

Joining Nonsignatories to an Arbitration in the US

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This Practice Note examines the circumstances under which a party not signing an arbitration agreement may participate in an arbitration. The Note explains when a nonparty to an arbitration agreement can join a signatory, when a party can join a nonsignatory, whether the issue is decided by courts or arbitrators, and when parties to the arbitration can enforce arbitral awards against third parties not signing or participating in the arbitration.

Scope of This Note

This Note explains the circumstances under which a nonsignatory to an arbitration agreement may participate in an arbitration proceeding. Nonsignatories may be joined, for example, where there are multiple interdependent contracts or where not all participants of a commercial transaction are parties to the agreement containing the arbitration clause. This issue often arises where a contracting party is a member of a group of companies and where its parent or the other subsidiaries have been involved in the commercial transaction but are not parties to the contract containing the arbitration clause.

This Note examines:

- The general rules for joinder of a nonsignatory to an arbitration (see [Judicial Assistance in Joining Nonsignatories to an Arbitration](#)).
- The allocation of authority between courts and arbitrators to decide nonsignatory issues (see [Who Decides?](#)).
- The general rules for enforcement of arbitral awards against third parties that were neither arbitration agreement signatories nor parties to the arbitration (see [Enforcing Arbitration Awards Against Nonparties to the Arbitration](#)).

For information on joining nonsignatories under French, English, German, Swiss, and Russian law, see [Article, Joining non-signatories to an arbitration](#).

Judicial Assistance in Joining Nonsignatories to an Arbitration

Choice of Law

A US court's approach to joining a nonsignatory to an arbitration depends on the relevant state law principles on the validity, revocability, and enforceability of contracts (*Perry v. Thomas*, 482 U.S. 483, 493, n.9 (1987)). When courts exercise jurisdiction under Chapter 2 of the Federal Arbitration Act (FAA) (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)), they apply the choice-of-law rules of the forum (Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.3 PFD (2019)). Some courts have held that federal common law govern nonsignatory issues regarding arbitration agreements governed by the New York Convention (*Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005); see Restatement § 2.3, Reporters Note c; Gary B. Born, *International Commercial Arbitration* 1494-95 (2d ed. 2014) (Born) ("federal common law should govern issues of alter ego, agency, estoppel and the like")).

The Restatement explains that because estoppel and waiver are alternatives to state law requirements for contract formation, these theories should be governed by state law (Restatement § 2.3, cmt. c).



Legal Theories to Join Nonsignatories

Legal bases to join nonsignatories include:

- Estoppel.
- Incorporation by reference (see [Practice Note, Arbitration Clauses Incorporated by Reference Under US Law](#)).
- Assignment, assumption, and waiver.
- Agency.
- Third-party beneficiary.
- Veil piercing/alter ego (see [Practice Note, Piercing the Corporate Veil](#)).

(*Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009); *McKenna Long & Aldridge, LLP v. Ironshore Specialty Ins. Co.*, 2015 WL 144190 (S.D.N.Y. Jan. 12, 2015).)

The *Arthur Andersen* case was in the domestic context but the reasoning applies with equal force to international cases under the New York Convention (*GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC*, 2020 WL 2814297 (June 1, 2020)).

Scope of Arbitration Clause

Courts initially examine whether the arbitration clause is broad or narrow. If the clause is limited to disputes between the parties to the agreement, courts generally do not join nonsignatories (see, for example, *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351 (11th Cir. 2017); *Iota Shipholding Ltd. v. Starr Indem. & Liab. Co.*, 2017 WL 2374359 (S.D.N.Y. May 31, 2017)).

A party, whether a signatory or nonsignatory, waives its right to contest the arbitrator's exercise of jurisdiction over it if it participates in the arbitration but does not timely object during the arbitration proceedings (see *Stone v. Theatrical Inv. Corp.*, 64 F. Supp. 3d 527, 533 (S.D.N.Y. 2014) reconsideration denied, 80 F. Supp. 3d 505 (S.D.N.Y. 2015)).

Estoppel

A court may estop a party from avoiding a contract's obligation to arbitrate if the party asserts a claim or defense under the contract and that contract contains an arbitration clause (see, for example, *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160-61 (4th Cir. 2004) ("in the context of arbitration, the doctrine [of equitable estoppel] applies when one party attempts to hold another party to the terms of an agreement while simultaneously trying to avoid the agreement's arbitration clause").

Nonsignatory Seeking to Join a Signatory

Courts have offered various explanations for estopping a signatory from disavowing an arbitration clause when suing a nonsignatory. For example:

- If the issues the nonsignatory seeks to arbitrate are intertwined with the agreement that the estopped party has signed (*Tradeline Enter.s Pvt. Ltd. v. Jess Smith & Sons Cotton, LLC*, 772 F. App'x 585 (9th Cir. 2019); *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001); *Caporicci U.S.A. Corp. v. Prada S.p.A.*, 2018 WL 2264194 at *3 (S.D. Fla. May 7, 2018)).
- If the signatory **either**:
 - relies on the terms of the written agreement in asserting its claims against the nonsignatory; or
 - raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

(*Machado v. System4 LLC*, 28 N.E.3d 401, 410 (Mass. 2015).)

- The nonsignatory shows **both**:
 - the signatory's claims arise under the subject matter of the agreement;
 - the nonsignatory has a close relationship to a signatory of the agreement; and
 - the nature of the nonsignatory to a signatory was known to the signatory asserting the claim at the time of contracting.
- (*Doe v. Trump Corp.*, 2020 WL 1808395, at*5 (S.D.N.Y. Apr. 8, 2020); *Ostrolenk Faber LLP v. Lagassey*, 2020 WL 30350, at *6 (S.D.N.Y. Jan. 2, 2020); *Bankers Consecro Life Ins. Co. v. Feuer*, 2018 WL 1353279, at *4 (S.D.N.Y. Mar. 15, 2018).)

However, where the plaintiff's claim or defense is statutory and not based on the contract containing the arbitration clause, the court may refuse to apply the estoppel doctrine (see *Scheurer v. Fromm Family Foods LLC*, 2016 WL 4398548, at *3 (W.D. Wis. Aug. 18, 2016); see also *Santos v. Wincor Nixdorf, Inc.*, 2016 WL 4435271 (W.D. Tex. Aug. 19, 2016)).

Choice of law is of paramount importance in estoppel matters. For example, in *Judge v. Unigroup, Inc.*, the court analyzed the estoppel standard regarding various plaintiffs the agreements of which were covered by different state laws. The court compelled arbitration under Florida law but refused to compel arbitration under Ohio, New Jersey, and Virginia laws. (2017 WL 3971457 (M.D.

Fla. Sept. 8, 2017).) The court in *In re Henson* similarly refused to compel arbitration because under California law, the nonsignatory defendant was unable to show that plaintiffs' claims relied on the agreement containing the arbitration clause were based on the same facts and are inherently inseparable from arbitrable claims against signatory defendants (869 F.3d 1052, 1061 (9th Cir. 2017)).

Signatory Seeking to Join a Nonsignatory

Courts may be more reluctant to estop a nonsignatory from seeking not to arbitrate in a dispute brought by a signatory. For example, in *Belzberg v. Verus Invs. Holdings Inc.*, a securities broker (Jefferies) brought an arbitration against its customer (Verus) to recover monies that Jefferies paid to tax authorities on account of withholding taxes related to a securities purchase (977 N.Y.S.2d 685 (2013)). Jefferies and Verus had an arbitration clause in their securities account agreement (SAA). Verus sought to bring third-party claims in the same arbitration against several persons and entities, including an individual named Belzberg, for their share of the taxes. Belzberg had not signed the SAA. Verus argued and the lower appellate court agreed that Belzberg should be estopped from avoiding arbitration because Belzberg received "direct benefits" from the SAA. The New York Court of Appeals reversed and held that "[w]here the benefits are merely 'indirect,' a nonsignatory cannot be compelled to arbitrate a claim." The court concluded that Belzberg derived benefits from the financial advisory services Belzberg provided to another party but not directly from the Jefferies-Verus SAA (977 N.Y.S.2d at 689; see also *KPMG LLP v. Kirschner*, 122 N.Y.S.3d 18, 20-21 (1st Dep't 2020) (benefits are indirect when the parties would not have originally contemplated the non-signatory's eventual benefit)).

Similarly, in *Jones v. Singing River Health Services Foundation*, workers sued an accounting firm alleging it breached its fiduciary duties in its role as auditor of their employer's pension plan and the auditor invoked the arbitration provision of the firm's engagement letter with the plan (674 F. App'x 382 (5th Cir. 2017)). Plaintiff's complaint disclaimed any reliance on the engagement letter. In refusing to order arbitration, the court noted that "[i]f that choice makes it harder for her to prove her case, so be it" (*Jones*, 674 F. App'x at 386) (see also *Leidel v. Coinbase, Inc.*, 729 F. App'x 883, 888-89 (11th Cir. 2018) (plaintiff was not relying on the contract with the arbitration clause to assert his tort claims); *Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 222 (3d Cir. 2014) (nonsignatory's claim did not "embrace" the contract containing the arbitration clause)).

In *2004 Parker Family LP v. BDO USA LLP*, however, investor plaintiffs were compelled to arbitrate because they knowingly exploited the benefits of the engagement agreements by asserting claims against auditors expressly based on those agreements (2020 WL 2844578 at *3 (Sup. Ct. N.Y. Co May 29, 2020)). Based on the plaintiffs' allegations that they were third party beneficiaries of the engagement agreements, the court could have compelled arbitration on a third party beneficiary basis but it relied on only on direct benefits estoppel. In

Under some state's laws, only the traditional equitable estoppel grounds can be used to join a party to arbitration (see *Peregrine Falcon, LLC v. Piaggio Am., Inc.*, 720 F. App'x 863, 864-65 (9th Cir. 2018) (applying Idaho law) (signatory did not show that that the nonsignatory made "a false representation or concealment of a material fact with actual or constructive knowledge of the truth")).

A signatory successfully compelled a nonsignatory to arbitrate where:

- Plaintiffs claimed the benefits of the terms of use on defendant's website that contained an arbitration clause (*Bentley v. Control Group Media Co., Inc.*, 2020 WL 3639660, at *3 (S.D. Cal. July 6, 2020)).
- The plaintiff made purchases from the defendant under a long-term supply and distribution agreement between defendant and plaintiff's affiliate (*Peak Pipe & Supply LLC v. UMW Oilfield (L) International Ltd*, 2018 WL 6177268 (N.D. Tex. Nov. 27, 2018)).
- The plaintiff's husband had entered into contracts with the franchisor for Subway and plaintiff sued for violation of state laws in connection with those contracts (*Lee v. Doctor's Assocs., Inc.*, 2016 WL 7332982 (E.D. Ky. Dec. 16, 2016)).
- A Financial Industry Regulatory Authority (FINRA) registered broker and employee of a FINRA member securities broker-dealer successfully compelled arbitration of claims brought by the broker-dealer's affiliate because the affiliate "received a 'direct benefit' directly traceable to the employment agreement" (*BGC Notes, LLC v. Gordon*, 36 N.Y.S.3d 130, 132 (1st Dep't 2016)).
- The allegations against the nonsignatory defendants were indistinct from those against the signatory (*Color-Web, Inc. v. Mitsubishi Heavy Indus. Printing & Packaging Mach., Ltd.*, 2016 WL 6837156 (S.D.N.Y. Nov. 21, 2016)).
- The nonsignatory's claims must be determined by referring to the contract containing the arbitration clause (see *Exigen Props., Inc. v. Genesys Telecomms. Labs., Inc.*, 2016 WL 520283, at *6 (Cal. Ct. App. Feb. 9, 2016)).

Incorporation by Reference

US courts recognize an arbitration agreement incorporated from one document into another if the documents, taken together, manifest an intent to arbitrate disputes, even where the contracts are between different parties (see [Practice Note, Arbitration Clauses Incorporated by Reference Under US Law: Contracts Between Different Parties](#)).

For example:

- Pharmacies that signed provider agreements incorporating a provider manual with an arbitration clause were bound to arbitrate their disputes with a pharmacy benefits manager (*Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 262 (5th Cir. 2014)).
- An insurer holding a subrogation claim was bound by an arbitration agreement contained in a contract between its subrogee and the party responsible for the loss (see *Alstom Brasil Energia e Transporte Ltda. v. Mitsui Sumitomo Seguros S.A.*, 2016 WL 3476430 (S.D.N.Y. June 20, 2016)).

Guarantors of obligations arising under an agreement containing an arbitration clause may, in some circumstances, be required to arbitrate their liability under the guaranty. The Fifth Circuit, for example, explained that guarantors signing the agreement containing the arbitration clause are generally required to arbitrate, but that guarantors signing a separate document providing for the guarantee are not (*Bettis Grp., Inc. v. Transatlantic Petroleum Corp.*, 55 F. App'x 717 (5th Cir. 2002)). On the other hand, the Seventh Circuit did not require the guarantor to arbitrate where the guarantee appeared below the signatures at the end of the contract because it found no clear expression of the guarantor's intention to be bound by the arbitration clause (*Grundstad v. Ritt*, 106 F.3d 201 (7th Cir. 1997)).

Lenders suing on a guaranty may also be compelled to arbitrate. In *Kvaerner ASA v. Bank of Tokyo-Mitsubishi, Ltd.*, for example, banks sued on a guaranty of a construction contract that contained an arbitration clause. The court held that language in the guaranty stating that the parties "shall have the same rights and remedies ... [as] under the [Construction] Agreement" incorporates the construction agreement's arbitration clause (210 F.3d 262, 265 (4th Cir. 2000)).

Assignment, Assumption, and Waiver

Assignment

A person taking on the rights and obligations of another party by assignment under a contract containing an

arbitration clause is likely to be compelled to arbitrate any contractual dispute if the assignment is broad enough to cover the arbitration obligation (*Tanbro Fabrics Corp. v. Deering Milliken, Inc.*, 318 N.Y.S.2d 764, 766 (1st Dep't), aff'd, 325 N.Y.S.2d 419 (1971) ("the assignee of a contract acquires the assignor's rights therein and assumes its obligations including an agreement to arbitrate"); see also *Andermann v. Sprint Spectrum L.P.*, 785 F.3d 1157 (7th Cir. 2015); *Shillman Rocbit LLC v. Am. Blasting Consumables, Inc.*, 2016 WL 5843880 (S.D.W. Va. Oct. 4, 2016); and *Variblend Dual Dispensing Sys., LLC v. Seidel GmbH & Co.*, KG, 970 F. Supp. 2d 157 (S.D.N.Y. 2013)). Even where the contract is not freely assignable, a party can waive its right to object to the assignment by dealing with the assignee (see *Levi Strauss & Co. v. Aqua Dynamics Sys.*, 2016 WL 6082415 (N.D. Cal. Oct. 18, 2016)).

Where the assignment of rights is in the form of subrogation (typically to an insurance carrier), the subrogee generally may compel arbitration with a signatory to an agreement containing an arbitration clause (see *Nationwide Agribusiness Ins. Co. v. Buhler Barth GmbH*, No. 2015 WL 6689572, at *5 (E.D. Cal. Oct. 30, 2015)). Similarly, the signatory generally may compel the subrogee to arbitrate (see *Am. Bureau of Shipping v. Tencara Shipyard S.p.A.*, 170 F.3d 349, 353 (2d Cir. 1999); *Solomon v. Consol. Resistance Co. of Am.*, 468 N.Y.S.2d 532, 533 (2d Dep't 1983)).

For the arbitration obligation to apply, however, it must also be connected to the assigned rights. For example, in *Garcia v. Midland Funding, LLC*, the assignee of accounts receivable did not acquire the right to compel arbitration with the account debtor. The court treated "accounts" and "receivables" as separate contract rights and the assignment of the receivables was not subject to the arbitration clause. (2017 WL 1807563, at *3 (D.N.J. May 5, 2017).)

A successor in interest of a contract containing an arbitration provision is also generally obliged to arbitrate any disputes that arise from that agreement despite never having signed the agreement (see *Fla. Farm Bureau Ins. Cos. v. Pulte Home Corp.*, 2005 WL 1345779, at *10 (M.D. Fla. June 6, 2005)).

Assumption and Waiver

A nonsignatory assumes the obligation to arbitrate and waives any objection to arbitration, by actively and voluntarily participating in the arbitration. For example, in a case from the Second Circuit between an airline and its employees, the plaintiff employees were not yet employed by the airline when the airline agreed to arbitrate a

seniority dispute. The plaintiffs sought to vacate an arbitral award as it applied to them on the grounds that they were not parties to the arbitration agreement. The court held that the plaintiffs had voluntarily and actively participated in the arbitration and were therefore bound by the award (*Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991)).

In another case, the US District Court for the Southern District of New York employed a similar analysis:

“CIMC participated in the arbitration as CIMC-TianDa’s parent and in the posture of a legitimate party. In fact, CIMC even offered claims of its own based on the contract for the EVA System. By participating in the arbitration, CIMC effectively waived its right to claim that it should not be a party to the arbitration.”

(*Data-Stream AS/RS Techs. v. China Int’l Marine Containers*, 2003 WL 22519456, at *3 (S.D.N.Y. Nov. 6, 2003); cf. *In Re Arbitration Between Keystone Shipping Co. & Texport Oil Co.*, 782 F. Supp. 28, 31 (S.D.N.Y. 1992) (acknowledging the assumption theory but finding that the party resisting a the petition to compel arbitration “consistently refused to arbitrate”).) On the other hand, relying on an arbitration clause in an attempt to avoid litigation elsewhere manifests an intent to be bound by the clause (*Safran Elecs. & Def. SAS v. iXblue SAS*, 2019 WL 5250790, at *2 (2d Cir. Oct. 17, 2019)).

The doctrine of assumption may overlap with other contractual or equitable principles, such as estoppel. For example, a Texas court held that a company’s conduct in accepting the benefit of shareholders’ and compensation agreements meant that the company was deemed to have ratified the agreements and was also estopped from avoiding arbitration required by those agreements (*Wetzel v. Sullivan, King & Sabom, P.C.*, 745 S.W.2d 78, 81-82 (Tex. App. 1988)).

Agency

A nonsignatory principal may enforce an arbitration agreement made for its benefit by an agent even where the other party to the contract did not know about the principal’s existence (*Interbras Cayman Co. v. Orient Victory Shipping Co., S.A.*, 663 F.2d 4, 6 (2d Cir. 1981)). A signatory may be able to compel arbitration against the undisclosed principal of its counterparty if the signatory has plausibly alleged facts that demonstrate an undisclosed agency relationship (see *D/S Norden A/S v. CHS de Paraguay, SRL*, 2017 WL 473913, at *4 (S.D.N.Y. Feb. 3, 2017)). However, where the principal is disclosed, usually only the

principal and not the agent must arbitrate with the other party (*Covington v. Aban Offshore Ltd.*, 650 F.3d 556, 559 (5th Cir. 2011)).

Courts are split on whether nonsignatory agents can invoke the protection of an arbitration clause contained in a contract signed by the agents’ principal. Compare the following cases:

- *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1360 (2d Cir. 1993). “Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement.”
- *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121-22 (3d Cir. 1993). “In keeping with the federal policy favoring arbitration, we share the views of the Courts of Appeals for the Sixth and Ninth Circuits and will extend the scope of the arbitration clauses to agents of the party who signed the agreements.”
- *Westmoreland v. Sadoux*, 299 F.3d 462, 466 (5th Cir. 2002). “A non-signatory cannot compel arbitration merely because he is an agent of one of the signatories.”
- *Andermann v. Sprint Spectrum L.P.*, 785 F.3d 1157, 1158 (7th Cir. 2015). The court allowed a defendant’s affiliate designated to hold the contracts containing the arbitration agreement to compel arbitration.
- *Neal v. Navient Sols., LLC*, 2020 WL 6122790, at * 3 (8th Cir. Oct. 19, 2020). The plaintiff sued an agent of the holder of his student loan debt for increasing the interest rate. Because the basis of potential liability lies in the credit agreement between plaintiff and the lender, the plaintiff is bound by the credit agreement’s arbitration provision.
- *Zambrana v. Pressler & Pressler, LLP*, 2016 WL 7046820 (S.D.N.Y. Dec. 2, 2016). The plaintiff brought putative class action alleging violations of the Fair Debt Collections Practices Act against lenders and their attorneys. The attorneys, nonsignatories, were able to compel arbitration because the allegations against them were in their capacity as agents of the signatory.
- *Degraw Const. Grp., Inc. v. McGowan Builders, Inc.*, 58 N.Y.S.3d 152, 155 (2d Dep’t 2017). Corporate officers and employees were allowed to enforce arbitration agreements entered into by their corporation when sued in their individual capacities for corporate debts.

Third-Party Beneficiary

A third-party beneficiary of a contract generally may invoke that contract’s arbitration clause. When deciding

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the issue, courts look at the intent of the parties at the time they executed the contract (*E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200, n.7 (3d Cir. 2001)). In one appellate case, the court found that the term “customer” in the National Association of Securities Dealers (NASD) rules includes the clients of an “associated person” of the NASD member firm against whom plaintiffs sought arbitration and compelled the firm to arbitrate a claim brought by these parties (*John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 59-60 (2d Cir. 2001)). In another case, the court allowed billing aggregators that served as financial intermediaries between a mobile content provider and its customers to compel arbitration of the consumers’ claims, based on language in the consumers’ subscription agreements (*Geier v. m-Qube Inc.*, 824 F.3d 797 (9th Cir. 2016)). Another court, however, read the arbitration clause as too narrow to encompass third-party beneficiaries (*Cortés-Ramos v. Martin-Morales*, 894 F.3d 55, 59 (1st Cir. 2018)).

A third-party beneficiary also may be compelled to arbitrate. In a Fifth Circuit case, a nursing home admission agreement contained an arbitration clause. The patient’s mother signed the agreement on the patient’s behalf. The court compelled the patient to arbitrate because the agreement expressly named the patient as the resident receiving care and services from the nursing home (*JP Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596, 600 (5th Cir. 2007); but see *Richmond Health Facilities v. Nichols*, 811 F.3d 192, 197 (6th Cir. 2016) (decendent’s arbitration agreement cannot be enforced against wrongful-death beneficiaries)). Even where an agreement expressly bars third parties from enforcing the contract’s provisions, an insurer may still enforce the contract and the arbitration clause within it under the principle of equitable subrogation (see *Zurich Ins. Co. v. Crowley Latin Am. Servs., LLC*, 2016 WL 7377047, at *4 (S.D.N.Y. Dec. 20, 2016)).

Veil Piercing/Alter Ego

To prevail under the alter ego theory, a plaintiff must prove that:

- The parent company completely dominated the subsidiary without regard for its separate identity.
- An injustice or other wrong to the plaintiff is likely to result if the corporate veil is not pierced.

For a further discussion of the alter ego theory, see [Practice Note, Piercing the Corporate Veil: Basis for Piercing the Corporate Veil: Alter Ego Theory](#).

In the arbitration context, a court may apply the alter ego doctrine to a nonsignatory to an arbitration agreement when it finds each of the following:

- The nonsignatory exercises complete domination over the signatory.
- The nonsignatory uses its domination to commit a fraud or wrong.
- The fraud or wrong results in an unjust loss or injury to the counter-party.

(*Freeman v. Complex Computing*, 119 F.3d 1044, 1052 (2d Cir. 1997).)

Courts have compelled alleged alter egos to arbitrate where, for example, in a claim under an insurance contract, the insurance carrier sought to join to the arbitration another corporation and an individual alleged to dominate the corporate group and to engage in sham transactions that were the subject of the insurance claim (*Global Commodities Grp., LLC v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 2013 WL 4713547 (S.D.N.Y. Aug. 29, 2013)).

The inquiry generally focuses on whether:

- The entities have ignored the independence of their separate operations.
- The use of separate entities furthered a fraudulent scheme.
- Holding the corporate form inviolate would lead to substantial injustice or inequity.

(*InterGen N.V. v. Grina*, 344 F.3d 134, 148-49 (1st Cir. 2003).)

Courts also have confirmed awards where arbitrators have pierced the corporate veil, for example, when:

- The undercapitalization of a governmental instrumentality and the government’s conduct in connection with the parties’ joint venture agreement made it impossible for the objectives of the joint venture agreement to be realized (*Bridas S.A.P.I.C. v. Government of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006)).
- The president and majority shareholder of the corporation that signed the arbitration agreement was properly the subject of an arbitration to collect corporation’s debts because the president directed the corporation to sell its assets and distribute the proceeds for purposes other than to repay its creditors (*Mobius Mgmt. Sys. v. Technologic Software Concepts*, 2002 WL 31106409, at **2-3 (S.D.N.Y. Sept. 20, 2002).)

Vouching-in

Vouching-in is a procedure that allows a party to an arbitration to join a nonparty who is an alleged indemnitor (referred to as the vouchee). Vouching in does not compel a nonsignatory to arbitrate, but it does provide the vouchee with an incentive to join the arbitration. If the vouchee refuses to join the arbitration, it may still be bound by its result (see, for example, *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 386 (2d Cir. 2003) and *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991); but see *Lester Bldg. Assocs., Inc. v. Davidson*, 514 A.2d 1100, 1103 (Del. Ch. 1986) (under Delaware law, vouching in may not be applied to an arbitration)).

Vouching-in can arise, for example, where a claim is brought against a seller of goods indemnified by its supplier. The respondent generally provides a notice to the potentially liable third party that states that the supplier may join the arbitration and defend against the claim (UCC § 2-607(5)(a); see Haig, 11 Bus. & Com. Litig. Fed. Cts. § 117:73 (4th ed.)).

For more information on the effect of arbitral awards in later proceedings, see [Practice Note, The Preclusive Effect of Arbitration Awards in the US: Vouching-in](#).

Who Decides?

Questions of arbitrability generally are “presumptively to be decided by courts, not the arbitrators themselves” (*Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 406 (2d Cir. 2009)). To determine whether a party must arbitrate a particular dispute, courts must examine:

- Whether a valid agreement to arbitrate exists.
- Whether a party to the agreement has failed to arbitrate.

(9 U.S.C. § 4; see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967).) For example, a court decides whether an agent lacked authority to make the agreement (see *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 101 (3d Cir. 2000)).

Parties can “agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy” (*Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010)). However, a court determines these issues unless the arbitration agreement contains clear and unmistakable evidence that the parties intended for arbitrators to determine the question of arbitrability

(*AT&T Tech., Inc. v. Commc'n Workers*, 475 U.S. 643 (1986)). The US Supreme Court has expressly left open the question of whether incorporation of institutional rules giving the arbitrators power to determine their own jurisdiction in fact delegates the arbitrability question to the arbitrators (*Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 531 (2019)).

Because a nonsignatory is challenging the arbitration agreement’s existence with respect to it, the court determines that issue. Before referring to the arbitrators the issue of arbitrability in a case involving a nonsignatory, a court must examine extrinsic evidence (see Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.8, Reporters’ Note ii to Comment b) Courts must determine:

- Whether the a signatory and a nonsignatory have a sufficient relationship to each other and to the rights created under the agreement.
- Whether there was clear and unmistakable evidence of the contracting parties’ intent to submit the issue of arbitrability to an arbitrator.

(*Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 209-10 (2d Cir. 2005).)

In *Contec*, there was no dispute that the parties had a close relationship. Regarding the second factor, the court held that the arbitrators must decide whether the signatory’s claims against the nonsignatory were arbitrable because the arbitration clause called for arbitration under the American Arbitration Association (AAA) rules that provide that arbitrators have jurisdiction to decide arbitrability (398 F.3d at 211). In *Wakaya Perfection, LLC v. Youngevity Int'l, Inc.*, by contrast, the Tenth Circuit held that a court must always decide whether to compel a nonsignatory to arbitrate because a nonsignatory cannot be said to have delegated that issue to an arbitrator (2018 WL 6495113 at *8 (10th Cir. Dec. 11, 2018)).

In *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, an award debtor argued that an award issued against it was not enforceable because it had never agreed to arbitrate. To determine whether the dispute with VRG was arbitrable, the court needed to decide whether the award debtor had consented in the first place to arbitrate arbitrability. (717 F.3d 322, 325 (2d Cir. 2013).) Because the parties had not agreed to arbitrate, the court then found that they had not delegated the arbitrability determination to the arbitrator or courts at the arbitral seat (605 F. App'x 59 (2d Cir. 2015); see also *Rossisa Participações S.A. v. Reynolds & Reynolds Co.*, 2019 WL 4242937, at*1 (S.D. Ohio Sept. 6,

2019) (court was not obligated to enforce or give preclusive effect to Brazilian court's decision on question of arbitrability); *Holzer v. Mondadori*, 2013 WL 1104269, at *9 (S.D.N.Y. Mar. 14, 2013) (where the arbitration clause referred to disputes "between the parties" there was no agreement to have the arbitrator decide nonsignatory issues); *215-219 W. 28th St. Mazal Owner LLC v. Citiscapex Bldrs. Group Inc.*, 2019 WL 5978712 (N.Y. 1st Dep't Nov. 14, 2019) ("[t]he issue of whether a party is bound by an arbitration provision in an agreement it did not execute is a threshold issue for the court, not the arbitrator, to decide").

In *Sarhank Group*, the arbitral tribunal had rendered an award against Oracle Systems, Inc. and its parent, Oracle Corp., over Oracle Corp.'s objection that it was not a signatory to the arbitration agreement (404 F.3d at 658). The court held that the arbitration agreement did not evidence a clear and unmistakable intent by the parent to permit the arbitrator to decide the issue of arbitrability and the court must decide the issue of consent by the parent to arbitrate under contract or agency law (404 F.3d at 662; see also *Trina Solar US, Inc. v. JRC-Servs. LLC*, 2020 WL 1592487 (2d Cir. Apr. 2, 2020) (even where parties delegate arbitrability determinations to arbitrators, courts review the decision to join a nonsignatory de novo); *DCK World Wide, LLC v. Pacifica Riverplace, L.P.*, 2018 WL 934898, at *2-*3 (W.D. Tex. Feb. 16, 2018) (same)).

In *Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, on the other hand, the court construed an arbitration agreement between and insured and a contractor that incorporated institutional rules giving arbitrators jurisdiction to decide arbitrability as including whether insurer could enforce its subrogation rights through arbitration (921 F.3d 522, 537-39 (5th Cir. 2019)).

For more detailed analysis on who decides arbitrability, see [Practice Note, Arbitrability Issues in US Arbitration: Determination by a Court or Arbitrator](#).

Enforcing Arbitration Awards Against Nonparties to the Arbitration

The rules that govern the question of who decides whether parties agreed to arbitrate a dispute and whether a dispute falls within the scope of an arbitration agreement do not apply where a party seeks to enforce an arbitration award against someone not a party to the arbitration agreement and was not a party to the arbitration. An arbitration award is a determination on the

merits of a dispute that is analogous to a judgment by a court of law (see Restatement (Third) of US Law of Int'l Comm. Arb. § 1-1(a) ("An 'arbitral' award is a decision in writing by an arbitral tribunal that sets forth the final and binding determination on the merits of a claim, defense, or issue, whether or not that decision resolves the entire controversy before the tribunal"); *DuBois v. Macy's Retail Holdings, Inc.*, 533 F. App'x 40, 41 (2d Cir. 2013) ("[T]he arbitration award constitutes a final judgment on the merits"). When courts determine against whom the award can be enforced, the inquiry is solely a question about the liability of third parties for satisfaction of an arbitration award.

In *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, the Second Circuit remanded an award enforcement proceeding to the district court to evaluate the award creditor's effort to reach alleged alter egos of the award debtor "under the applicable law in the Southern District of New York." It is unclear what law the court meant and presumably the issue is to be fleshed out on remand. (850 F.3d 58, 76 (2d Cir. 2017); see also *LiquidX Inc. v. Brooklawn Capital, LLC*, 254 F.Supp.3d 609, 616-17 (S.D.N.Y. 2017) (applying New York law, the forum state and the principal place of business of the companies alleged to be alter egos, instead of Delaware, those companies state of incorporation, or Louisiana, the arbitral seat, but noting that the law of each of those states employs substantially the same analysis).)

The *de Gusa* decision also raises procedural questions that remain unanswered. For example, the court seemed to assume, without deciding, that it had subject matter jurisdiction under Chapter 2 of the FAA. By contrast, the Ninth Circuit held that it lacked subject matter jurisdiction in a post-award action against a nonsignatory guarantor (*Cerner Middle E.Ltd. v. Belbadi Enter.s LLC*, 2019 WL 4582837, at *6 (9th Cir. Sept. 23, 2019)).

Moreover, where a claim against a non-signatory is made for the first time after the arbitration is concluded, during recognition and enforcement proceedings under the FAA, it remains unclear whether the enforcing court may proceed to determine the alter ego issues either:

- As if the proceeding were a plenary action (with full discovery and a trial on disputed issues of fact).
- In summary fashion, without merits review, as provided in the FAA (9 U.S.C. §§ 9 and 207).

(See also *Recom Corp. v. Miller Bros.*, 2018 WL 3930090 (D.N.J. Aug. 16, 2018) (Arbitrators granting relief against the respondent "and its parents, successors, affiliates and assigns, jointly and severally").)

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On the other hand, nonparties to the arbitration award alleged to be alter egos of the award debtor generally may not intervene in the proceeding to confirm the award to oppose confirmation (see *Eddystone Rail Co., LLC v. Jamex Transfer Servs., LLC*, 289 F. Supp. 3d 582, 588-89 (S.D.N.Y. 2018); cf. *Techcapital Corp. v. Amoco Corp.*, 2001 WL 267010, at *4 (S.D.N.Y. Mar. 19, 2001) (in an action to confirm or vacate award, a court permits nonsignatories to intervene after considering the reasons why they did not seek to intervene in the arbitration)).

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