent the entire claim from being arbitrable.

53. See *Nederlands Erts-Tankersmaatschappij, N.V. v. Ibrandtsen Co.*, 339 F.2d 440, 440-42, 1965 AMC 177, 177-80 (2d Cir. 1964); *Montauk Oil Transp. Corp. v. S.S. Mut. Underwriting Ass’n (Bermuda) Ltd.*, 859 F. Supp. 669, 677, 1995 AMC 1114, 1125 (S.D.N.Y. 1994); *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 748 (2d Cir. 1991).

54. *Montauk* 859 F. Supp. at 677, 1995 AMC at 1125.

55. The test for determining whether to issue a stay of litigation pending arbitration pursuant to the court’s inherent powers to issue a stay is whether a delay in the litigation would unfairly prejudice the nonparty to the arbitration agreement. See *Cargill Ferrous Int’l v. M/V*

5. Disputing an Order of Arbitration

A district court's order staying further action pending the outcome of arbitration is a final appealable decision if it is the only remaining issue in the federal court.⁵⁶ The standard of review for determining whether a district court erred in finding that a dispute was properly referred to arbitration is whether the conclusion regarding the existence of an agreement to arbitrate was made in clear error.⁵⁷ Under *Genesco, Inc. v. T. KaKiuchi & Co.*, whether an arbitration agreement is present is a factual finding, and under the Federal Rules of Civil Procedure, Rule 52(a), the appropriate standard of review for factual findings is the "clear error" standard.⁵⁸ Rulings determining which entities are, in fact, bound to arbitration are reviewed de novo.⁵⁹

B. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Similar to the FAA is the New York Convention on the Recognition of Foreign Arbitral Awards (Convention).⁶⁰ The Convention is essentially a replication of the FAA, with a broader jurisdictional scope—

Anatoli, 935 F. Supp. 833, 837 n.4, 1996 AMC 1811, 1816 n.4 (E.D. La. 1996) (noting that if the parties were able to propose an agreement for a stay and arbitration which would not prejudice those litigants the court would reconsider).

56. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 13 (1983). This is not necessarily the case in state court actions. Litigants in Louisiana courts should be aware of *Collins v. Prudential Insurance Co. of America*, 752 So. 2d 825 (La. 2000), in which the Louisiana Supreme Court held that decisions ordering parties to arbitration are not final judgments and such are only subject to supervisory review if the order would give rise to "irreparable injury." *Collins*, 752 So.2d at 831. In *Collins*, the court held that arbitration did not lead to irreparable injury despite the result that a wrongful order of arbitration will require the improperly bound party to incur unnecessary delays and significant expenses and participate fully in arbitration, thereby losing appellate rights to challenge the resultant award. *Id.* In Louisiana, only after fully arbitrating the matter may parties appeal the initial wrongful order of arbitration. *Id.* The authors submit that the Louisiana result is both inefficient and unjust and should instead mirror the federal approach, under which a final judgment on the issue of arbitrability is immediately appealable. See *Moses H. Cone*, 460 U.S. at 8-9; *Manning v. Energy Conversion Devices, Inc.*, 833 F.2d 1096, 1101 (2d Cir. 1987) (holding that orders issued in independent proceedings under the FAA are appealable); *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992); *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991). *But see Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1022 (9th Cir. 1991) (holding that a partial judgment on arbitrability is not appealable).

57. *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845 (2d Cir. 1987).

58. *Id.*; FED. R. CIV. P. 52(a).

59. *Id.*; see also *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352, 1999 AMC 1858, 1861 (2d Cir. 1999).

60. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (codified as amended at 9 U.S.C. §§ 201-208).

authorizing district courts to order arbitration proceedings in jurisdictions beyond the United States and to enforce foreign arbitration awards in the United States.⁶¹ Pertinent sections are reproduced below.⁶² Appellate courts have jurisdiction to recognize the Convention's enforcement of arbitration contracts in order to adhere to the federal policy favoring arbitration.⁶³

The Convention is enforced pursuant to the enabling legislation adopted by Congress in chapter 2 of the FAA.⁶⁴ The Convention, as

61. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil Co. (Pemex)*, 767 F.2d 1140, 1149, 1986 AMC 706, 713 (5th Cir. 1985).

62. New York Convention, *supra* note 60:

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

63. *Sedco*, at 1149, 1986 AMC at 713.

64. 9 U.S.C. §§ 201-208 (2000); FAA, 9 U.S.C. §§ 1-4 (2000); *Sedco*, 767 F.2d at 1149, 1986 AMC at 713; *Chloe Z Fishing Co. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1242, 2000 AMC 2409, 2413 (S.D. Cal. 2000).

opposed to the FAA, does not expressly provide for a stay of litigation pending arbitration, but the final section of the statute that implements the Convention, 9 U.S.C. § 208, states that the provisions of chapter 1 of the FAA apply to chapter 2 cases when there is no conflict.⁶⁵ As such, the FAA may be construed to allow a stay in cases falling under the Convention as long as a stay is not inconsistent with the Convention, and is factually justified.⁶⁶

The Convention contemplates a limited inquiry by courts when considering a motion to compel arbitration:

- (1) is there an *agreement in writing* to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;
- (2) does the agreement provide for arbitration in the territory of a Convention signatory;
- (3) does the agreement to arbitrate arise out of a commercial legal relationship;
- (4) is the party to the agreement not an American citizen?⁶⁷

If these factors are present, courts should mandate arbitration.

The Convention defines its writing requirement, and as a result, arbitration agreements falling under the Convention, as opposed to the FAA, may be held to a more stringent standard for satisfaction of “writing.”⁶⁸ In *Sen Mar, Inc. v. Tiger Petroleum Corp.*, decided under the Convention, a buyer of crude oil was found to have properly objected to arbitration when only one telex had been forwarded, the party to be charged with arbitration did not sign that telex, and as such, the arbitration clause was not deemed to be an agreement “in writing” under the Convention.⁶⁹

A circuit split exists with regard to the definition of “agreement in writing” under the Convention. The United States Court of Appeals for the Fifth Circuit has held that “agreement in writing” under the Convention is either: “(1) an arbitral clause in a contract or (2) an

65. *Chloe Z*, 109 F. Supp. at 1242, 2000 AMC at 2414.

66. *Id.* (citing *Tenn. Imports Inc. v. Filippi*, 745 F. Supp. 1314, 1323-25 (M.D. Tenn. 1999)); *see also Siderius, Inc. v. Compania de Acero Del Pacifico*, 453 F. Supp. 22, 24 (S.D.N.Y. 1978); *Ripmaster v. Toyoda Gosei*, 824 F. Supp. 116, 117 (E.D. Mich. 1993); *E. Eur. v. Transpartmaschinen, Export-Import, Inc.*, 658 F. Supp. 612, 614 (S.D.N.Y. 1987).

67. *Sedco*, 767 F.2d at 1144-45, 1986 AMC at 710-11 (emphasis added) (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 185-86 (1st Cir. 1982)).

68. *See* 9 U.S.C. § 208 (2000); *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879, 882 (S.D.N.Y. 1991). The Convention differs from the Federal Arbitration Act in that, unlike the FAA, the Convention defines an agreement in writing, although this definition is, of course, hotly disputed as discussed herein.

69. *Sen Mar*, 774 F. Supp. at 883-84.

arbitration agreement, (a) signed by the parties *or* (b) contained in an exchange of letters or telegrams.”⁷⁰

Under the Fifth Circuit’s analysis, if an arbitral clause is contained within a contract, the qualifications applicable to arbitration agreements under the Convention apply, and no signature is required.⁷¹

In contrast to the Fifth Circuit’s approach, the United States Court of Appeals for the Second Circuit has adopted a definition of “agreement in writing” under the Convention as an agreement that requires signing.⁷² The Second Circuit has held that whether it be “an arbitration agreement or an arbitral clause in a contract, [it must be] signed by the parties, or [contained in] an exchange of letters or telegrams.”⁷³ Therefore, in the Second Circuit, arbitration clauses contained in contracts that are not signed nor further evidenced by a series of letters or telegrams will not be enforceable.⁷⁴ In fact, in *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, the party that signed the contract containing the arbitration clause was the agent of the seller of the goods.⁷⁵ The purchase order listed the seller twice by name, although the agent actually signed the contract.⁷⁶ The purchaser accepted the purchase orders from its agent without objection.⁷⁷ Nevertheless, the court found that because the arbitration clause that was contained within the purchase order was not signed by the purchaser and even though the purchaser issued a confirmation of order form, the clause was not contained within a series of letters or telegrams, and as such did not meet the test for “agreement in writing” under the Convention.⁷⁸

The terms of the Convention also focus on the “legal relationship” between the parties that gives rise to an agreement in writing subject to the Convention. The limitation on the Convention is its applicability to commercial relationships.⁷⁹ In determining whether the “agreement in writing” requirement of the Convention was met, the *Chloe Z Fishing*

70. *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669, 1994 AMC 1581, 1586 (5th Cir. 1994) (emphasis added).

71. *Id.* (compare with *Sen Mar*, 774 F. Supp. at 882, which required arbitration clauses to be found either in a signed writing or in an exchange of letters).

72. *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999).

73. *Id.* (rejecting *Sphere Drake*, 16 F.3d at 666).

74. *Id.* (choosing not to enforce arbitration because there was no agreement in writing when arbitration clauses were contained within purchase orders signed only by one party).

75. *Id.* at 213.

76. *Id.*

77. *Id.*

78. *Id.* at 218-19.

79. *Chloe Z Fishing Co. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1244, 2000 AMC 2409, 2418 (S.D. Cal. 2000); FAA, 9 U.S.C. § 2 (2000).

Co. v. Odyssey Re (London) Ltd. court looked to both *Sphere Drake Insurance PLC v. Marine Towing, Inc.* and *Kahn Lucas* to determine whether a P&I policy satisfies that requirement.⁸⁰

That court adopted *Kahn Lucas's* approach in reaching the decision that the conduct of the parties in negotiating P&I policies manifests a consent to arbitral clauses within the meaning of the “exchange of letters or telegrams” requirement of the Convention.⁸¹ The *Chloe Z* court also engaged in a conflict of laws analysis concerning the placement of the P&I policy through a London broker and the manifestation of mutual assent occurring in London.⁸² Because of the contract’s nexus with London, the conduct and occurrences in London rendered federal law inapposite in its analysis.⁸³ An exchange of brokers’ slips and certificates of insurance constituted exchange of letters even though the slips do not contain arbitration agreements.⁸⁴ The *Chloe Z* court adopted an inclusive approach to the writing agreement, and indicated that facsimiles, telex, or e-mails should satisfy the Convention’s exchange of letters or telegrams definition.⁸⁵ That court held that the insured was bound to the arbitration agreement pursuant to agency principles under both U.S. law and English law under which it is well settled that a brokers’ knowledge and acts are binding upon the insured.⁸⁶

C. Claims Not Covered by the FAA or the New York Convention Are Generally Governed by State Law

Courts have held that by enacting the FAA, Congress’s declaration of a national policy favoring arbitration is so strong that it preempts the power of states to require adjudication of claims that the contracting parties agree to arbitrate.⁸⁷ The holding in *Southland Corp. v. Keating* holding is simple: Section 2 of the FAA applies in state as well as federal

80. *Chloe Z*, 109 F. Supp. at 1246-47, 2000 AMC at 2420-22.

81. *Id.* at 1248, 2000 AMC at 2423 (relying on *Kahn Lucas*, 186 F.3d at 218).

82. *Id.* at 1246, 2000 AMC at 2420. The English Arbitration Act that implements the Convention broadens the “agreement in writing” requirement, with the recognition that article II, section 2, of the Convention contains a nonexhaustive list of “writings.” *Id.*

83. *Id.*

84. *Id.* at 1247-48, 2000 AMC at 2422-23.

85. *Id.* at 1250, 2000 AMC at 2426.

86. *Id.* at 1251, 2000 AMC at 2427 (citing *Lien Ho Hsing Steel Enter. Co. v. Weihtag*, 738 F.2d 1455, 1458 (9th Cir. 1984); *Howard Fuel v. Lloyd's Underwriters*, 588 F. Supp. 1103, 1108, 1985 AMC 182, 187-88 (S.D.N.Y. 1984)).

87. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.* 460 U.S. 1, 24 (1983) (“[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”).

courts and withdraws the power of the states to require adjudication of claims that the contracting parties agree to resolve by arbitration.⁸⁸

The United States Supreme Court has considered the applicability of the FAA to cases arising in state court.⁸⁹ The claimant in *Allied-Bruce Terminix Cos. v. Dobson* was a purchaser of a home who sued on a contract that had been entered into by an exterminating company and the previous owner of the home.⁹⁰ Suit was filed in state court, and the exterminators in turn moved for a stay of the litigation pending arbitration under the extermination contract and § 2 of the FAA.⁹¹ The Alabama Supreme Court ruled that the FAA applies only if, at the time the parties entered into the contract containing the arbitration clause, they “contemplated” substantial interstate activity.⁹² The question at issue in *Allied-Bruce* was whether the FAA’s language indicating that it applied to contracts “evidencing a transaction involving commerce” was the functional equivalent of the phrase “affecting commerce,” language signaling congressional intent to exercise its full commerce clause powers.⁹³ In addressing these concerns, the *Allied-Bruce* Court stated that § 2 of the FAA states a method for protecting consumers against unwanted arbitration provisions “upon such grounds as exist in law or in equity for the revocation of any contract.”⁹⁴ However, states could not carve out and invalidate the arbitration provisions of those contracts.⁹⁵ In her concurrence, Justice O’Connor indicated that the application of § 2 to state courts is troublesome, with the effect of displacing many state statutes that are specifically calibrated to protect consumers.⁹⁶ Although Justice O’Connor “adhere[s] to the view . . . that Congress designed the Federal Arbitration Act to apply only in federal courts,” she acknowledged that if the FAA is, in fact, to be applied in state court, it must be read the same way as interpreted by federal courts.⁹⁷ She added

88. *Southland*, 465 U.S. at 10-14.

89. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1994).

90. *Id.* at 268.

91. *Id.* at 269.

92. *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354, 355 (Ala. 1993), *rev’d*, 513 U.S. 265 (1994).

93. *Id.* at 273 (citing *Russell v. United States*, 471 U.S. 858, 859 (1985) (holding that the FAA’s language should be read broadly enough to extend the FAA’s reach to the limits of Congress’s commerce clause power)).

94. *Id.* at 281.

95. *Id.*

96. *Id.* at 282 (O’Connor, J., concurring).

97. *Id.* “I continue to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass.” *Id.* at 283 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 21-36 (1984); *see also* Perry

that “over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”⁹⁸ Recognizing the bounds of *stare decisis*, Justice O’Connor notes that, “[t]hrough wrong, *Southland* has not proved unworkable, and, as always, ‘Congress remains free to alter what we have done.’”⁹⁹

Indeed, *Southland* remains on shaky ground. Three justices severely criticized *Southland* in *Allied-Bruce* concurrences and dissent, with Justice Scalia noting, “I shall not in the future dissent from judgments that rest on *Southland*. I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time. . . .”¹⁰⁰

Although *Southland* and its progeny dictate that cases falling under the FAA be construed in accord with the FAA’s terms, the FAA’s application is limited and should not be applied to disputes outside its ambit.¹⁰¹ Of interest in maritime law are the specific classes of claims exempted from the act as well as other “salty” cases not otherwise subject to construction under general maritime law or falling within admiralty jurisdiction. Predictable cases in which confusion as to whether the FAA applies are contracts to construct vessels or mixed marine and land-based contracts.

Contracts to repair ships are governed by general maritime law, while contracts to build ships are not “maritime contracts,” and thus fall under state law.¹⁰² In cases involving intrastate shipbuilding contracts, the contracts should be subject to state interpretation and enforcement of arbitration agreements, and the protection of state citizens and intrastate

v. Thomas, 482 U.S. 483, 493 (1987) (O’Connor, Stevens, JJ., dissenting); *York Int’l v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984) (O’Connor, J., dissenting from remand).

98. *Allied-Bruce*, 513 U.S. at 283 (O’Connor, J., concurring) (citing *Perry*, 482 U.S. at 493 (Stevens, J., dissenting)).

99. *Id.* at 284 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)).

100. *Id.* at 285; see also *id.* at 285-97 (Scalia & Thomas, JJ., dissenting).

101. See FAA, 9 U.S.C. § 1 (2000).

102. *N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 126-27 (1919) (citing *People’s Ferry Co. v. Beers*, 61 U.S. (20 How.) 393 (1857); *Roach v. Chapman*, 63 U.S. (22 How.) 129 (1859); *Edwards v. Elliot*, 88 U.S. (21 Wall.) 532, 553, 557 (1874); *The Winnebago*, 205 U.S. 354, 363 (1907); see also *Royal Ins. Co. of Am. v. Pier 39, Ltd.*, 738 F.2d 1035, 1036, 1986 AMC 2392, 2393 (9th Cir. 1984). This concept arises out of the personification of vessels, and the concept that “[a] ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching, she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics’ liens created by state law enforceable [sic] in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed and becomes a subject of admiralty jurisdiction.” *Tucker v. Alexandroff*, 183 U.S. 424, 438 (1902).

interests should all be considered. Indeed, if the *Southland* dissenters ultimately prevail, such contracts will be subject to state law as long as the cases are pending in state court.

III. REQUIREMENTS TO BE BOUND TO ARBITRATION

A. *Agreement*

In order for an arbitration agreement to be valid, there must, in fact, be an agreement. Arbitration is a matter of contract and should not be compelled without agreement.¹⁰³ “This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.”¹⁰⁴ In general, in determining whether to enforce an arbitration clause, courts must first decide whether there was in fact an agreement to arbitrate, and second, whether any of the issues raised within the cause of action fall within the ambit of that arbitration agreement.¹⁰⁵ As discussed below, there are a number of exceptions to traditional requirements for formation of a contract to arbitrate.

The party seeking to compel arbitration has the burden of proving the existence of an agreement to arbitrate.¹⁰⁶ When a party opposes arbitration by challenging the existence of an arbitration agreement, courts proceed summarily.¹⁰⁷ The moving party must demonstrate by affidavit or otherwise that there is no genuine dispute as to any material fact and that it is entitled to the relief requested as a matter of law,¹⁰⁸ and

103. *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990); *Diskin v. J.P. Stevens & Co.*, 836 F.2d 47, 50-51 (1st Cir. 1987) (finding that under New York law, an arbitration clause is a material addition which can only become part of a contract if it is expressly assented to by both parties); *Cargill Ferrous Int'l v. M/V Anatoli*, 935 F. Supp. 833, 837, 1996 AMC 1811, 1816 (E.D. La. 1996).

104. *AT&T*, 475 U.S. at 648-49 (citing *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374 (1974)).

105. *Cargill Ferrous*, 935 F. Supp. at 837, 1996 AMC at 1815 (citing *In re Hornbeck Offshore (1984) Corp.*, 981 F.2d 752, 754, 1993 AMC 1248, 1251 (5th Cir. 1993)).

106. *In re First Thermal Sys., Inc.*, 182 B.R. 510, 513 (Bankr. E.D. Tenn. 1995); *United States v. Miller-Stauch Bankr. Constr. Co.*, 904 F. Supp. 1209, 1213 (D. Kan. 1995); *In re Am. Freight Sys., Inc.*, 164 B.R. 341, 345 (Bankr. D. Kan. 1994); *Liberty Univ., Inc. v. Kemper Secs. Group, Inc.*, 758 F. Supp. 1148, 1151 (W.D. Va. 1991); *Fisser v. Int'l Bank*, 175 F. Supp. 305, 307, 1959 AMC 1192, 1193-94 (S.D.N.Y. 1958).

107. *First Thermal*, 182 B.R. at 512-13.

108. *Id.*

the Court must give the party opposing the motion to compel arbitration “the benefit of all reasonable doubts and inferences that may arise.”¹⁰⁹

Although the court recognized, in *In re Talbott Big Foot, Inc.*,¹¹⁰ that the FAA strongly favors arbitration as a matter of federal public policy, the court acknowledged that the Act will not require arbitration unless the parties to a particular dispute have actually agreed to refer the dispute to arbitration.¹¹¹ The mandatory stay provisions of the FAA do not bind those who are not contractually bound to the arbitration agreement.¹¹² *Talbott Big Foot* involved personal injury and wrongful death claimants’ lawsuits against a protection and indemnity insurer pursuant to Louisiana’s direct action statute.¹¹³ That court held the arbitration clause contained in the P&I policy did not mandate a stay of litigation pending arbitration of the claims because the claimant had not agreed to the arbitration clause in the policy issued by the insurer to the insureds.¹¹⁴ This was true even though the insured was seeking the benefit of the P&I policy by suing that entity directly under Louisiana Revised Statute 22:655.¹¹⁵

In *Fleetwood Enterprises, Inc. v. Gaskamp*,¹¹⁶ the Fifth Circuit considered a case filed by the Gaskamps, a married couple who bought a mobile home from Fleetwood, and resided in that home with their two children who eventually fell ill due to exposure to formaldehyde.¹¹⁷ The parents brought suit in Mississippi state court individually, and as next friends of their children, alleging liability for personal injury resulting from the exposure.¹¹⁸ Thereafter, the defendants sought to compel arbitration pursuant to the home’s financing agreement.¹¹⁹ The district court determined that the family’s claims must be arbitrated and that the

109. *Smith Wilson Co. v. Trading and Dev. Establishment*, 744 F. Supp. 14, 16 (D.D.C. 1990) (quoting *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980)).

110. 887 F.2d 611, 1990 AMC 1780 (5th Cir. 1989).

111. *Id.* at 614, 1990 AMC at 1784 (citing *AT&T Techs. v. Communications Workers of Am.*, 475 U.S. 643, 647-48 (1986); *Del E. Webb Constr. v. Richardson Hosp. Auth. Inc.*, 823 F.2d 145, 148 (5th Cir. 1987); *Interocean Shipping Co. v. Nat’l Shipping and Trading Corp.*, 523 F.2d 527, 538-39, 1975 AMC 1238, 1298-99 (2d Cir. 1975)).

112. *Id.*, 1990 AMC at 1784-85 (citing *Coastal (Bermuda) Ltd. v. E.W. Saybott & Co.*, 761 F.2d 198, 203 n.6 (5th Cir. 1985); *Nederlandse Erts-Tankersmaatschappij v. Isbrandtsen Co.*, 339 F.2d 440, 441, 1965 AMC 177, 178 (2d Cir. 1964)).

113. *Id.*, 1990 AMC at 1781-82.

114. *Id.* at 614, 1990 AMC at 1784.

115. *Id.* Compare this result to that outlined for third-party beneficiaries discussed in the *Fleetwood Enterprises, Inc. v. Gaskamp* case, *infra* text accompanying note 116.

116. 280 F.3d 1069 (5th Cir. 2002).

117. *Id.* at 1071-72.

118. *Id.* at 1072.

119. *Id.* at 1073.

children were bound to arbitration as permanent residents of the home “whose presence and use is wholly derivative of the parents’ use.”¹²⁰ The Fifth Circuit examined the validity of this determination, and acknowledged that ambiguities should be resolved in favor of arbitration, but that “this federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead ‘[o]rdinary contract principles determine who is bound.’”¹²¹ The *Fleetwood* court further noted, “[t]he federal policy favoring arbitration does not extend to a determination of who is bound because, as stated by the Supreme Court, the purpose of the Federal Arbitration Act is ‘to make arbitration agreements as enforceable as other contracts, but not more so.’”¹²² In determining that the Gaskamp children’s claims were not subject to arbitration, the Fifth Circuit applied Texas law, which only recognizes two instances when nonsignatories are bound to arbitration: suits to enforce contractual obligations and third-party beneficiaries.¹²³ The children were not found to fall under either category and were thus not bound to arbitration.¹²⁴

B. *Dispute Must Fall Within the Scope of the Agreement*

In determining whether a dispute is subject to arbitration, a court must not only determine whether the parties agreed to arbitrate, but whether the dispute falls within the scope of the arbitration agreement. In *In re Hornbeck Offshore (1984) Corp.*,¹²⁵ a dispute between cargo interests and charterers who sought to bind cargo interests to arbitration

120. *Id.*

121. *Id.* (quoting *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994)); see also *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 49 U.S. 468, 478 (1989) (“The FAA does not require parties to arbitrate when they have not agreed to do so”); *EEOC v. Waffle House, Inc.*, 534 U.S. ___, 122 S. Ct. 754, 764 (2002) (“Because the FAA is ‘at bottom a policy guaranteeing the enforcement of private contractual agreements’ . . . we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals *It goes without saying that a contract cannot bind a nonparty.*” (emphasis added) (internal citations omitted)); *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994) (“The federal policy [favoring arbitration], however, *does not extend to situations in which the identity of the parties who have agreed to arbitrate is unclear*” (emphasis added)).

122. *Fleetwood*, 280 F.3d at 1074 n.5 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 1969 AMC 222 (1967) (AMC reporter summarizing case); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625-26 (1985) (“The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered.”)).

123. *Id.* at 1074. Of particular interest here is that although third-party beneficiary status is specifically recognized and noted, children are not deemed third-party beneficiaries. Compare *Fleetwood* result with cases cited below as exceptions to the party requirement.

124. *Id.*

125. 981 F.2d 752, 1993 AMC 1248 (5th Cir. 1993).

via clauses contained within the charter party incorporated by reference thereto in the bills of lading triggered this “scope” issue.¹²⁶ In *Hornbeck*, the arbitration clause in the charter party stated that “[s]hould any disputes arise between [them], the matter in dispute shall be referred to [arbitration].”¹²⁷ In interpreting a very similar arbitration clause, the Fifth Circuit “question[ed] the merit of [the charterer’s] contention that any of the disputes involved in this litigation, other than disputes between it and [the ship owner], ‘arise out of’ the charter party between it and [the owner of the vessel].”¹²⁸ In finding that the carrier had waived any right to arbitration that it may have possessed, the court below was “not convinced that disputes between third parties and one of the parties to a charter party containing an arbitration clause can be said to ‘arise out of’ the charter party.”¹²⁹

Similarly, the Court in *Siderius, Inc. v. M/V Ida Prima*,¹³⁰ also questioned a substantially similar arbitration clause:

Finally, I question whether the arbitration clause, by its terms, applies to disputes arising under the bill of lading. The charter party states that disputes “arising under this Charter Party” shall be arbitrated in London. As seen from the viewpoint of the consignee of freight, the dispute does not arise under the charter. He has no interest in the charter, which governs the business relationship between the vessel owner (or disponent owner) and the charterer. He would view the bill of lading as the document upon which his rights are founded. Thus, even in the unlikely event that the consignee were aware of the arbitration clause in the charter party, in my view he would not understand it to cover his claim for shortage or damage to the cargo covered by his bill of lading.¹³¹

Under these cases, although the parties would be bound to arbitrate under the first prong of the analysis questioning whether the parties are subject to the clause, arbitration would be improper because the dispute fell outside the scope of the applicable clause.

126. *Id.* at 754, 1993 AMC at 1249-50.

127. *Id.* at 753, 1993 AMC at 1249 (alteration in original).

128. *Bunge Edible Oil Corp. v. M/V Torm Rask*, 756 F. Supp. 261, 268, 1991 AMC 1102, 1112 (E.D. La. 1991), *aff’d* 949 F.2d 786, 1992 AMC 2227 (5th Cir. 1992); *see also* Valero Ref., Inc. v. M/T Lauberhorn, 813 F.2d 60, 64, 1987 AMC 2100, 2105 (5th Cir. 1987) (holding that “[o]rdinary contract principles determine who is bound by a written arbitration agreement”).

129. *Bunge Edible Oil*, 756 F. Supp. at 268 n.8, 1991 AMC at 1112 n.8.

130. 613 F. Supp. 916 (S.D.N.Y. 1985).

131. *Id.* at 922.

C. *Signature Requirement, or Lack Thereof*

Despite the necessity that parties agree to arbitration in order to be bound to the terms of an arbitration agreement, “[i]t 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.”¹³² In *Thomson-CSF v. American Arbitration Ass’n*, the court stated that “a nonsignatory party may be bound to an arbitration agreement if so dictated by the ‘ordinary principles of contract and agency.’”¹³³

Courts consistently differentiate between an arbitration clause that specifically identifies the parties to which it applies and broader forms of arbitration clauses that do not restrict the parties.¹³⁴ Language providing that “all disputes arising out of this contract are to be submitted to arbitration” is broad enough to be applied to nonsignatories, while terms requiring arbitration “between the disponent owner and the charters” or “between contracting parties” are narrow and do not encompass claims involving nonsignatories.¹³⁵

*Zimring v. Coinmach Corp.*¹³⁶ involved a claim to enjoin arbitration.¹³⁷ Therein, the plaintiff, Zimring, signed an asset purchase agreement both as a representative of the seller and in his individual capacity.¹³⁸ Zimring was also a founder of the company selling its

132. *Fisser v. Int’l Bank*, 282 F.2d 231, 233, 1961 AMC 306, 308 (2d Cir. 1960); *Thomson-CSF v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1063-64 (2d Cir. 1993).

133. *Thomson-CSF*, 64 F.3d at 776 (citing *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524, 1980 AMC 2050, 2053 (2d Cir. 1980); *A/S Custodia v. Lessin Int’l, Inc.*, 503 F.2d 318, 320, 1974 AMC 865, 867 (2d Cir. 1974) (per curiam)). Under the 1996 Arbitration Act of the United Kingdom, an agreement, coupled with intent to be bound to arbitration is binding, regardless of whether the parties have signed the agreement. United Kingdom Arbitration Act, 1996, ch. 23, § 5(2)(1). Intent may be ascertained from extrinsic evidence and surrounding circumstances. *Excomm Ltd. V. Ahmed Abdul-Qawi Bamaodah (The St. Raphael)*, [1985] 1 Lloyd’s Rep. 403, 408-09 (C.A. 1984).

134. *Lucky Medals Corp. v. M/V Ave.*, 95 Civ. 1726, 1995 WL 575195, at *2, 1996 AMC 265, 267 (S.D.N.Y. Sept. 28, 1995) (quoting *In re Southwind Shipping Co.*, 709 F. Supp. 79, 82, 1989 AMC 1088, 1092 (S.D.N.Y. 1989)); see also *Limonium Maritime S.A. v. Mizushima Marineria, S.A.*, No. 96 Civ. 1888, 1999 WL 46721, at *4, 2000 AMC 343, 348-49 (S.D.N.Y. Feb. 1, 1999).

135. *Limonium Maritime*, 1999 WL 46721, at *5, 2000 AMC at 350 (citing *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venz.*, 991 F.2d 42, 47-49, 1993 AMC 2916, 2923-25 (2d Cir. 1993); *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687, 688-89, 1952 AMC 1931, 1933 (2d Cir. 1952); *Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503, 505-06, 1966 AMC 237, 239-40 (2d Cir. 1965); *Continental U.K. Ltd. v. Anagel Confidence Compania Naviera, S.A.*, 658 F. Supp. 809, 812, 1987 AMC 2012, 2016-17 (S.D.N.Y. 1987)).

136. No. 00 Civ. 8111, 2001 WL 1855115, at *1 (S.D.N.Y. Dec. 19, 2000).

137. *Id.*

138. *Id.*

assets.¹³⁹ Plaintiff limited his individual signature to only two particular provisions contained within the purchase agreement, one involving his obligation to perform consulting services, and the other regarding covenants not to compete and confidentiality requirements.¹⁴⁰ Under that contract, the parties agreed to arbitrate “[a]ny and all questions, disputes or controversies arising in connection with [the] [a]greement.”¹⁴¹ Plaintiff sought a declaratory judgment that he was not bound to arbitrate claims for breach of the covenant not to compete and confidentiality requirements in the purchase agreement.¹⁴² The court focused on Zimring’s declaration that he had not been a party to the particular contractual provisions that dealt with arbitration and that his signature was limited to the two discrete paragraphs of the contract, neither of which contained an arbitration agreement.¹⁴³ The court determined that the two provisions that were signed personally and individually by Zimring constituted discrete contractual requirements, which created a separate contract within the whole purchase agreement that did not incorporate the arbitral clause.¹⁴⁴

Although party signatures are certainly indicative of an agreement to arbitrate and put the signing parties on actual notice of those terms, signature is not required.¹⁴⁵ This may well come as a surprise to industry professionals, but as the following exceptions illustrate, a nonparty, nonsignator may be bound to arbitration in a number of ways regardless of agreement, signature, or notice.

IV. EXCEPTIONS TO THE AGREEMENT REQUIREMENT—WHEN NONPARTIES ARE BOUND TO ARBITRATION

Although the FAA and the Convention both require a written agreement to arbitrate, courts have been increasingly willing to enforce exceptions to such requirements allowing nonsignatories and, in fact, nonparties to be bound to an agreement containing an arbitration clause under general contract or agency principles.¹⁴⁶ As noted above, a

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at *2.

144. *Id.* at *3. Here, the purchaser also argued that for consistency, all provisions of the purchase agreement should be read together, an approach that was rejected by the court, which found a separate signature block for an individual’s signature would be moot and nonsensical. *Id.*

145. *Id.*

146. As noted above, state law contractual or agency principles are considered in making these determinations.

signature is not required to bind a party to arbitration. Generally, courts rely on principles of contract and agency law to determine which nonsignators may bind signing parties to an arbitration agreement.¹⁴⁷ Conversely, the exceptions are also applied to determine which nonparties may be haled into arbitration.

Traditionally, there are five theories of agency and contract law that constitute exceptions to the signature requirement. The exceptions are common law principles of agency and contract, and specifically include: (1) agency, (2) estoppel, (3) alter ego/veil piercing, (4) incorporation by reference, and (5) assumption.¹⁴⁸

Exceptions may be triggered when a signator to an arbitration agreement seeks to bind a nonsignatory or, alternatively, when the court estops a signator from avoiding arbitration with a nonsignatory when the issues the nonsigning party is seeking to resolve in arbitration are intertwined with an agreement that the estopped party has signed.¹⁴⁹ Whether a nonparty's claims are sufficiently related to the agreement in order to justify compelling arbitration requires an examination of the relationship of the entities involved, as well as the relationship of the "alleged wrongs to the nonsignatory's obligations and duties under the agreement at issue."¹⁵⁰ The test often centers on whether the nonsignator was either linked contractually to the signator, was engaged in a previous business relationship with the signing parties or the claims arise out of the agreement containing the arbitration clause.¹⁵¹ In cases in which there are interrelated issues between a cause of action and an arbitration already proceeding, the claims in litigation may be arbitrated if they are "intimately founded in and intertwined with" the claim involved in

147. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995).

148. *Id.*; *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 445 (3d Cir. 1999); *see also* *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmBH*, 206 F.3d 411, 416-17 (4th Cir. 2000); *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994); *In re Oil Spill by Amoco Cadiz*, 659 F.2d 789, 794, 1981 AMC 2407, 2413-14 (7th Cir. 1981); *In re Hydro-Action, Inc.*, 266 B.R. 638, 640 (Bankr. E.D. Tex. 2001). In referring to these five theories under which a nonsignatory may be bound to arbitration, the Fifth Circuit has found these exceptions as only reaching "a little further than Texas," where nonparties may only be bound to arbitration when they file suit to enforce contractual remedies or when *intended* third-party-beneficiaries. *See generally* discussion of *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1076 (5th Cir. 2002) (holding that children are not third-party beneficiaries of their parents' contract for housing).

149. *Thomson-CSF*, 64 F.3d at 779; *Orange Chicken L.L.C. v. Nambe Mills, Inc.*, No. 00 CIV. 4730, 2000 WL 1858556, at *4 (S.D.N.Y. Dec. 19, 2000); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988).

150. *Orange Chicken*, 2000 WL 1858556, at *5 (citing *Fluor Daniel Intercontinental, Inc. v. Gen. Elec. Co.*, No. 98 Civ. 7181, 1999 WL 637236, at *6 (S.D.N.Y. Aug. 20, 1999)).

151. *Id.* (citing *Sunkist*, 10 F.3d at 758).

arbitration.¹⁵² A business relationship analysis may mean that in claims not founded in contract, absent a standing business relationship, noncontracting parties may not be forced to arbitrate arm's length business relationships. Specific exceptions to the signature and party requirements are discussed below.

A. Agency

“Traditional principles of agency law may bind a nonsignatory to an arbitration agreement.”¹⁵³ As agency relationships arise by mutual assent of the principal and the agent, wherein both parties agree that the agent will act for and on behalf of the principal, the agent is subject to the principal's control.¹⁵⁴ Essentially, an agent with actual or apparent authority enters into contracts on behalf of the principal, and third parties may rely on that actual or apparent authority in binding the principal.¹⁵⁵ In such agreements, the principal has agreed to the terms of the contracts which the agent has negotiated and/or executed on his behalf, and agency is a justifiable exception to the requirement that parties agree to arbitration.¹⁵⁶

Under certain circumstances, an agent for a principal may be bound to the terms of an arbitration agreement, but generally “an agent for a *disclosed* principal is not a party to and is not personally bound by a contract that he signs on behalf of disclosed principal—a principle that has consistently been applied in the arbitration context.”¹⁵⁷

In *Arhontisa Maritime Ltd. v. Twinbrook Corp.*¹⁵⁸, the agent involved was the representative of a vessel owner in a contract for the sale of a vessel.¹⁵⁹ Pursuant to the contract, the buyer was to wire the

152. *Id.* at *6.

153. *Thomson-CSF*, 64 F.3d at 777 (citing *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 31-32, 1989 AMC 537, 545-46 (1st Cir. 1988); *Interbras Cayman Co. v. Orient Victory Shipping Co., S.A.*, 663 F.2d 4, 6-7, 1982 AMC 737, 739-40 (2d Cir. 1981) (per curiam); *A/S Custodia v. Lessin Int'l, Inc.*, 503 F.2d 318, 320, 1974 AMC 865, 867 (2d Cir. 1974) (per curiam); *Fisser v. Int'l Bank*, 282 F.2d 231, 233-38, 1961 AMC 306, 309-12 (2d Cir. 1960).

154. *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 445 (3d Cir. 1999).

155. *Id.*

156. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 1-14 (1958).

157. *Arhontisa Maritime Ltd. v. Twinbrook Corp.*, No. 01 Civ. 5044, 2001 WL 1142136, at *4 (S.D.N.Y. Sept. 27, 2001) (emphasis added) (citing *Bel-Ray*, 181 F.3d at 445 (“An employee or an agent who did not agree to arbitrate can [not] be compelled to arbitrate his personal liability on the basis of a commitment made by the corporation he serves.”)); *see also* *Salim Oleochemicals, Inc. v. M/V Shropshire*, 169 F. Supp. 2d 194, 200 n.3 (S.D.N.Y. 2001) (holding that parties acting as “disclosed agents . . . accordingly, are not proper defendants in this action [to compel arbitration]”).

158. No. 01 Civ. 5044, WL 1142136, at *1 (S.D.N.Y. Sept. 27, 2001).

159. *Id.*

purchase amount to the agent's personal bank account.¹⁶⁰ The parties did not contest that the agent was a nonparty to the arbitration clause, although the agent was an "attorney-in-fact" who negotiated a bill of sale and received wired funds into his personal account.¹⁶¹ When problems arose with the vessel, the buyer demanded that the agent be joined as a party to the arbitration pursuant to a theory of fraudulent concealment.¹⁶² The court rejected this approach, finding instead that the agent was not a party to the agreement containing the arbitration clause and could not be personally bound thereto.¹⁶³

Guarantors of contracts, specifically charter parties, cannot generally be forced into arbitration on the basis of an arbitration clause contained within the charter because guarantors are not parties to the charter.¹⁶⁴

B. Estoppel

Estoppel is a well-established, yet little-understood, exception to the agreement requirement for binding arbitration. The underlying concept in the doctrine of estoppel is fairness.¹⁶⁵ Just as a party may waive a number of their other rights, rights and objections to arbitration are similarly waiveable.¹⁶⁶ Typically, estoppel arises in circumstances such as those in which (1) the party fails to invoke their right to arbitration or object to arbitration timely by participating in arbitration or litigation in contravention of their dispute to that process, or (2) the party is deemed to be a third-party beneficiary.¹⁶⁷ The authors submit that only the first of these theories of estoppel is equitable and in line with the requirement

160. *Id.*

161. *Id.*

162. *Id.* at *2.

163. *Id.* at *2-4; *see also* Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co., 957 F. Supp. 839, 841-42 (S.D. Miss. 1997) (enforcing an arbitration agreement against a nonsignatory whose *agent* had signed the contract); Monumental Life Ins. Co. v. R.A.J. Holdings, Inc., No. Civ.A.99-1224, 1999 WL 632891, at *2-*3 (E.D. La. Aug. 18, 1999) (enforcing an agreement because the nonsignatory was found to be part of a single business enterprise with the party to the contract, and the contract reached this determination through "piercing" the corporate veil).

164. *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 523 F.2d 527, 539, 1975 AMC 1283, 1299 (2d Cir. 1975); *Nissho Iwai Corp. v. Mizushima Marinera S.A.*, No. 95-3771, 1996 WL 904562, at *3 (D.N.J. Apr. 23, 1996).

165. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir.), *cert. denied*, 531 U.S. 1013 (2000) (adopting the equitable estoppel theory announced by the Eleventh Circuit in *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993)); *see also* *Watkins Eng'rs. & Constructors, Inc. v. Deutz AG*, No. Civ. A.3:01, 2001 WL 1545738, at *2 (N.D. Tex. 2001).

166. *Grigson*, 210 F.2d at 527.

167. *Id.*

that parties must agree to release litigation rights in favor of arbitration. The third-party beneficiary theory is too broadly applied and not enforced consistently. Status under this theory may subject a party to arbitration and mandatory waiver of litigation rights when that party did not participate in, have notice of, or negotiate the terms of that contract.

1. Estoppel by Failing to Assert Rights or Object Thereto in a Timely Manner

The right to arbitrate or avoid arbitration, like any contractual right, can be waived if not asserted in a timely manner.¹⁶⁸ Waiver occurs when a party has delayed invoking arbitration, causing its adversary to incur unnecessary delay or expense.¹⁶⁹ Waiver will also be found “when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.”¹⁷⁰ As noted in *E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas*.¹⁷¹

When one party reveals a disinclination to resort to arbitration on any phase of suit involving all parties, those parties are prejudiced by being forced to bear the expenses of a trial Arbitration is designed to avoid this very expense. Substantially invoking the litigation machinery qualifies as the kind of prejudice . . . that is the essence of waiver.¹⁷²

Motion practice and some discovery activities are inconsistent with claiming a right to arbitrate.¹⁷³ Engaging in discovery to which a party may not be entitled in an arbitration proceeding may conflict with claiming a right to arbitrate, as is requiring an adverse party to expend resources litigating a claim that would not otherwise have been incurred had the arbitration process moved forward.¹⁷⁴ The court must also consider whether there has been prejudice to the party opposing arbitration.¹⁷⁵

The party seeking to enforce arbitration should make a claim or a defense of arbitration in its answer, if not earlier.¹⁷⁶ If the answer contains

168. *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1158 (5th Cir. 1986).

169. *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993); *S&H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990).

170. *Price*, 791 F.2d at 1158 (quoting *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986)).

171. 559 F.2d 268 (5th Cir. 1977).

172. *Id.* at 269.

173. *Price*, 791 F.2d at 1159; *S&H Contractors*, 906 F.2d at 1514.

174. *Cent. States, Southeast & Southwest Areas Pension Fund v. Cent. Transp., Inc.*, 861 F. Supp. 1402, 1408 (N.D. Ill. 1994), *aff'd*, 69 F.3d 1312 (7th Cir. 1995).

175. *Price*, 791 F.2d at 1159-61.

176. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1150, 1986 AMC 706, 714 (5th Cir. 1985) (citing *Hilti, Inc. v. Oldach*, 392 F.2d 368, 371 (1st Cir. 1968)).

a defense of arbitration, the burden is heavy on the party seeking to argue waiver of such a defense.¹⁷⁷ Appropriate delays may be due to pre-arbitration discovery, jurisdictional matters and disputes, and the like.¹⁷⁸ One test for waiver is whether the parties have engaged in substantial protracted litigation, but delay by itself is not sufficient to constitute waiver, particularly because the federal presumption in favor of arbitration will not make a determination of waiver lightly.¹⁷⁹ A number of factors are to be considered in determining whether waiver has been established, including: the time elapsed from the commencement of the litigation to the request for arbitration; how extensively the parties have engaged in litigation; and proof of prejudice, specifically, the conducting of pre-trial discovery (which is otherwise not available in arbitration) and delays and expenses.¹⁸⁰

A waiver argument has been rejected when the party seeking the stay pending arbitration waited eight months to bring the motion, filed an answer, propounded interrogatories and a document request, moved for a protective order, and agreed to a joint motion for a continuance requesting an extension of the discovery period.¹⁸¹ The Fifth Circuit noted that “this and other courts have allowed such actions as well as considerably more activity without finding that a party has waived a contractual right to arbitrate.”¹⁸² There is a presumption against waiver of right to arbitrate in the Fifth Circuit.¹⁸³ The burden of proof to establish waiver is on the party seeking the waiver.¹⁸⁴ Because there is a presumption against waiver, substantial delay prior to request of arbitration, filing answers, engaging in discovery and filing discovery pleadings may not be sufficient to constitute waiver.¹⁸⁵

177. *Hilti*, 392 F.2d at 371.

178. *Id.*

179. *Id.*; see also *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995); *In re HBLS, L.P.*, No. 01 Civ. 2025, 2001 WL 1490696, at *5 (S.D.N.Y. Nov. 21, 2001) (“[a]ny doubts concerning whether there has been a waiver are resolved in favor of arbitration.”).

180. *HBLS*, 2001 WL 1490696, at *6 (citing *S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 83 (2d Cir. 1988)). In *HBLS*, the party requesting arbitration waited sixteen (16) months before doing so, and had previously filed a motion for a deficiency judgment, neither of which constituted protracted, substantial litigation sufficient to constitute waiver. *Id.*

181. *Tenneco Resins, Inc. v. Davy Int’l, AG*, 770 F.2d 416, 420 (5th Cir. 1985).

182. *Id.* at 421.

183. *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1985); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 661 (5th Cir. 1995).

184. *Southwest Indus. Imp. & Exp., Inc. v. Wilmod Co.*, 524 F.2d 468, 470 (5th Cir. 1975); *Tenneco*, 770 F.2d at 420; *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d, 1156, 1158 (5th Cir. 1986); *Gen. Guar. Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924, 929 n.5 (5th Cir. 1970).

185. See *Tenneco*, 770 F.2d at 420-21.

2. Estoppel and Third-Party Beneficiaries

Nonparties have also been held to arbitrate claims in cases in which they are determined to be third-party beneficiaries of a contract containing an arbitration agreement. In these circumstances, parties who have not sued under the contract but who are in a position to benefit from the enforcement of the contract may have their claims forced to arbitration, although they were not actual or intended parties of the contract.¹⁸⁶ However, it seems inappropriate to bind them when they are not given the opportunity to consider and reject any arbitration provision before the transaction is bound. The standards for third-party beneficiary status vary, which is in part due to the application of state law contractual principals as guiding the interpretation of the FAA.¹⁸⁷ State approaches to third-party beneficiary status from selected maritime jurisdictions are noted below.¹⁸⁸

186. See *Zac Smith & Co. v. Moonspinner Condominium Ass'n*, 472 So. 2d 1324, 1324-25 (Fla. Dist. Ct. App. 1985) (per curiam).

187. *Id.* at 1325.

188. In Florida, third-party beneficiaries may be bound to arbitration clauses. See *Tartell v. Chera*, 668 So. 2d 1105, 1106 (Fla. Dist. Ct. App. 1996) (denying third-party beneficiary status when the complaint did not assert claims under the contract and “[a]t most, the appellants are incidental beneficiaries . . . not third-party beneficiaries which would require that the parties to the contract *intended to primarily and directly benefit* the [nonparty]” (emphasis added)); *Terminix Int’l Co. v. Ponzio*, 693 So. 2d 104, 105 (Fla. Dist. Ct. App. 1997) (hinging third party beneficiary status on the nonsigning plaintiffs claims to the contract as members of a class intended to benefit from the contract). Florida’s focus seems to center on whether the third party was intended to be a beneficiary which is evidenced when “the parties clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party.” *Hirshenson v. Spaccio*, 800 So. 2d 670, 673 (Fla. Dist. Ct. App. 2001) (citing *Jim Macon Bldg. Contractors, Inc. v. Lake County*, 763 So. 2d 1223 (Fla. Dist. Ct. App. 2000)).

Similarly, California recognizes two general exceptions to the signature requirement: third-party beneficiaries and cases in which the nonsignator has a “preexisting relationship” with one of the parties to the contract. See *County of Contra Costa v. Kaiser Found. Health Plan Inc.*, 54 Cal. Rptr. 2d 628, 633 (Cal. Ct. App. 1996) (citing cases regarding a preexisting relationship that seem to center on issues common to third-party beneficiaries and agency principals in order to determine whether the preexisting relationship exists); *Benasra v. Marciano*, 112 Cal. Rptr. 2d 358, 362 (Cal. Ct. App. 2001) (choosing to compel arbitration of a claim against a person who signed solely in his representative capacity and who was not deemed to be a third-party beneficiary). Third-party beneficiary status may turn on whether the nonsignator seeks contractual remedies, in which cases that nonsignator would likewise be bound to arbitrate under estoppel principles for contractual claims outlined alone. *Van Tassel v. Superior Court of Fresno County*, 526 P.2d 969, 970 (Cal. 1974).

Louisiana recognizes third-party beneficiaries when the contract has stipulated a benefit and the intent to do so must be manifestly clear. *Paul v. La. State Employees’ Group Benefit Program*, 762 So. 2d 136, 140 (La. Ct. App. 2000). A contract for the benefit of others, or a *stipulation pour autrui* is not presumed, and in order for an agreement to be classified as such, the “third-party relationship must form the consideration for a condition of the contract, and the benefit may not be *merely incidental* to the contract.” *Stadtlander v. Ryan’s Family Steakhouses, Inc.*, 794 So. 2d 881, 886 (La. Ct. App. 2001) (emphasis added) (citing *Paul*, 762 So. 2d at 140).

Third-party beneficiaries may obtain such status by admission. An entity seeking to enforce the terms of an arbitration agreement in a contract to which it was not a party may claim third-party beneficiary status by suing in contract and specifically asserting status as a third-party beneficiary.¹⁸⁹ This status implies that the party either has a contractual right or is set to receive a direct benefit from the enforcement of the contract containing the arbitration provision.¹⁹⁰ In *Grigson v. Creative Artists Agency, L.L.C.*,¹⁹¹ the Fifth Circuit determined that a nonsignatory to a contract with an arbitration clause may be permitted to compel arbitration under the theory of equitable estoppel when the cause of action is “intertwined with, and dependent upon” the contract containing the arbitration agreement.¹⁹² Although the *Grigson* court acknowledged that the determination of such a question is, of course, factually dependent, it adopted the “intertwined-claims test” as specified by the United States Court of Appeals for the Eleventh Circuit in *MS Dealer Serv. Corp. v. Franklin*.¹⁹³

Although *Grigson* may be applied to allow nonsignators to enforce arbitration of their claims with parties to an arbitration contract as third-party beneficiaries, the converse of *Grigson*, requiring nonsignators to be compelled to arbitrate claims they do not wish to arbitrate pursuant to contracts to which they are not privy, has not yet been established by the Fifth Circuit. As such, *Grigson* does not end the query. Binding a

New York also recognizes third-party beneficiaries, but “an intent to benefit the third party must be shown and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts.” *Port Chester Elec. Constr. Corp. v. Atlas*, 357 N.E.2d 983, 986 (N.Y. 1976). The third party must be directly affected by the contract. *Hudak v. Hornell Indus., Inc.*, 106 N.E.2d 609, 612 (N.Y. 1952); *see also* *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Barth v. Addie Co.*, 2 N.E.2d 34 (N.Y. App. Div. 1936); *Gulla v. Barton*, 149 N.Y.S. 952 (N.Y. App. Div. 1914); *Lawrence v. Fox*, 20 N.Y. 268 (N.Y. App. Div. 1859). In circumstances in which a number of contractual relationships are involved, a contract must “expressly state that the intention of the contracting parties is to benefit a third party [if not] . . . [s]uch third parties are generally considered mere incidental beneficiaries.” *Port Chester*, 357 N.E.2d at 986; *see also* *Int’l Erectors Inc. v. Wilhoit Steel Erectors & Rental Serv.*, 400 F.2d 465 (5th Cir. 1968); *Watson v. Am. Creosote Works*, 84 P.2d 431 (Okla. 1938).

189. *See* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 779D (1952).

190. *See generally id.*

191. 219 F.3d 524 (5th Cir. 2000).

192. *Id.* at 527 (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993); *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 841 n.9 (7th Cir. 1981)).

193. 177 F.3d 942, 947 (11th Cir. 1999) (holding that equitable estoppel is triggered when the signatory to an arbitration agreement must rely on the terms of that agreement in asserting claims against a nonsignatory and, secondly, that the signatory to the contract raises allegations “of substantially interdependent and concerted misconduct by both the nonsignatory and one or more signatories of the contract”); *see also* *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 343 (11th Cir. 1984).

signator to an arbitration agreement in defense of claims by nonsignators is an entirely different matter than requiring a party that did not enter into an arbitration agreement to abandon its trial and appellate remedies. “It is one thing to permit a nonsignatory to relinquish his right to a jury trial, but quite another to compel him to do so.”¹⁹⁴

Status as a third-party beneficiary may estop a nonparty to an arbitration agreement from avoiding arbitration. This issue was particularly highlighted by *American Bureau of Shipping v. Tencara Shipyard, SPA*.¹⁹⁵ In *Tencara*, the court determined that under general maritime law, direct third-party beneficiaries to a contract containing an arbitration agreement could be bound to arbitration.¹⁹⁶ Therein, the vessel owners contracted with a shipbuilder for construction of a yacht.¹⁹⁷ The shipbuilder entered into a request for class agreement with the American Bureau of Shipping (ABS), which the owners were sent a copy of prior to delivery.¹⁹⁸ The class agreement contained an arbitration clause.¹⁹⁹ The owners secured insurance coverage and registration and/or approval of the vessel for use in French waters that was premised on the existence of valid ABS classification.²⁰⁰ The *Tencara* court noted the major benefits for ship owners in obtaining vessel classification include less expensive insurance, and many countries, including France, will not permit a vessel to sail under their flag absent such classification.²⁰¹ ABS sought enforcement of the arbitration agreement as to the nonparty vessel owners.²⁰²

The Second Circuit, sitting in admiralty as to all the parties, rejected the owners’ argument that they were not bound to arbitration for lack of privity with ABS, noting that an owner is “estopped from denying its obligation to arbitrate when it receives a ‘direct benefit’ from a contract containing an arbitration clause.”²⁰³ The court’s analysis focused on the fact that without the interim classification certification, registration of the vessel would have been nearly impossible in France, and that the

194. *Benasra v. Marciano*, 112 Cal. Rptr. 2d 358 (2d Cal. Ct. App. 2001).

195. 170 F.3d 349, 1999 AMC 1858 (2d Cir. 1999).

196. *Id.* at 350-51, 1999 AMC at 1859.

197. *Id.* at 351, 1999 AMC at 1859.

198. *Id.*, 1999 AMC at 1860.

199. *Id.*

200. *Id.*

201. *Id.* at 353, 1999 AMC at 1862. In *Tencara*, owners received the request for class agreement which contained the arbitration clause and was signed by the shipbuilder and the American Bureau of Shipping eight months prior to delivery of the yacht.

202. *Id.* at 351-52, 1999 AMC at 1860.

203. *Id.* at 353, 1999 AMC at 1862 (citing *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 778-79 (2d Cir. 1995)).

owners received significantly lower insurance rates on the yacht as a result of certification.²⁰⁴ In fact, the *Tencara* court further found that the insurer-subrogee of the owner was likewise compelled to arbitrate and that the motion to compel arbitration against the third-party insured owner was equally valid as to its underwriters.²⁰⁵

Determining whether a party is a direct or incidental beneficiary could be quite determinative in the question as to whether that party is bound to arbitration. Some courts will require “strangers” to a contract to enforce a contract only in circumstances in which the terms of the contract that had been breached were placed in the contract for the suing party’s direct benefits.²⁰⁶ “A mere incidental beneficiary acquires by virtue of the contractual obligation no right against the promisor or promisee.”²⁰⁷ Considerations of rights of direct beneficiaries must look to whether the contractual terms are broad enough to include the third party either as a member of a class of a named beneficiary, whether the third party was evidently within the intent of the terms of the contract, or whether the promisee had a “substantial and articulable interest in the welfare” of the third party.²⁰⁸

The Fifth Circuit has indicated that “[t]he intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied.”²⁰⁹ However, “the fact that a person is directly affected by the parties’ conduct, or that he ‘may have substantial interest in the contract’s enforcement, does not make him a third-party beneficiary.’”²¹⁰ Under this analysis, in order for a party to be a third-party beneficiary, the intent of the contracting parties to make that outside party a beneficiary must be clearly written or

204. *Id.*

205. *Id.* The problem that arises with *Tencara*, is that the court’s jurisdiction was based on general maritime law, yet the court does not specify the terms of the request for class agreement. It seems that in cases in which class societies are retained by a shipbuilder to oversee the construction and design of the vessels prior to launching, such arrangements would not be subject to maritime jurisdiction as contracts accessory to a ship construction contract, which are claims clearly falling under state court jurisdiction. See discussion of federalism issues above at *supra* notes 30-40. *Tencara* does not discuss the classification society’s role in that particular contract, nor the application of state law. Of course, the FAA would be applicable to an arbitration provision in an agreement for certification of an existing vessel. See FAA, 9 U.S.C. § 1 (2000).

206. Miss. High Sch. Activities Ass’n v. Farris, 501 So. 2d 393, 396 (Miss. 1987).

207. *Id.* at 395-96.

208. Miss. Fleet Card, L.L.C. v. Bilstat, Inc., 175 F. Supp. 2d 894, 902 (S.D. Miss. 2001) (citing *Arnold’s of Miss., Inc. v. Clancey*, 171 So. 2d 152, 153 (Miss. 1965); *Farris*, 501 So. 2d at 396; *Hanberry Corp. v. State Bldg. Comm’n*, 390 So. 2d 277, 279 (Miss. 1980)).

209. *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1075 (5th Cir. 2002) (applying Texas state law) (quoting *MCI Telcomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999)).

210. *Id.*

evidenced by the contract, and indicative factors may include notation or mention of intended third-party beneficiaries within the contract itself.²¹¹ Proving third-party beneficiary status requires establishing with “special clarity that the contracting parties intended to confer” the benefits to that specific nonparty.²¹² The distinction between intended third-party beneficiaries versus incidental beneficiaries is an approach that seems at least somewhat more just and equitable than simply conferring third-party beneficiary status on those who may benefit from the performance or execution of contract.²¹³

The United States District Court for the Southern District of New York has rejected allegations that an agent who received insured funds into his personal account to secure a resultant purchase was subject to arbitration under a theory of estoppel, or that the agent received a “direct benefit,” from the purchaser as a result of receipt of wired funds into his personal account pursuant to the terms of the contract that contained the arbitration agreement.²¹⁴ The *Arhontisa* court found that the receipt of wired funds was not a direct benefit since the attorney-in-fact/agent served strictly as an “escrow agent” required to transfer the funds promptly thereafter to the seller.²¹⁵ Further, it was important that the agent did not receive a benefit for the ship purchase and was determined to be strictly a “contractually-specified conduit for a funds transfer.”²¹⁶ As such, any claims of estoppel were rejected.²¹⁷ The court further noted that even if the agent had been authorized to retain a portion of the money as a fee for his services, the benefit would not flow from the contract of the sale containing the arbitration agreement, but from the agent’s contract of engagement with the seller.²¹⁸ This raises the question of why agents would act on behalf of principals if not for benefits conferred upon them by their principals. It seems that under the *Arhontisa* approach, an agent who receives an “indirect” benefit either as fees, commission, or a portion of a contract of sale, and who retains such sums with authority to do so, will not be deemed to have received a

211. *Id.*

212. *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994).

213. *Id.*

214. *Arhontisa Mar. Ltd. v. Twinbrook Corp.*, No. 01 CIV. 5044, 2001 WL 1142136, at *3 (S.D.N.Y. Sept. 27, 2001). The purchaser’s argument was based exclusively on *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 1999 AMC 1858 (2d Cir. 1999).

215. *Arhontisa*, 2001 WL 1142136, at *3.

216. *Id.* at *4.

217. *Id.* This court specifically noted, however, if the agent had failed to transfer any portion of the funds to the seller without its consent, “he would no doubt be subject to various forms of civil and criminal liability.” *Id.* at *4 n.1.

218. *Id.* at *3.

direct benefit under *Tencara* from the contract containing an arbitration agreement if such benefits stem from the agreement giving rise to the agency relationship.

Compare *Arhontisa* with *Zimring v. Coinmach*,²¹⁹ wherein the parties seeking the enforcement of an arbitration agreement against the founder/representative of the selling corporation argued that the representative was estopped from denying an obligation to arbitrate.²²⁰ The *Zimring* court concluded that the founder/representative of the seller under a purchase agreement containing an arbitration clause clearly received a substantial benefit through the sale.²²¹ The party seeking to enforce arbitration argued that because the representative did, in fact, reap benefits from the sale, the representative was a third-party beneficiary bound to arbitrate under the doctrine of estoppel.²²² Although the court acknowledged that estoppel was a compelling argument, the representative was deemed an “intentional nonsignatory” because the representative signed the contract in his individual capacity only with regard to specific, limited provisions therein.²²³ This distinction was sufficient to distinguish the matter from *Tencara*, in which “there was no evidence to indicate in what capacity the defendant [who was bound to arbitration] was signing the contract.”²²⁴

Depending on the circumstances, the rights of a claimant who is forced to arbitration may be “derivative” rights of the actual party to the arbitration agreement. If a “substantial nexus” exists between a third party’s claims that sound in tort and a contract containing a valid arbitration clause, the third party holding tort rights may still be bound to arbitration pursuant to the clause contained within the contract dealing with third party beneficiaries.²²⁵ *Jansen v. Salomon Smith Barney, Inc.*²²⁶ involved the claims of heirs who were bound to the terms of a client agreement between their father and his financial advisors.²²⁷ Because the beneficiaries’ claims arose out of their father’s client agreement with the

219. No. 00 Civ. 8111, 2001 WL 185515, at *1 (S.D.N.Y. Dec. 19, 2000).

220. *Id.* at *3 (relying on *Tencara*, 170 F.3d at 352, 1999 AMC at 1861).

221. *Id.*

222. *Id.*

223. *Id.* at *3-*4.

224. *Id.* at *4 n.1.

225. See *Jansen v. Salomon Smith Barney, Inc.*, 776 A.2d 816, 819-21 (N.J. Super. Ct. App. Div. 2001) (stating that although *Jansen* is a state law decision, New Jersey law comports with the federal policy of favoring arbitration, and relies in very large part upon a number of federal arbitration cases, discussed throughout this Article), *cert. denied*, 785 A.2d 434 (N.D. 2001).

226. 776 A.2d at 816.

227. *Id.* at 818.

advisors, the beneficiaries were bound to arbitrate.²²⁸ *Jansen* involved “intended beneficiaries” of successors who derived direct benefits from the relationship between their father and his financial advisor.²²⁹ Such a relationship was found to fall within the clause at issue.²³⁰ The “substantial nexus” theory promoted by the *Jansen* court is not discussed or adequately defined within that decision, but could be an important theory to utilize when seeking to construe arbitration clauses at issue in tort cases.

Under direct action statutes, personal injury claimants may be allowed to pursue claims under an insurance policy containing an arbitration clause through litigation, even if the principal coverage dispute between the policy holder and the insurance company is pending in arbitration.²³¹ In *Zimmerman v. International Cos. & Consulting Inc.*,²³² the Fifth Circuit affirmed the decision of a district court to permit litigation of personal injury claims by plaintiffs who were not contractually bound to arbitration, and declined to find the personal injury plaintiff to be a direct beneficiary of the insurance contract containing the arbitration clause.²³³ *Zimmerman* and *Talbott Bigfoot* remain in effect in the Fifth Circuit, despite the holding of *Tencara* and other cases extending third-party beneficiary status to any party receiving a benefit by operation of a contract containing an arbitration provision.²³⁴

C. *Alter Ego/Veil Piercing*

Parties may be bound to arbitrate by virtue of their status as an alter ego of a signator to an agreement.²³⁵ The issue as to whether a party is an

228. *Id.*

229. *Id.* at 818-19.

230. *Id.* at 818.

231. *Zimmerman v. Int'l Cos. & Consulting, Inc.*, 107 F.3d 344, 346, 1997 AMC 1812, 1813 (5th Cir. 1997).

232. *Id.* at 344, 1997 AMC at 1812.

233. *See id.*

234. *Id.*; *In re Talbott Big Foot*, 887 F.2d 611, 614, 1990 AMC 1780, 1784 (5th Cir. 1989). In fact, the *Zimmerman* court expressly rejected an argument that direct action plaintiffs should be deemed to be bound to the policy's arbitration clause as third-party beneficiaries of the insurance contract finding instead an independent direct action right may have the effect of exempting direct action plaintiffs from third-party beneficiary status. *Zimmerman*, 107 F.3d at 346, 1997 AMC at 1813. Whether *Zimmerman* will be followed in other courts, including the Second Circuit which has seemed particularly receptive to third party beneficiary delineations, will be telling.

235. *Nat'l Dev. Co. v. Khashoggi*, 781 F. Supp. 959, 963 (S.D.N.Y. 1992) (citing *Fisser v. Int'l Bank*, 282 F.2d 231, 234-35, 1961 AMC 306, 310 (2d Cir. 1960)).

alter ego of the party to the contract is not necessarily for the arbitrator.²³⁶ A federal court will not be bound by an arbitrator's determination of alter ego status, absent waiver of review of that issue, because a defendant is entitled to judicial determination of that issue.²³⁷ As a general matter, corporate relationships alone are not sufficient to justify binding nonsignatories to arbitration agreements.²³⁸ Further, individuals should not be personally bound to terms of a contract when signing on behalf of their principal.²³⁹

In some circumstances, nonparties to arbitration agreements may be forced to arbitrate a matter pursuant to arbitration agreements that were entered into by other individuals or entities to which the nonparty is "related."²⁴⁰ For instance, a subsidiary corporation may be insolvent, therefore the plaintiff seeks to "pierce the corporate veil" to bind parent or controlling entities to arbitration in order to bind a solvent entity for payment of judgments.²⁴¹ The court, in doing so, does not need to inquire as to whether the party to the arbitration agreement is, in fact, insolvent.²⁴² Rather, an analysis of the relationship of the parties to the claimant must be considered in order to determine whether there is a contractual obligation to arbitrate.²⁴³

In *Monumental Life Insurance Co. v. R.A.J. Holdings Inc.*,²⁴⁴ the United States District Court for the Eastern District of Louisiana noted that neither the Fifth Circuit nor the United States Supreme Court had yet addressed the issue of whether related nonsignatories to an arbitration agreement may be bound to arbitrate and found jurisprudence from the Second Circuit to be instructive.²⁴⁵ Determining whether an entity is, in fact, sufficiently related to the signatory may require analysis under state

236. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

237. See *id.*; *Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 384 (3d Cir. 1994); *Nissho Iwai Corp. v. Mizushima Marinera S.A.*, No. 95-3771, 1996 WL 904562, at *3 (D.N.J. Apr. 23, 1996).

238. *Keystone Shipping Co. v. Texport Oil Co.*, 782 F. Supp. 28, 30-31, 1992 AMC 1768, 1770 (S.D.N.Y. 1992).

239. See *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994) ("[D]istinction between individual capacity and representative capacity . . . portends a meaningful legal difference.").

240. *Monumental Life Ins. Co. v. R.A.J. Holdings, Inc.*, No. CIV. A 99-1224, 1999 WL 632891, at *3 (E.D. La. 1999).

241. *Id.* at *2.

242. *Id.*

243. *Id.*

244. *Id.* at *1.

245. *Id.* at *3 (relying on *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995); *Fisser v. Int'l Bank*, 282 F.2d 231, 1961 AMC 306 (2d Cir. 1960)).

law contractual principles.²⁴⁶ The court should allow discovery into such factual allegations and if through an analysis of the various factors to be considered in piercing the corporate veil, the parties do in fact constitute a single entity that would be sufficient to support contractual privity, the nonsigning entity will properly be bound to arbitration.²⁴⁷

Piercing the corporate veil is appropriate when necessary to “prevent fraud or other wrong[s], or where a parent dominates and controls a subsidiary.”²⁴⁸ The decision to “veil pierce” is a fact-specific determination that “differs with the circumstances of each case.”²⁴⁹ If the conduct of the two entities demonstrates “a virtual abandonment of separateness,” they lose their discrete corporate identities, and as such, contractual obligations of one party will bind the other.²⁵⁰ Factors may include shared office and staff, common officers, intermingling of funds, lack of “arms length” dealings, treatment as a joint profit center, and absence of corporate formalities.²⁵¹

In *United States v. Clipper Shipping Co.*,²⁵² the court considered a motion to compel arbitration pursuant to an arbitration clause contained in a sub-charter party. The sub-charterer, who also issued the bill of lading at issue, was one of four entities named the “Clipper interests” made party to the case.²⁵³ Only one of the Clipper interests actually signed the arbitration agreement, and although the court did not engage in an analysis of the terms by which the nonsigning parties were bound to arbitration, only one of the Clipper interests was found to be bound to arbitration, and the remainder were determined to have no privity of contract.²⁵⁴ The court noted that arbitration would not dispose of all the issues in the case, but that a stay of proceedings was warranted to allow for resolution of the claims that were subject to arbitration.²⁵⁵

246. *Webb v. Investacorp, Inc.*, 89 F.3d 252, 257-58 (5th Cir., 258 1996); *Monumental Life*, 1999 WL 632891, at *2.

247. *Carte Blanche*, 2 F.3d at 27.

248. *Carte Blanche (Singapore) Pte., Ltd. v. Diner’s Club Int’l, Inc.*, 2 F.3d 24, 25 (2d Cir. 1993); see also *Thomson-CSF*, 64 F.3d at 777; *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 138 (2d Cir. 1991) (involving a finding of liability of an agent on the basis of fraud or “complete control by the dominating corporation that leads to a wrong against third parties”).

249. *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988).

250. *Carte Blanche*, 2 F.3d at 27; see also *Thomson-CSF*, 64 F.3d at 778; *Wm. Passalacqua*, 933 F.2d at 137-38.

251. *Carte Blanche*, 2 F.3d at 27; *Wm. Passalacqua*, 933 F.2d at 139.

252. CIV. A. No. 93-2798, 1995 WL 131077, at *1 (E.D. La. Mar. 23, 1995).

253. *Id.*

254. *Id.*

255. *Id.* at *3.

D. Incorporation by Reference

1. Inherently Inseparable or Interrelated Contracts

When contracts are “inherently inseparable,” disputes arising under a contract that does not contain an arbitration agreement will still be held to arbitration according to the arbitration provision in the other contract.²⁵⁶ In determining whether language sufficiently incorporates an arbitration agreement found in a separate contract, the incorporating language should reflect the desire or the intention of the parties to either incorporate all terms of the other agreement, or delineate which terms are incorporated, and specify that arbitration is included.²⁵⁷ If the nonarbitral contract incorporates “the obligations” under the arbitrable contract, a reference to incorporating “obligations” does not necessarily extend to the arbitration clause without a more specific incorporation or language reflecting intent to arbitrate.²⁵⁸

Notwithstanding the generally accepted approach that parties may bind themselves to arbitration through subsequent agreements made with the same parties through their course of dealings, some concerns may arise with regard to the parity of the contractual relationship, the equity of the contract at issue, and other fact-specific issues, such as notice.²⁵⁹ In circumstances in which a bill of lading incorporates the terms of the arbitration clause contained within a charter party, but the terms of the arbitration provision are not specifically noted within the bill of lading, compelling the parties to the bill of lading to arbitration may be inappropriate.²⁶⁰ As for notice, if the parties to the bill of lading receive completed bills of lading after commencement of the voyage, and arbitration provisions have been inserted without discussion or opportunity to negotiate or delete such clauses, bills of lading and their attempts to force arbitration may constitute contracts of adhesion.²⁶¹ Actual notice of foreign arbitration provisions should be given before such provisions are enforceable.²⁶²

256. See *Watkins Eng'rs & Constructors, Inc. v. Deutz AG*, No. CIV. A.3:01, 2001 WL 1545738, at *3 (N.D. Tex. Dec. 3, 2001).

257. *Id.* at *4.

258. *Id.*

259. See *Siderius, Inc. v. M/V Ida Prima*, 613 F. Supp. 916, 922 (S.D.N.Y. 1985).

260. See *id.*; *Japan Sun Oil Co. v. M/V Maasdijk*, 864 F. Supp. 561, 566 n.7, 1995 AMC at 726, 733 n.7 (E.D. La. 1994).

261. See *Pacific Lumber & Shipping Co. v. Star Shipping Inc.*, 464 F. Supp. 1314, 1315, 1979 AMC 2137, 2137-38 (W.D. Wash. 1979).

262. See *State Establishment for Agric. Prod. Training v. M/V Wesermude*, 838 F.2d 1576, 1581, 1988 AMC 2328, 2334 (11th Cir. 1988).

Although some courts have held that notice is necessary for the terms of one contract to be incorporated into the other, proper incorporation may yield constructive notice.²⁶³ Constructive notice has been defined as “a rule in which ‘if you should have known something, you’ll be held responsible for what you should have known.’”²⁶⁴ This determination may turn on the sophistication of the parties and industry practices.²⁶⁵ Additionally, if one of the contracts is a standard form, such as “Congen Bill” bills of lading that are internationally recognized and common, such a standard form will further corroborate claims of notice and sophistication.²⁶⁶

2. Incorporating Terms of a Charter Party into a Bill of Lading

Incorporation by reference frequently arises in circumstances involving charter parties containing arbitration provisions and bills of lading, which often incorporate the terms of the charter party, even though the shipper does not necessarily receive, review, or agree to the terms of the arbitration agreement as specified within the charter party.²⁶⁷ Although many arbitration agreements contained within charter parties are, in fact, standard and expected terms therein, shippers are often not party to, or participants in, the terms of the charter agreements. By nature of the need to transport goods by sea, shippers are often bound to arbitration, including foreign arbitration, by operation of incorporation of the charter party arbitration clauses within the bill of lading.²⁶⁸

263. See *Steel Warehouse v. Abalone Shipping, Ltd.*, 141 F.3d 234, 237, 1998 AMC 2054, 2057-58 (5th Cir. 1998).

264. *Id.* at 237, 1198 AMC at 2057.

265. *Id.*

266. *Id.*

267. As noted in *Production Steel Co. v. SS Francois L.D.*, 294 F. Supp. 200, 201, 1968 AMC 2529, 2530 (S.D.N.Y. 1968):

[T]he charter party contract and the bill of lading are two separate and distinct integrated contracts . . . the mere statement in the bill of lading that it was “Subject to all terms, conditions of” the charter party contract even if it be treated as an incorporation by reference (which is doubtful), could not have the effect of obligating plaintiff to perform the obligations of the parties to the charter party. . . . Plaintiff was not a party to the charter party contract, which . . . contained numerous promises on the part of the parties thereto . . . that were personal to them and not assumed by plaintiff (e.g., payment of freight for charter of the ship, options to cancel, laydays, demurrage charges, expenses related to loading and discharge, etc.).

268. See *id.*

Incorporation of charter party terms into the bill of lading is customary, acceptable, and valid.²⁶⁹ Claimants should be aware that by bringing a suit under a bill of lading, any claims thereunder will likely be subject to the terms of a charter party's arbitration clause. The touchstone of whether a bill of lading incorporates an arbitration clause contained in a charter party is whether the holder of the bill had either actual or constructive notice of the charter party.²⁷⁰ Arbitration clauses may be a material addition and may only be incorporated into the contract if assented to by the parties at the time of the contractual creation.²⁷¹ Although U.S. law will allow similar bills of lading to bind the party to the terms of the charter parties' arbitration clause, the party bound to the arbitration contract without an opportunity to review the bill of lading prior to shipment may be able to establish the contract as one of adhesion.²⁷² Ocean bills of lading may be deemed contracts of adhesion and should be strictly construed against the carrier.²⁷³ Indeed, one of the

269. See *Henkel, K.G. v. M/T Stolt Hippo*, 1980 AMC 2618, 2619 (S.D.N.Y. 1980); *Midland Tar Distillers, Inc. v. M/T Lotos*, 362 F. Supp. 1311, 1312-13, 1973 AMC 1924, 1926-27 (S.D.N.Y. 1973).

270. *Cargill, Inc. v. Golden Chariot M/V*, 31 F.3d 316, 318-19, 1995 AMC 1077, 1081-82 (5th Cir. 1994); *Siderius, Inc. v. M/V Ida Prima*, 613 F. Supp. 916, 921 n.3 (S.D.N.Y. 1985); *Tropical Gas Co. v. M/T Mundogas Caribe*, 388 F. Supp. 647, 649, 1975 AMC 987, 989 (D.P.R. 1974); *Midland Tar Distillers*, 362 F. Supp. at 1313, 1973 AMC at 1927.

271. See *Mitsui & Co. v. Mira M/V*, 111 F.3d 33, 35, 1997 AMC 2126, 2128 (5th Cir. 1997) (per curiam) (holding that whether the bill of lading incorporated the arbitration terms and foreign forum selection clause of the charter party was on the face of the bill of lading); *Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 738-39, 1993 AMC 2842, 2848 (4th Cir. 1993); *Kanematsu v. M/V Gretchen W*, 897 F. Supp. 1314, 1317, 1995 AMC 2957, 2961 (D. Ore. 1995); *Diskin v. J.P. Stevens & Co.*, 836 F.2d 47, 49-50 (1st Cir. 1988) (applying New York law).

272. In *Organes Enterprises, Inc. v. M/V Khalij Frost*, No. 88 Civ. 4710, 1989 WL 37660, at *3, 1989 AMC 1460, 1465-66 (S.D.N.Y. Apr. 12, 1989), the court described how ocean bills of lading typically come into existence:

In the typical transaction an ocean bill of lading for common carriage is a contract of adhesion. Most often, the ocean bill of lading is prepared abroad by the carrier and delivered to the shipper in exchange for the goods. The shipper then exchanges the bill of lading with a bank which had previously arranged letter of credit financing at the consignee's behest. Thus, the consignee most often does not have any access to the bill of lading before entering into its transaction with the shipper. In the typical transaction the ocean bill of lading for common carriage is a form bill, incorporating terms of COGSA, which is prepared by the carrier. The consignee does not negotiate with the shipper with respect to jurisdictional terms to be included in, or omitted from, the bill of lading.

Id. at 1465-66.

273. See *Interocean v. New Orleans Cold Storage*, 865 F.2d 699, 703, 1989 AMC 1250, 1254 (5th Cir. 1989); *Pac. Lumber & Shipping Co. v. Star Shipping A/S*, 464 F. Supp. 1314, 1315, 1979 AMC 2137, 2138 (W.D. Wash. 1979). In *Pacific Lumber*, shippers did not receive the bill of lading until after sailing and that the London arbitration clause which was inserted in the bill of lading without discussion or option of deletion. The court rendered the contract as one of adhesion unilaterally imposed by the carrier and never agreed to by the shippers. Although the

purposes of COGSA was to avoid overreaching clauses inserted by carriers into bills of lading that unreasonably limited the carrier's liability or obstructed the freight claimants' ability to secure redress.²⁷⁴

Incorporation of the terms of one arbitration contract into another should only occur in circumstances in which the incorporation is completed with enough specificity to allow a subsequent holder in due course of the instrument or contract to have meaningful notice of the terms contained in the agreement containing the arbitration clause.²⁷⁵ Notice is meaningful if it gives a party enough notice to prevent acts to its detriment.²⁷⁶ General words of incorporation should not be sufficient enough to incorporate an arbitration clause by a reference.²⁷⁷ In the United States, if the incorporation clause in question refers to the date of the charter party, such reference will generally be sufficient to effect incorporation of all provisions of the charter, including the arbitration clause.²⁷⁸ Conversely, if the bill of lading fails to state the date of the charter party, such failure will generally negate the incorporation of the charter party.²⁷⁹

Compare the liberal incorporation policies of the United States with those of the United Kingdom, where language such as "[a]ll terms conditions and exceptions as per charter party" will probably not incorporate arbitration, but will only operate to incorporate provisions that are directly related to the shipment, carriage, or delivery of goods or freight.²⁸⁰

bill of lading did indicate arbitration on the face of the bill, the London clause was voided and the arbitration clause deemed unenforceable. *Pac. Lumber*, 464 F. Supp. at 1315, 1979 AMC at 2138.

274. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534-35, 1995 AMC 1817, 1821-22 (1995); *Siderius*, 613 F. Supp. at 920 (S.D.N.Y. 1985). Importantly, *Sky Reefer* did not address the issue of whether foreign arbitration clauses are unenforceable contracts of adhesion when unilaterally imposed by a carrier.

275. See *Cargill*, 31 F.3d at 318-19, 1995 AMC at 1081-82; *Pressen*, 5 F.3d at 738-39, 1993 AMC at 2848; *Kanematsu*, 897 F. Supp. at 1317, 1995 AMC at 2561; *Tropical Gas*, 388 F. Supp. at 649, 1975 AMC at 989.

276. See *Lowry & Co. v. S.S. Nadir*, 223 F. Supp. 871, 873, 1965 AMC 1340, 1342-43 (S.D.N.Y. 1963).

277. *Id.*

278. See *id.* at 874, 1965 AMC at 1343; *Henkel K.G. v. M/T Stolt Hipo*, 1980 AMC 2618, 2619 (S.D.N.Y. 1980); *Midland Tar Distillers, Inc. v. M/T Lotos*, 362 F. Supp. 1311, 1312-13, 1973 AMC 1924, 1926-27 (S.D.N.Y. 1973); *Alucentro Div. Dell'alusuisse Italia S.P.A. v. M/V Hafnia*, 785 F. Supp. 155, 156, 1992 AMC 267, 268 (M.D. Fla. 1991); *Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503, 506, 1966 AMC 237, 240-41 (2d Cir. 1965).

279. *Cargill*, 31 F.3d at 318-19, 1995 AMC at 1081-82.

280. *Skips A/S Nordheim v. Syrian Petroleum Co.*, [1983] 2 Lloyd's Rep. 592, 595 (The *Varenna*) (holding that when dealing with a bill of lading incorporating "all terms and conditions," the word "conditions" means "the conditions under which the goods are loaded, stowed, kept, cared for, carried and discharged," therefore finding an arbitration clause to not be a 'condition' of a charter party); *Fed. Bulk Carriers, Inc. v. C. Itoh & Co.*, [1989] 1 Lloyd's Rep.

In *Pacific Lumber & Shipping Co. v. Star Shipping A/S*,²⁸¹ shippers had not received the completed bills of lading until after the vessel had sailed, a “London arbitration clause” was inserted into the bills of lading by the carrier without discussion, and the shippers never had the option of deleting the clause.²⁸² Consequently, the carrier’s motion to stay the case pending arbitration in London was denied because the bills of lading at issue were found to be contracts of adhesion unilaterally imposed by the carrier and never agreed to by the shippers.²⁸³ Compare this result with *Japan Sun Oil Co. v. M/V Maasdijk*,²⁸⁴ in which an addendum to a charter party that specified London arbitration was completed after the execution of the initial charter party, but prior to the completion of a bill of lading.²⁸⁵ The bill of lading incorporated the terms of the charter party by referring to the date of the charter party’s execution, but did not reference the date of the addendum.²⁸⁶ The addendum was found to be incorporated by reference, because there was only one charter party at issue.²⁸⁷ Language that stated “all terms whatsoever of said Contract of Afreightment/Charter Party including the Arbitration clause . . . apply and . . . govern the rights of the parties concerned in this shipment” was found to include and incorporate the addendum.²⁸⁸

103, 106 (holding that when dealing with a bill of lading that attempted to incorporate all “terms, conditions, and exceptions of the Charter Party” was insufficiently wide to include an arbitration clause). Lord Justice Bingham stated:

It is common ground that the Court is concerned with the construction of the contract contained in or evidenced by the bills of lading, that is, the contract of carriage between the shipowners and the cargo-owners. The Court’s task is to ascertain the intention of those parties as expressed in the written document and the Court is not in any way concerned to construe the charter-party or ascertain the intentions of the parties to that contract save in so far as the terms of the charter-party have been effectively incorporated into the bill of lading contract.

Fed. Bulk Carriers, [1989] 1 Lloyd’s Rep. at 105.

281. 464 F. Supp. 1314, 1979 AMC 2137 (W.D. Wash. 1979).

282. *Id.* at 1314-15, 1979 AMC at 2137-38.

283. *Id.* at 1315, 1979 AMC at 2138; *see also* *Siderius, Inc. v. M/V Ida Prima*, 613 F. Supp. 916, 920-21 (S.D.N.Y. 1985) (noting that a consignee under a bill of lading does not bargain with the carrier).

284. 864 F. Supp. 561, 1995 AMC 726 (E.D. La. 1994).

285. *Id.* at 564-65, 1995 AMC at 729-30.

286. *Id.* at 565, 1995 AMC at 730.

287. *Id.*

288. *Id.* at 564, 1995 AMC at 728. Because arbitration in London was valid, the court also questioned whether such clauses could be enforced and whether compulsory arbitration in London violated COGSA’s mandate that “[a]ny clause, covenant, or agreement in contract of carriage . . . lessening such liability otherwise than as provided in this chapter shall be null and void and of no effect.” *Id.* at 565, 1995 AMC at 729 (omission in original) (quoting Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1303(8) (1994)). Plaintiff contended that enforcement of compulsory arbitration in London would have the effect of diminishing shipper’s liability in

If a guaranty references a charter agreement that contains an arbitration clause, the guaranty may also incorporate all terms of the charter agreement by reference.²⁸⁹ Language in the final clause “as if he were the primary obligor” may be particularly persuasive in incorporating by reference all terms of the charter agreement to the guaranty.²⁹⁰ Guarantors cannot be compelled to arbitrate solely on the basis of an arbitration clause in a charter party, but under *Thomson-CSF*, a nonsignatory guarantor may be compelled to arbitrate under the other theories that are outlined herein.²⁹¹

E. Assumption

Like other defenses, a party who would not otherwise be bound to arbitration may waive its proper objection to binding arbitration through assumption of that obligation.²⁹² For example, in *Gvozdenovic v. United Air Lines, Inc.*,²⁹³ parties were determined to have manifested an intention to arbitrate by sending a representative to negotiate on their behalf in the

violation of § 1303(8) and relied on *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 204, 1967 AMC 589, 595 (2d Cir. 1967), in which a forum selection clause in a bill of lading in requiring suit be brought in Norway was deemed a violation of COGSA. *Japan Sun Oil*, 864 F. Supp. at 566, 1995 AMC at 731-32 (citing *State Establishment for Agric. Prod. Trading v. M/V Wesermunde*, 838 F.2d 1576, 1988 AMC 2328 (11th Cir. 1988); *Organes Enters. Inc. v. M/V Khalij Frost*, 1989 AMC 1460 (S.D.N.Y. 1989).

The *Japan Sun Oil* court rejected the extension of *Indussa* to arbitration clauses, relying instead on *Sky Reefer* in which the court enforced a foreign arbitration clause finding that the Federal Arbitration Act, as a subsequent statute to COGSA, preempted and specifically validated arbitration clauses in maritime bills of lading. *Japan Sun Oil*, 864 F. Supp. at 567, 1995 AMC at 734-735. Under *Japan Sun Oil* and *Sky Reefer*, an American court’s suspicion of foreign arbitration and the competence of other tribunals is inappropriate and invalid. *Id.* at 568, 1995 AMC at 736; *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 29 F.3d 727, 732, 1994 AMC 2513, 2522 (1st Cir. 1994), *aff’d*, 515 U.S. 528, 1995 AMC 1817 (1995). *Sky Reefer* and *Japan Sun Oil* establish that foreign arbitration clauses contained within a bill of lading are valid under COGSA. *Japan Sun Oil*, 864 F. Supp. at 567, 1995 AMC at 734-35; *Sky Reefer*, 29 F.3d at 732, 1994 AMC at 2521.

289. *Limonium Maritime S.A. v. Mizushima Marinera S.A.*, No. 96 CIV. 1888, 1999 WL 46721, at *6, 2000 AMC 343, 350-51 (S.D.N.Y. Feb. 1, 1999) (noting that the guaranty at issue indicated that the guarantor “unconditionally, jointly and severally guarantees to . . . the due [plaintiff] and faithful performance of the Charterer’s obligations under the Agreement . . . including . . . the due and prompt payment of Charter Hire by the Charterer, as if the undersigned were primary obligors”) [sic] (omissions in original).

290. *Id.*

291. See *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 777 (2d Cir. 1995).

292. *Id.* (citing *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991)); see also *Keystone Shipping Co. v. Texport Oil Co.*, 782 F. Supp. 28, 31, 1992 AMC 1768, 1771 (S.D.N.Y. 1992); *In re Transrol Navegacao S.A.*, 782 F. Supp. 848, 851, 1992 AMC 1831, 1834-35 (S.D.N.Y. 1991).

293. 933 F.2d 1100 (2d Cir. 1991).

arbitration proceedings.²⁹⁴ Because the issue of arbitration is often raised early in litigation, parties seeking to avoid arbitration must be sure to assert rights to litigation early, before ever agreeing to participate in any element of arbitration. Conversely, a party holding a right to arbitration may certainly waive that right by participating in litigation. Motions to stay a case pending the outcome of arbitration and objections thereto should be filed immediately upon receipt of complaints.

An attempt to assume or enforce the terms of a contract containing an arbitration clause “provides clear and unmistakable evidence that the entity regards itself bound by the arbitration clause.”²⁹⁵ In lawsuits to enforce the terms of a contract for breach of contract, logic dictates that the party seeking to enforce the terms of the contract, even if not a party to the contract itself, is held to be bound by the terms thereunder, including provisions for arbitration. It would be nonsensical to permit a plaintiff to seek benefits under a contract but avoid its burdens.²⁹⁶

The doctrine of assumption has been used to force a nonsignatory to arbitrate in situations when, “with full knowledge of the facts, [a party] accepts the benefits of a transaction, contract, statute, regulation or order [from] subsequently tak[ing] an inconsistent position to avoid the corresponding obligations or effects.”²⁹⁷ This has special applicability when a party could have objected to an arbitration provision before entering into the transaction in issue, but did not, even in cases when the party had no prior knowledge and could not object to the provision. Hence, claimants seeking to file suit against parties to a contract that contains an arbitration clause, but now seek to avoid arbitration, may wish to plead their claims carefully in order to avoid mandatory arbitration under the terms of the contract. This could be accomplished by only asserting claims involving tort liability or other noncontractual breaches of duties such as gross negligence, fraud, gross

294. *Id.* at 1105.

295. *Naru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 167 (5th Cir. 1998); *see also* *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1993) (holding that because appellee sought to enforce the licensing agreement, it was equitably estoppel from avoiding the arbitration clause in that agreement); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319-21 (4th Cir. 1988); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 343-44 (11th Cir. 1984) (holding that a party cannot avoid arbitration by attempting to case its claims in tort).

296. *See* *Avila Group, Inc. v. Norma J. of Cal.*, 426 F. Supp. 537, 542 (S.D.N.Y. 1977).

297. *Kaneb Servs., Inc. v. FSLIC*, 650 F.2d 78, 81 (5th Cir. Unit A 1981); *see also* *Neiman-Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 371 (5th Cir. 1990) (stating that quasi estoppel occurs when a party chooses to “accept benefits in a manner genuinely inconsistent with his subsequent claim”).

misrepresentation, detrimental reliance, or products liability. Claimants may also be able to avoid being bound to arbitration by bringing suit only against parties with whom no privity of contract exists, but who, in turn, may join the party to the subject arbitral clause through a third-party claim.²⁹⁸

Conduct may also give rise to waiver of objections, or alternatively, waiver of the right to arbitration. If a nonsignator's conduct indicates an intent to arbitrate, such conduct may bind that nonsignatory/nonparty to arbitration.²⁹⁹ Intention to be bound by an arbitral agreement must be "clearly and unambiguously demonstrated."³⁰⁰

F. Note on Consolidation of Arbitral Issues/Parties with Other Claims

In *Dean Witter Reynolds Inc. v. Byrd*,³⁰¹ the Supreme Court held that "the [Federal] Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums. . . . [B]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."³⁰² *Dean Witter* properly focused on whether the parties to be consolidated in arbitration agreed to arbitrate, but did not resolve the issue of consolidation of related arbitration proceedings. There is a circuit split on this issue. The Second and First Circuits have concluded that district courts have such power under the FAA.³⁰³ The Fifth, Ninth, Eighth, and Eleventh Circuits have reached the opposite conclusion, finding that "a court may only determine whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms."³⁰⁴

298. Note, however, that this could still trigger the third-party beneficiary issue and may subject the primary claim to consolidation with the arbitral claim in arbitration discussed below.

299. See generally *Gvozdenovic*, 933 F.2d at 1100; *Chios Charm Shipping Co. v. Rionda*, No. 93 CIV. 6313, 1994 WL 132141, at *1 (S.D.N.Y. Apr. 12, 1994).

300. *Chios*, 1994 WL 132141, at *3 (emphasis omitted) (citing *Gvozdenovic*, 933 F.2d at 1105); see also *In re Arbitration Promotora de Navegacion, S.A.*, 131 F. Supp. 2d 412 (S.D.N.Y. 2000).

301. 470 U.S. 213 (1985).

302. *Id.* at 217-18.

303. *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 1975 AMC 2421 (2d Cir. 1975); *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 1989 AMC 537 (1st Cir. 1988).

304. *Baessler v. Cont'l Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) (citing *Weyerhaeuser v. W. Seas Shipping Co.*, 743 F.2d 635, 637, 1985 AMC 30 (9th Cir. 1984); see also *Protective*

In *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*,³⁰⁵ the court noted, “It bears mention that an arbitration award may be enforced in a subsequent proceeding against parties that did not participate in an arbitration in circumstances when the parties to the arbitration had related and congruent interests which were properly advanced during the arbitration.”³⁰⁶ The *Nauru* holding is particularly disconcerting, considering its conclusion “that an arbitration panel can effectively determine the ‘rights’ of the noteholders when they were not formal parties to the arbitration.”³⁰⁷

V. IN COMMERCIAL CASES, NOTICE OR SUBSEQUENT RATIFICATION IS THE TEST TO DETERMINE WHETHER THIRD PARTIES SHOULD BE COMPELLED TO ARBITRATE

There is a line of cases involving the “battle of the forms” under the Uniform Commercial Code (U.C.C.), when, for example, one party submits a form that contains an arbitration provision and the other responds with a form that does not.³⁰⁸

Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987)). The committee on Maritime Arbitration and Mediation of the Maritime Law Association of the United States approved amendments to the FAA in October of 2000, and endorsed revisions to section 4 of the FAA in order to reverse the presumption that parties object to consolidation. These changes, however, were never proposed as a resolution to the Association, but the issue may be revisited in the future.

305. 138 F.3d 160 (5th Cir. 1998).

306. *Id.* at 166 (citing *Isidore Paiewonsky Assocs., Inc. v. Sharp Props., Inc.*, 998 F.2d 145, 155 (3d Cir. 1993) (holding nonparties to arbitration clause since they have “related and congruent interests” with the principals)); *see also Cecil's, Inc. v. Morris Mech. Enters., Inc.*, 735 F.2d 437, 439-40 (11th Cir. 1984) (enforcing indemnification agreement between general contractor and subcontractor even though underlying liability was determined by arbitration to which subcontractor was not a party); *In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789, 795-96 (7th Cir. 1981) (binding a plaintiff to outcome of arbitration between its principal and defendant even the plaintiff would be nonparty to arbitration proceedings).

307. *Nauru*, 138 F.3d at 167 (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (noting that “[c]ourts should not assume that the parties agreed to arbitrate arbitrarily unless there is ‘clear and unmistakable’ evidence that they did so”). Note, however, that the *Nauru* court acknowledges that “[a]s a general matter, the interests of judicial economy ought not to be furthered by drawing non-parties within the gravitational force of an arbitration by shortchanging their legitimate wish to pursue their claims in court.” *Naru*, 138 F.3d at 167.

308. *See, e.g.*, 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §§ 1-3 (4th ed. 1995); U.C.C. § 2-207 (2001). Section 2-207 of the U.C.C. addresses this circumstance. That section reads:

- (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

Several cases that discuss this issue have held that the inclusion of an arbitration clause in a form that is not replicated in the other party's form generally constitutes a "material alteration" of the contract and, as such, requires express assent by the offeree before it can form part of the contract.³⁰⁹ In determining such issues, the court generally has to determine both what state laws apply,³¹⁰ and whether the arbitration provision would constitute a "surprise" or "hardship" on the nonassenting party.³¹¹ The First Circuit has held that under New York law, an arbitration provision is a material alteration to a contract under section 2-207.³¹²

If arbitration clauses are considered "material alterations" to contracts under section 2-207 of the U.C.C., the same analysis could be employed in determining whether third parties are bound by arbitration agreements under the FAA. The authors submit that if a third party can show either surprise or hardship when a party to a contract attempts to bind it to arbitration, the court should probably not require arbitration unless equity otherwise requires it, i.e., if the nonsignator of the arbitration agreement knew or acknowledged that the arbitration provision might apply to it and proceeded with the transaction anyway.

This approach is certainly consistent with the holding in *Klocek v Gateway, Inc.*,³¹³ in which the party who sought to avoid arbitration had notice of the arbitration provision and had the right to reject the agreement after notice.³¹⁴ Because it did not do so, the court held that it was bound by the arbitration provision.³¹⁵ This seems to be a fair

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

U.C.C. § 2-207 (2001).

309. See, e.g., *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1285 (10th Cir. 1997).

310. *Id.* at 1284.

311. *Bergquist Co. v. Sunroc Corp.*, 777 F. Supp. 1236, 1246 (E.D. Pa. 1991), cited in *Willow Valley Manor v. Trouvailles, Inc.*, 977 F. Supp. 700, 703 n.1 (E.D. Pa. 1997).

312. See, e.g., *Diskin v. J.P. Stevens Co.*, 836 F.2d 47, 50-51 (1st Cir. 1987).

313. 104 F. Supp.2d 1332 (D. Kan. 2000).

314. *Id.* at 1336.

315. *Id.*

approach in determining whether third-party beneficiaries should be bound to arbitrate, because it requires that notice of the arbitration provision be given and preserves the right to rescind the clause before compelling arbitration. If third parties perform with notice and opportunity to rescind, it seems much more appropriate to bind them to arbitration than in cases in which they have no such knowledge and no ability to reject the underlying agreement.

In *Cunningham v. Fleetwood Homes of Georgia, Inc.*,³¹⁶ the court held that the Magnuson-Moss Warranty Act³¹⁷ precluded the manufacturer's invocation of a third-party beneficiary argument to compel arbitration when it failed to disclose the arbitration clause in the written warranty to the consumer.³¹⁸ In so holding, the court stated, "Compelling arbitration on the basis of an arbitration agreement that is not referenced in the warranty presents an inherent conflict with the [Magnuson-Moss] Act's purpose of providing clear and concise warranties to consumers."³¹⁹ Because the heart of the Magnuson-Moss Warranty Act is to provide consumers with a clear disclosure of warranty terms in a single document, the manufacturer could not insist on arbitration that was not mentioned in that document.³²⁰

If arbitration is to be truly consensual, third parties must be given notice of the arbitration provision before entering into the transaction that becomes the subject of the dispute. In cases that do not involve fraud, notice should be the touchstone of subjecting third parties to arbitration, absent their subsequent agreement to arbitrate or ratification of the arbitration provision.

VI. CONCLUSION

As the above discussion reflects, courts have often bound third parties to arbitration agreements, notwithstanding the fact that they had no notice of the arbitration provisions and no opportunity to accept or reject the arbitration agreement, or the contract containing it. This problem stems from the courts' improper presumption of an arbitration agreement between the parties to such an agreement and a nonparty. If arbitration is to be a consensual arrangement, involving the relinquishment of substantial rights, the favored approach should be one that binds nonparties to arbitration only when such parties (1) have notice of the

316. 253 F.3d 611 (11th Cir. 2001).

317. 15 U.S.C. §§ 2301-2312 (2000).

318. *Cunningham*, 253 F.3d at 622.

319. *Id.*

320. *Id.*

arbitration provision and (2) agree to same either before entering into a transaction implicating the arbitration or by thereafter ratifying the arbitration agreement.

Insofar as judicial preference for arbitration is judge-made, and not justified by the FAA or any other federal statute, this correction should be made through rulings applying the FAA and other statutes as written, without the judicial gloss that has accumulated over the past few decades.

In addition, the policies embodied in the FAA and other arbitration statutes have been applied by federal courts across the board, notwithstanding substantial state interests in guaranteeing litigants their “day in court” in specific types of disputes, including construction, consumer, and insurance disputes. While this all-encompassing approach has been favored by courts to date, the authors hope that with time and careful consideration, this will change, and that the courts will ultimately permit litigation in specific disputes carved out for protection by the states.