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When Nonsignatories Can Be Compelled to Arbitrate

The Federal Arbitration Act ("FAA") provides that written arbitration agreements concerning transactions in interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111-12 (2001). The FAA embodies a "liberal federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983). That policy requires "ambiguities as to the scope of the arbitration clause itself [to be] resolved in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ*., 489 U.S. 468, 476 (1989). A party seeking to compel arbitration "must show [1] that a valid agreement to arbitrate exists, [2] that the movant is entitled to invoke the arbitration clause, [3] that the other party is bound by that clause, and [4] that the claim asserted comes within the clause's scope." *InterGen N.V. v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003).

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit." *McCarthy v. Azure*, 22 F.3d 351, 354 (1st Cir. 1994) (*quoting AT&T Techns., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 681 (2010) (*quoting Volt Info. Scis.*, 489 U.S. at 479) (a "basic precept" underlying the FAA is that "arbitration is a matter of consent, not coercion"). While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, "it does not follow . . . that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." *Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2d Cir. 1960). Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause. *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000). Because arbitration is a creature of contract (*United Am. Healthcare Corp. v. Backs*, 997 F. Supp. 2d 741, 745 (E.D. Mich. 2014)), grounds for compelling a nonsignatory to arbitrate are governed by state law. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009); *Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1170 (11th Cir. 2011)

Federal Courts have recognized six theories for binding nonsignatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing / alter ego; (5) estoppel, and (6) third-party beneficiary. *See* J.E. Grenig, Alternative Dispute Resolution § 7:4 (3d ed. 2005); 1 LNPG: MA Alternative Dispute Resolution § 4.20 (2018); *see also Walker* v. *Collyer*, 85 Mass. App. Ct. 311, 319 (2014); *Bridas S.A.P.I.C.* v. *Gov't of Turkmenistan*, 345 F.3d 347, 356 (5th Cir. 2003), *cert. denied*, 541 U.S. 937 (2004).[1] Whether the party seeking to compel or resist arbitration is a signatory matters in this context. "[A] willing nonsignatory seeking to arbitrate with a signatory that is unwilling may do so under what has been called an alternative estoppel theory which takes into consideration the relationships of persons, wrongs, and issues, but a willing signatory seeking to arbitrate with a non-signatory that is unwilling must establish at least one of the [recognized theories for binding nonsignatories to

[1] The Second Circuit, however, only recognizes five theories for binding nonsignatories to arbitration agreements. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) ("we have recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.").

arbitration agreements]." *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005). Each of the six theories recognized by federal courts for binding nonsignatories to arbitration agreements is discussed below.

Incorporation by Reference

Under an "incorporation by reference" theory, "[a] nonsignatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the nonsignatory which incorporates the existing arbitration clause." *Thomson-CSF, S.A.* v. *Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995); *Machado*, 471 Mass. at n.9; *Upstate Shredding, LLC v. Carloss Well Supply Co.*, 84 F. Supp. 2d 357, 365 (N.D.N.Y. 2000).

"Notwithstanding the existence of a separate contract between the signatory and the nonsignatory incorporating the arbitration agreement by reference, the nonsignatory still cannot be compelled to arbitrate unless the arbitration clause itself contains language broad enough 'to allow nonsignatories' disputes to be brought within its terms.'" *Limonium Mar., S.A. v. Mizushima Marinera, S.A.*, 1999 U.S. Dist. LEXIS 20010, at *15 (S.D.N.Y. Jan. 28, 1999) (citing *Cont'l U.K., Ltd. v. Anagel Confidence Compania Naviera, S.A.*, 658 F. Supp. 809, 814 (S.D.N.Y. 1987)). In general, "courts have held that arbitration clauses providing that all disputes arising out of this contract are to be submitted to arbitration are broad enough to cover disputes involving nonsignatories to the charter party." *Limonium Mar., S.A. v. Mizushima Marinera, S.A.*, 1999 U.S. Dist. LEXIS 20010, at *15-17 (S.D.N.Y. Jan. 28, 1999); *see, e.g., Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venez.*, 991 F.2d 42, 47-49 (2d Cir. 1993). On the other hand, courts have held that clauses requiring arbitration of disputes "between the disponent owner and the charterers" or "between the contracting parties" are too narrow to encompass disputes involving nonsignatories and thus apply only to disputes between the particular parties identified in the arbitration clause. *See, e.g., Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503, 505-06 (2d Cir. 1965).

Assumption

Under an "assumption" theory, "a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate," despite being a nonsignatory. *Machado*, 471 Mass. at n.10; *see e.g. Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir.), *cert. denied*, 502 U.S. 910 (1991) (flight attendants manifested a clear intention to arbitrate by sending a representative to act on their behalf in arbitration process); *In re Transrol Navegacao S.A.*, 782 F. Supp. 848, 851 (S.D.N.Y. 1991) (court found the nonsignatory respondent had agreed to arbitrate because it previously had agreed to arbitrate in France and only later refused to arbitrate in New York).

Agency

Under an "agency" theory, a nonsignatory who is an agent of a signatory may compel arbitration for liability arising under the contract in question. *Bridas S.A.P.I.C.*,, 345 F.3d at 356-58; *Machado*, 471 Mass. at n.11; *see Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 10-11 (1st Cir. 2014) (holding that a nonsignatory employee of a signatory corporation may compel arbitration against signatory plaintiffs); *Pritzker v. Merrill Lynch, Pierce, Fenner &*

Smith, Inc., 7 F.3d 1110, 1121-22 (3d Cir. 1993) (holding that a nonsignatory employee and a nonsignatory corporate sister of a signatory corporation may compel arbitration against signatory plaintiffs).

On the other hand, for a nonsignatory to be compelled to arbitrate under an agency theory, "not only must an [agency] arrangement exist . . . so that one [party] acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the [legal obligation in dispute]." *Phoenix Can. Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988); *see InterGen N.V. v. Grina*, 344 F.3d 134, 148 (1st Cir. 2003) (refusing to compel arbitration against a parent corporation which was not a signatory to an arbitration agreement, even though its subsidiary was a signatory and acted as the parent's agent in certain other contexts, because there was no evidence that the subsidiary acted as the parent's agent when it committed the specific acts that were the subject of the dispute).

Veil Piercing / Alter Ego

Under a "veil-piercing / alter ego" theory, a party "may be bound by an agreement entered into by its subsidiary regardless of the agreement's structure or the subsidiary's attempts to bind itself alone to its terms, 'when their conduct demonstrates a virtual abandonment of separateness.'" *Bridas S.A.P.I.C.*, 345 F.3d 347, 358-59 (*quoting Thomson-CSF, S.A.*, 64 F.3d at 777). While a corporate relationship alone is not sufficient to bind a nonsignatory to an arbitration agreement,*see Keystone Shipping*, 782 F. Supp. at 30-31, courts will pierce the corporate veil to hold an alter ego liable for the commitments of its instrumentality if (1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil. *Bridas S.A.P.I.C.* , 345 F.3d at 359; *McCarthy v. Azure,* 22 F.3d 351, 362-3 (1st Cir. 1994) (holding that the alter ego doctrine can be invoked "only where equity requires the action to assist a third party").

Equitable Estoppel

Equitable estoppel "precludes a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations." *InterGen*, 344 F.3d at 145. Federal courts generally "have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Id*. (*quoting Thomson-CSF*, 64 F.3d at 779).[2]

[2] Note that state laws can vary on the test for equitable estoppel. *Contrast Machado*, 471 Mass. at 211 ("Equitable estoppel typically allows a nonsignatory to compel arbitration in either of two circumstances: (1) when a signatory 'must rely on the terms of the written agreement in asserting its claims against the nonsignatory' or (2) when a signatory 'raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'") *with Smith* v. *Mark Dodge, Inc.*, 934 So. 2d 375, 380-381 (Ala. 2006) (quoting *Ex parte Napier*, 723 So. 2d 49, 51 (Ala. 1998) (court will consider whether arbitration may be compelled under equitable estoppel doctrine only if arbitration agreement is written in broad language so that it applies, e.g., to "[a]ll disputes, claims or controversies arising from or relating to this [c]ontract or the relationships which result from this [contract]").

However, courts have been reluctant to estop a nonsignatory attempting to avoid arbitration. *Id*. at 145-46. In the latter scenario, "estoppel has been limited to 'cases [that] involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.'" *InterGen*, 344 F.3d at 146 (*quoting E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)).

Third Party Beneficiary

A nonsignatory may also seek to enforce an arbitration agreement as a third party beneficiary of the contract. "The third-party beneficiary doctrine, while similar in some ways to estoppel, is a distinct ground for compelling a nonsignatory to arbitrate." *Ouadani v. TF Final Mile LLC*, 876 F.3d 31, 39 (1st Cir. 2017). While an equitable estoppel analysis focuses on the parties' conduct after the execution of the contract, a court analyzing whether the third-party beneficiary doctrine applies looks to the parties' intentions at the time the contract was executed. *See Bridas S.A.P.I.C.*, 345 F.3d at 362 (*quoting DuPont*, 269 F.3d at 200 n.7). The "critical fact" that determines whether a nonsignatory is a third-party beneficiary is whether the underlying agreement "manifest[s] an intent to confer specific legal rights upon [the nonsignatory]." *InterGen*, 344 F.3d at 147. "A third-party beneficiary must demonstrate with 'special clarity that the contracting parties intended to confer a benefit on him,' considering that such status is 'an exception to the general rule that a contract does not grant enforceable rights to nonsignatories.'" *Hogan v. SPAR Grp., Inc.*, 2019 U.S. App. LEXIS 2576, at *8 (1st Cir. Jan. 25, 2019) (*citing InterGen*, 344 F.3d at 146).

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