

Joining non-signatories to an arbitration

by Irina Tymczyszyn and Claire Morel de Westgaver, Bryan Cave, Allan Van Fleet, McDermott Will & Emery, and Mark A. Corroero, Stornello & Corroero with Practical Law Arbitration

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This article examines the circumstances under which a party that is not a signatory to an arbitration agreement may participate in an arbitration. The authors consider joinder of a non-signatory in the US, as well as under the national laws of France, England, Switzerland, Russia and Germany. Joinder when states and state-owned entities are involved in the dispute is also examined.

Note: For a more up-to-date discussion of US law, see [Practice note, Joining Nonsignatories to an Arbitration in the US](#).

This article sets out the circumstances under which a party that is not a signatory to an arbitration agreement may participate in an arbitration proceeding. Non-signatories may be joined, for example, where there are multiple but interdependent contracts, or where multiple parties are involved in a commercial transaction but only some of them 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 signatories to that contract.

This article examines:

- Joinder of a non-signatory in the US.
- Joinder of a non-signatory under the national laws of France, England, Switzerland, Russia and Germany.
- Joinder when states and state-owned entities are involved in the dispute.

US

A US court's approach to joining a non-signatory to an arbitration depends on the relevant state law principles on the validity, revocability and enforceability of contracts generally (*Perry v. Thomas*, 482 U.S. 483, 493, n. 9 (1987)). Those principles include:

- Estoppel.
- Incorporation by reference.

- 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).) For a recent decision summarizing case law for each of these principles, see *McKenna Long & Aldridge, LLP v. Ironshore Specialty Ins. Co.*, 2015 WL 144190 (S.D.N.Y. Jan. 12, 2015).

When courts exercise jurisdiction under Chapter Two of the Federal Arbitration Act (FAA) (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)), they apply federal law to the question of whether an agreement to arbitrate is enforceable (see *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999)).

A party waives its right to contest the arbitrator's exercise of jurisdiction over it if it 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 will invoke equitable estoppel to prevent a party who invokes a claim or defence that relates to a



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contract containing an arbitration clause from avoiding the contract's obligation to arbitrate (for example, in *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160–61 (4th Cir. 2004), the court said that “[I]n 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”) and in *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 527-28 (Tex. 2015) the court stated that the claim must “depend on the existence” of the contract.

In *Meyer v. WMCO-GP L.L.C.*, 211 S.W.3d 302 (Tex. 2006), for example, a dispute arose out of a purchase and sale agreement (PSA) under which WMCO would buy Bullock's Ford dealership. Bullock's dealership agreement with Ford Motor Company (Ford), the manufacturer, gave Ford a right of first refusal to buy the dealership. The PSA acknowledged Ford's right of first refusal and provided that, if Ford exercised its option, Bullock would be permitted to terminate the PSA and sell to Ford. The PSA also contained an arbitration clause requiring WMCO to arbitrate any disputes with Bullock. Ultimately, Ford exercised its right of first refusal and Bullock terminated its PSA with WMCO. Ford assigned its right to acquire the dealership to an individual named Meyer, and Bullock sold to Meyer.

WMCO sued Bullock, Meyer and Ford. WMCO claimed that Ford's right of first refusal was void because, in violation of the dealership agreement, Meyer had disclosed WMCO's confidential information to third parties. Even though Ford and Meyer were not parties to the arbitration agreement contained in the PSA, they demanded arbitration under the PSA. The Texas Supreme Court held that because WMCO's claims “all depend on the existence of the PSA,” which contained an arbitration clause, WMCO's claims relied on the PSA and therefore WMCO would be estopped from refusing to arbitrate. The court, quoting *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000), explained that the plaintiff “cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory”. (See also *Hays v. HCA Holdings, Inc.*, 838 F.3d 605 (5th Cir. 2016) and *Star Sys. Int'l Ltd. v. 3M Co.*, 2016 WL 2970272 (Tex. App. May 19, 2016) (where the court noted that signatories will be estopped from avoiding arbitration where the alleged facts touch matters, have a significant relationship to, are inextricably enmeshed with, or are factually intertwined with the contract containing an arbitration clause; *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*,

271 F.3d 403, 406 (2d Cir. 2001) where the court said that “[T]he circuits have been willing to estop a signatory from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed”; *Machado v. System4 LLC*, 28 N.E.3d 401, 410 (Mass. 2015), noting that a signatory can be estopped when it must rely on the terms of the written agreement in asserting its claims against the nonsignatory or when it raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract; and *Heritage Capital Corp. v. Christie's, Inc.*, 2017 WL 1550514, at *3 (N.D. Tex. May 1, 2017), finding that plaintiffs' causes of action for copyright infringement, unfair competition and other legal theories all rely on plaintiffs' website use agreements that contain arbitration clauses.) However, where the plaintiff's claim is not based on the contract containing the arbitration clause, but instead is pursuant to a statute, the estoppel doctrine may not apply (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) (court rejected an estoppel theory based on intertwined claims as basis for compelling a non-signatory to arbitrate statutory claims)).

The Meyer court also acknowledged that, if the signatory alleges substantially interdependent and concerted misconduct between a non-signatory and a signatory, arbitration is appropriate (*Meyer*, 211 S.W.3d at 306). Some courts, however, have questioned the continued viability of this test. (See, for example, *Glassell Producing Co., Inc. v. Jared Res., Ltd.*, 422 S.W.3d 68, 82 (Tex. App. 2014) where the court said “Therefore, we reject the Non-signatories' concerted misconduct argument and will confine our analysis to direct benefit estoppel — the only form of equitable estoppel recognized in Texas”). (See also *Ross v. Am. Express Co.*, 547 F.3d 137, 144 (2d Cir. 2008) where the court noted that concerted misconduct estoppel applies only to parties that share a close corporate relationship, such as a parent and a subsidiary.)

Recently, in *Judge v. Unigroup, Inc.*, the court applied the estoppel standard to various plaintiffs whose agreements were covered by different state laws. The court compelled arbitration under Florida law but refused to compel arbitration under Ohio, New Jersey and Virginia law. (2017 WL 3971457 (M.D. Fla. Sept. 8, 2017).)

Although courts have generally been willing to estop a signatory from avoiding arbitration of claims based on a contract that requires arbitration of disputes, courts

are more reluctant to estop a non-signatory in a dispute brought by a signatory. In *Belzberg v. Verus Invs. Holdings Inc.*, 977 N.Y.S.2d 685 (N.Y. 2013), for example, 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. 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 he received “direct benefits” from the SAA. The New York Court of Appeals reversed that decision and held that “[w]here the benefits are merely ‘indirect,’ a non-signatory cannot be compelled to arbitrate a claim.” Applying this principle to the facts, the court concluded that Belzberg derived benefits from the financial advisory services he provided to another party but not directly from the Jefferies-Verus SAA. (See also *Lee v. Doctor’s Associations, Inc.*, 2016 WL 7332982 (E.D. Ky. Dec. 16, 2016); *BGC Notes, LLC v. Gordon*, 36 N.Y.S.3d 130, 132 (1st Dep’t 2016); *Al Rushaid v. Nat’l Oilwell Varco, Inc.*, 814 F.3d 300, 305 (5th Cir. 2016); *Flintkote Co. v. Aviva PLC*, 769 F.3d 215 (3d Cir. 2014) and *Wallace v. AmSurg Holdings, Inc.*, 2015 WL 7568592 (D. Or. Nov. 24, 2015).)

More recently, in *Jones v. Singing River Health Servs. Found.*, 2017 WL 65384 (5th Cir. Jan. 5, 2017), workers accused an accounting firm of breaching 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. Here, the plaintiffs chose to disclaim 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” (2017 WL 65384 at *4). Similarly, in *Color-Web, Inc. v. Mitsubishi Heavy Indus. Printing & Packaging Mach., Ltd.*, 2016 WL 6837156 (S.D.N.Y. Nov. 21, 2016) a case arising out of an agreement to purchase a printing press, non-signatory affiliates of both the purchaser and the seller were named in a lawsuit. The court compelled arbitration of the entire dispute. As to the defendants, the court noted that the allegations against the non-signatory defendants were indistinct from those against the signatory because their claims related to direct benefits they would receive arising out the sales agreement.

In *City of Riverside v. Mitsubishi Heavy Indus., Ltd.*, 2014 WL 1028835 (S.D. Cal. Mar. 14, 2014), the plaintiff claimed that it was the principle on whose behalf a purchase

order with the defendant had been signed, and in the alternative, that it was the beneficiary of the purchase order’s terms. The purchase order contained an arbitration clause. Under those circumstances the court stayed the litigation pending arbitration. The plaintiff was estopped from avoiding arbitration because its claims seek to benefit from the purchase order by recovering for causes of action arising from the it. Equity required that plaintiff abide by the agreement to use arbitration to resolve contract disputes (see also *McKenna Long & Aldridge*, 2015 WL 144190 at *11-*12 (non-signatories required to arbitrate under insurance policy containing an arbitration clause where the policy was procured for the non-signatories’ benefit and they received substantial sums paid out on the policy), *Sanford v. Bracewell & Giuliani, LLP*, 618 F. App’x 114, 118 (3d Cir. 2015) (non-signatory claiming professional malpractice and breached an engagement agreement was bound by the engagement agreement’s arbitration clause under equitable estoppel principles) and *Everett v. Paul Davis Restoration, Inc.*, 771 F.3d 380 (7th Cir. 2014) (owner of corporate franchisee was required to arbitrate with franchisor under direct benefit estoppel doctrine)).

Direct benefit estoppel is not recognized in all states. In *Jacks v. CMH Homes, Inc.*, the Tenth Circuit refused to compel arbitration against non-signatories because Oklahoma has not “embraced the doctrine of direct-benefits estoppel” (2017 WL 2129555, at *4 (10th Cir. May 17, 2017)).

Apart from direct benefit estoppel, some courts will bind a nonsignatory to arbitrate if the nonsignatory seeks to enforce the terms of a contract containing an arbitration clause or to assert claims that must be determined by reference to that contract (see *Exigen Properties, Inc. v. Genesys Telecommunications Labs., Inc.*, 2016 WL 520283, at *6 (Cal. Ct. App. Feb. 9, 2016)). At least one court, however, has refused to extend this analysis where the arbitration clause is explicitly limited to disputes between the parties (*Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351 (11th Cir. 2017)).

Incorporation by reference

Courts may incorporate an arbitration agreement from one document into another (see, for example, *Crawford Prof’l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 262 (5th Cir. 2014) where pharmacies that signed provider agreements incorporating a provider manual with an arbitration clause were bound to arbitrate their disputes with a pharmacy benefit manager). (See also *Century Indem. Co. v. Certain Underwriters at Lloyd’s, London*, subscribing to Retrocessional Agreement Nos. 950548,

950549, 950646, 584 F.3d 513, 550 (3d Cir. 2009), which involved a retrocessional agreement that incorporated an arbitration clause in reinsurance treaties and *LDF Constr., Inc. v. Texas Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 726 (Tex. App. 2015), in which an agreement between a property owner and a contractor incorporated an American Institute of Architects form “General Conditions of the Contract for Construction” that provided for arbitration). Similarly, an insurer holding a subrogation claim will be 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)).

If other parties personally guarantee an agreement containing an arbitration clause, the guarantors may, in some circumstances, be required to arbitrate their liability to the claimant. The US Court of Appeals for the Fifth Circuit drew a distinction between guarantors who sign the agreement containing the arbitration clause and seek to limit the guarantee to certain enumerated obligations and guarantors who sign a separate document providing for the guarantee, with only the former generally required to arbitrate (*Bettis Grp., Inc. v. Transatlantic Petroleum Corp.*, 55 F. App'x 717 (5th Cir. 2002)). Therefore, in another case, the court ordered arbitration because the guarantor initialed every page of the agreement, including the page containing the arbitration clause (*Development Bank of the Philippines v. Chemtex Fibers, Inc.*, 617 F. Supp. 55 (S.D.N.Y. 1985)). On the other hand, the US Court of Appeals for the Seventh Circuit did not require the guarantor to arbitrate where the guarantee appeared below the signatures at the end of the contract (*Grundstad v. Ritt*, 106 F.3d 201 (7th Cir. 1997)). The court held that there was no clear expression of the guarantor's intention to be bound by the arbitration clause.

For more information on the incorporation by reference doctrine see [Practice Note, Arbitration Clauses Incorporated by Reference Under US Law](#).

Assignment, Assumption and waiver

A person who by assignment expressly takes on the rights and obligations of another party under a contract containing an arbitration clause will be compelled to arbitrate where the assignment was sufficiently broad to cover that obligation (see 1 Domke on Com. Arb. § 13:13). Similarly, the assignee, as a successor in interest to the contract, is entitled to the benefit of the arbitration

clause in the agreement, where the agreement is freely assignable (see *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, through its conduct, can waive its right to object to the assignment by dealing with the assignee (see *Levi Strauss & Co. v. Aqua Dynamics Systems*, 2016 WL 6082415 (N.D. Cal. Oct. 18, 2016)).

The principle of assumption depends on implied consent evidenced by a party's conduct. A non-signatory's active and voluntary participation in arbitration constitutes an assumption of the obligation to arbitrate and a waiver of his objections to arbitration. For example, in a case from the US Court of Appeals for the Second Circuit, the plaintiffs were individuals who were not yet employees of 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); but see *Garcia v. Midland Funding, LLC*, 2017 WL 1807563, at *3 (D.N.J. May 5, 2017)(assignment of accounts receivable did not acquire the right to compel arbitration with the account debtor)).

The doctrine of assumption may overlap with other contractual or equitable principles such as estoppel. 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 also would be 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

Parties may be joined to an arbitration under principles of agency. A principal can enforce an arbitration agreement made for its benefit by an agent even where the other party to the contract did not know about the undisclosed principal (*Interbras Cayman Co. v. Orient Victory Shipping Co., S.A.*, 663 F.2d 4, 6 (2d Cir. 1981)). When the principal is disclosed, however, only the principal, and not the agent, will usually be required to arbitrate with the other party (*Covington v. Aban Offshore Ltd.*, 650 F.3d 556, 559 (5th Cir. 2011)).

In an appropriate case, a signatory can compel arbitration against the undisclosed principal of its counterparty. However, the party seeking to compel arbitration must plausibly allege 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)).

Courts are split as to whether non-signatory 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). Here the court said "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".
- *Westmoreland v. Sadoux*, 299 F.3d 462, 466 (5th Cir. 2002). Here the court said "[A] non-signatory cannot compel arbitration merely because he is an agent of one of the signatories".
- *Andermann v. Sprint Spectrum*, 785 F.3d at 1158. The defendant, Sprint Spectrum, designated its affiliate, Sprint Solutions, to hold the contracts containing the arbitration agreement, the plaintiff's argument that it the defendant cannot compel arbitration was held to be without merit.
- *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, non-signatories, were able to compel arbitration because the allegations against them were in their capacity as agents of the signatory.

Third-party beneficiary

A party deemed to be a third-party beneficiary of a contract may invoke that contract's arbitration clause. A

court looks to the intentions of the parties at the time the parties execute 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 a Second Circuit case, for example, 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 firm against whom arbitration is sought. The court compelled the NASD member 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 a Ninth Circuit case, billing aggregators that served as financial intermediaries between mobile content provider and its customers may be entitled 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)).

A third-party beneficiary may also 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 patient was bound 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) (decedent's arbitration agreement cannot be enforced against wrongful-death beneficiaries)). Some state courts have also refused to enforce arbitration agreements against nursing homes, noting that the third-party beneficiary doctrine enables a non-contracting party to enforce a contract against a contracting party but not the other way around (see, for example, *Mendez v. Hampton Court Nursing Ctr., LLC*, 203 So.3d 146, 151-52 (Fla. 2016); *Coleman v. Mariner Health Care, Inc.*, 755 S.E.2d 450 (S.C. 2014) and *State ex rel. AMFM, LLC v. King*, 740 S.E.2d 66 (W. Va. 2013)).

Even where an agreement expressly bars third parties from enforcing the contract's provisions, however, an insurer may nonetheless enforce the contract and the arbitration clause within it under its right 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 with disregard for its separate identity.

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- An injustice or other wrong to the plaintiff may likely result if the corporate veil is not pierced.

(See [Practice Note, Piercing the Corporate Veil](#).)

In the arbitration context, a court will find the non-signatory to be the alter ego of a signatory to an arbitration agreement when:

- The non-signatory exercises complete domination over the signatory.
- The non-signatory 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).)

In *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006), the Fifth Circuit reversed a decision of the district court that vacated a \$495 million arbitral award against a foreign government. The court confirmed the arbitral tribunal's award deciding that the government was a proper party to the arbitration and that the tribunal had the authority to adjudicate the dispute. Rather than defer to the tribunal's analysis, the court reviewed the facts and the law and concluded that the undercapitalization of the 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. The court noted that intentionally bleeding a subsidiary to thwart creditors is a classic ground for piercing the corporate veil.

In a case from the US District Court for the Southern District of New York, the claimant brought an arbitration against a corporation that was a signatory to an arbitration agreement, and its president, who was not. The claimant submitted the following evidence to the arbitrator regarding the respondents:

- The individual was the president and majority shareholder of the corporation that signed the arbitration agreement.
- The corporation defaulted on its payment obligations.
- The corporation sold its assets to a third party.
- The corporation used the proceeds for purposes other than to repay all of its creditors.

The arbitrator decided that the claims in question were arbitrable against the individual non-signatory, based

on piercing the veil of the corporate respondent, and rendered an award against the individual. The court confirmed the award (*Mobius Mgmt. Sys. v. Technologic Software Concepts*, 2002 WL 31106409, at **2-3 (S.D.N.Y. Sept. 20, 2002)).

In a Second Circuit case, defendants in a lawsuit in the Dominican Republic petitioned a New York federal court to compel arbitration. Because these defendants had assigned their contracts, they no longer had the status of a party to the contracts that contained the arbitration clause. Nevertheless, the district court compelled arbitration and the plaintiff in the Dominican Republic lawsuit appealed. The Court of Appeals affirmed, noting that the claims in the lawsuit treated a group of related companies as though they were interchangeable and therefore piercing the corporate veil was appropriate (*Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 97 (2d Cir. 1999)).

In *Global Commodities Grp., LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2013 WL 4713547 (S.D.N.Y. Aug. 29, 2013), insured parties brought an arbitration against the issuer of an export credit insurance policy after the insurance carrier denied coverage of a claimed loss. The insurance carrier sought to join to the arbitration another corporation and an individual who was alleged to dominate the corporate group and to engage in sham transactions that were the subject of the insurance claim. The court declined to compel arbitration because there were disputed issues of fact regarding the veil-piercing/alter ego factors. The court noted that, if issues of fact remained after discovery and a consideration of the evidence, it would hold a trial to determine whether non-signatories were alter egos of the insured parties and should be compelled to arbitrate.

Most recently, in *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 76 (2d Cir. 2017), the Second Circuit remanded and 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 not clear what law the court meant and presumably the issue will be fleshed out on remand (see also *LiquidX Inc. v. Brooklawn Capital, LLC*, 2017 WL 2266879, at *6 (S.D.N.Y. May 23, 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)).

Who decides?

To find out whether a party can be required to arbitrate a particular dispute, courts usually must determine:

- 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).)

A court determines these issues unless the arbitration agreement contains clear and unmistakable evidence that the parties intended the question of arbitrability to be decided by the arbitrator (*AT&T Tech., Inc. v. Commc'n Workers*, 475 U.S. 643 (1986)). Questions of arbitrability 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)). Parties can, however, “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)).

A US Federal Appellate Court has held that, before referring the issue of arbitrability to the arbitrators in a case involving a non-signatory, a court must determine:

- Whether the parties have a sufficient relationship to each other and to the rights created under the agreement.
- Whether there was clear and unmistakable evidence of the 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. With regard to the second factor, the court held that the arbitrators must decide whether the signatory’s claims against the non-signatory 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. Similarly, in *Eckert/Wordell Architects v. FJM Properties of Willmar, LLC*, 756 F.3d 1098 (8th Cir. 2014), where a party signed a contract providing for arbitration under AAA rules, the court held that the arbitrator was to decide threshold questions of arbitrability in a claim brought by a non-signatory (see also *Neal v. Asta Funding, Inc.*, 2016 WL 3566960 (D.N.J. June 30, 2016) and *Fed. Ins. Co. v. Reedstrom*, 197 So.3d 971, 976 (Ala. 2015). The same result is required where

the party resisting arbitration signed an agreement incorporating the rules of the International Chamber of Commerce (ICC), which provide that the question of arbitrability is for the tribunal or the ICC court to decide. (see *Kastner v. Vanbestco Scandanavia, AB*, 2014 WL 6682440, at *6 (D. Vt. Nov. 25, 2014)).

In *Thai-Lao Lignite (Thailand) Co. Ltd. v. Government of the Lao People’s Democratic Republic*, 2011 WL 3516154, *21 (S.D.N.Y. Aug. 3, 2011), aff’d, 492 F. App’x 150 (2d Cir. 2012), the court granted recognition and enforcement to an arbitral award finding that a non-signatory was an intended beneficiary of an arbitration agreement and therefore could assert a claim in arbitration. (Ultimately the courts at the seat of the *Thai-Lao Lignite* arbitration, Malaysia, set aside the award and the set-aside judgment was given effect in the US) (*Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov’t of Lao People’s Democratic Republic*, 864 F.3d 172 (2d Cir. 2017).) In *Carder v. Carl M. Freeman Communities, LLC*, 2009 WL 106510, at *7 (Del. Ch. Jan. 5, 2009) the court held that where the defendant’s assertion that it was a third-party beneficiary of the arbitration agreement was “nonivolous,” the plaintiff must make its arguments opposing arbitrability to an arbitrator in the first instance.

In *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir.), cert. denied, 134 S. Ct. 62 (2013), however, where plaintiffs purchased automobiles and entered into arbitration agreements with the dealers who sold them, the court held that the issue of arbitrability must be decided by the court because the arbitration agreements did not contain clear and unmistakable evidence that the plaintiffs and the manufacturer agreed to arbitrate arbitrability (see also *Republic of Iraq v. BNP Paribas USA*, 472 F. App’x 11, 13 (2d Cir. 2012)).

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

European jurisdictions

France

Under French law, a non-signatory may be joined to an arbitration under the “group of companies doctrine”. Under that doctrine, French courts and arbitral tribunals applying French law extend arbitration agreements to non-signatories in the same group only if:

- The non-signatory played a part in the conclusion, performance or termination of the contract containing the arbitration agreement.

- It was the common intention (express or implied) of the parties that the non-signatory be bound by the contract and the arbitration clause within it.

The first and best-known case applying the group of companies doctrine is *Dow Chemical Group v Isover-Saint-Gobain* (ICC Case No. 4131 Interim Award, Sept. 23, 1982). In *Dow Chemical*, two companies within the Dow Chemical group (Dow AG and Dow Europe) each entered into distribution agreements with a number of companies whose obligations were assumed by Isover-Saint-Gobain. Each agreement contained an arbitration clause. When a dispute arose, the two Dow Chemical companies that signed the agreements together with their American parent (Dow USA) and its French subsidiary (Dow France) commenced arbitration.

Isover-Saint-Gobain objected to the claims brought by the non-signatory claimants. The tribunal rejected the challenge after finding that:

- One of the non-signatory companies had in fact made all the deliveries to Isover-Saint-Gobain under the agreements.
- The relationship could not have been formed without the approval of the American parent company.
- The American parent had absolute control over those subsidiaries that were directly involved or could contractually have become involved in the performance or termination of the distribution agreements.

The tribunal therefore concluded that, given the role the non-signatories played in the transactions, the non-signatories were de facto parties to the contracts and could invoke the arbitration clauses contained within them. The Paris Court of Appeals upheld the award (*Isover-Saint-Gobain v Dow Chemical France* (21 October 1983) (CA Paris)).

The group of companies doctrine was also found to bind a non-signatory to arbitration in the *Dallah* case. The Paris Court of Appeals dismissed an application to set aside an ICC award rendered in Paris, thereby rejecting the argument by the government of Pakistan that it was not a party to the arbitration agreement signed by a Saudi Arabian company (Dallah) and a trust established by a Pakistani presidential ordinance (*Government of Pakistan, Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company* (17 February 2011) (CA Paris)). The Paris Court of Appeals considered the Pakistani government's involvement in the pre-contractual dealings with Dallah and in performing and terminating the agreement. It found that the government had behaved

at all times as if it were a "true party" to the agreement, rather than the trust. Further, the trust had expired and therefore ceased to exist before the arbitration.

This decision reinforces the French law, applied in *Dow Chemical*, that an arbitration agreement may be extended to a non-signatory based on an implicit intention of the parties that such non-signatory be bound, as evidenced by the non-signatory's involvement in various phases of contract formation and performance. For a more detailed explanation of the Paris court's decision and the refusal of the English courts to recognise and enforce the same award, see [Legal Update, Paris Court of Appeal upholds ICC award in Dallah case](#).

In another ICC arbitration in Paris, however, the tribunal refused to extend an arbitration clause to a non-signatory company in the same group because it was not established that the non-signatory party would have accepted the arbitration clause if it had signed the contract directly (*ICC Case No. 2138, 1974*).

Under certain circumstances, French law also permits the application of an arbitration agreement signed by a company to the (non-signatory) individual who controls that company. The Paris Court of Appeals compelled a non-signatory individual to arbitrate under an agreement signed by a company where the non-signatory individual:

- Was the sole decision-maker for a group of companies.
- Fraudulently used the corporate veil of the companies to avoid paying creditors for debts incurred for his benefit.

(*Orri v Société des Lubrifiants Elf Aquitaine* (11 January 1990) (CA Paris); affirmed by the French Supreme Court (Cassation) (11 June 1991) (First Civil Chamber)). On that basis, the court found the individual to be the alter ego of the signatory company. That the company, and not the individual, signed the contract constituted a "subterfuge, amounting to fraud, aimed at concealing the identity of the actual contractor."

England

The group of companies doctrine under French law has no counterpart in English law (*Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), Langley J at paragraph 62). In *Peterson Farms*, an English court set aside an arbitral award in favour of non-signatories, holding that the substantive law applicable to the contract also governs the arbitrator's jurisdiction over non-signatories. (See [Practice Note, Which laws apply in international arbitration?](#))

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In *Peterson Farms*, a sales contract was subject to Arkansas law and provided for ICC arbitration in London. The arbitrators decided that the choice of law provision in the contract applied only to substantive issues and that procedural issues would be governed by ICC precedent. Applying the group of companies doctrine, among other things, the tribunal decided that it had jurisdiction over all the parties, including non-signatory claimants. The tribunal awarded damages to the non-signatories. Peterson Farms sought a declaration from the English commercial court that certain findings in the award regarding the non-signatories were made without jurisdiction. The court set aside the award in favour of the non-signatories. The court ruled:

- The group of companies doctrine was not the law of Arkansas.
- Even if English law applied, that law does not recognise the group of companies doctrine.
- The evidence did not establish a right to bring arbitration under agency or estoppel theories.

(Sulamérica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others [2012] EWCA Civ 638.)

Even if English law is the substantive law, the tribunal can take “other considerations” into account in deciding the dispute, if the parties agree or if it is so determined by the tribunal (*section 46(1)(b), Arbitration Act 1996* (AA 1996)). Whether a non-signatory may be deemed to be a party to an arbitration is generally examined through the prism of *section 82(2)* of the AA 1996, which provides that references to a party in an arbitration agreement include any person claiming “under or through” a party to the agreement. In accordance with this provision, when a third party to an agreement containing an arbitration clause makes a claim under this agreement, this third party becomes a person claiming under or through a party to the arbitration agreement, and thereby a party to the arbitration agreement for the purposes of the AA 1996. The third party can become bound to refer the dispute to arbitration in accordance with that arbitration agreement (*The London Steam-Ship Owners’ Mutual Insurance Association Ltd v The Kingdom of Spain, the French State [2013] EWHC 3188 (Comm)*).

In the same vein, a non-signatory to an arbitration agreement can become a party to an arbitration under that agreement by way of the Contracts (Rights of Third Parties) Act 1999 (C(RTP)A 1999). The C(RTP)A 1999 abolished the long-standing doctrine of privity of contract (that only a party to a contract can enforce its terms). A third party can enforce a term of the contract

if the contract expressly provides that it can do so (*section 1(a), C(RTP)A 1999*), or if the term provides a benefit to it (*section 1(b), C(RTP)A 1999*). *Section 8* of the C(RTP)A 1999 expressly envisages the applicability of *section 1* to arbitration agreements. The English Court of Appeal has recently held, however, that one may not impose an obligation to arbitrate on a third party who did not intend to be bound by an arbitration agreement (*Fortress Value Recovery Fund I LLC and others v Blue Sky Special Opportunities Fund LP and others [2013] EWCA Civ 367*). It is common for commercial contracts governed under English law to exclude the applicability of the C(RTP)A 1999.

Additionally, a non-signatory may be treated as a party to the arbitration by piercing the corporate veil. One example is where a company had been used by a beneficial owner as a device to commit fraud (*Hashem v Shayif [2008] EWHC 2380; Antonio Gramsci Shipping Corp and others v Stepanovs [2011] EWHC 333 (Comm)*). However, the exact circumstances in which it would be appropriate to pierce the corporate veil remain unclear. Recently, in the case of *VTB Capital plc v Nutritek International Corp and others [2013] UKSC 5*, the UK Supreme Court confirmed the courts’ power to pierce the corporate veil but did not elaborate on the circumstances in which it may do so.

Recently, in *Egiazaryan and others v OJSC OEK Finance and another [2015] EWHC 3532 (Comm)*, the parties accepted the tribunal’s finding that a Russian Civil Code provision stipulating that parent companies are jointly and severally liable for the acts of their subsidiaries, extended to the obligation to arbitrate. On this basis, the court ruled that a Russian non-signatory to the English law arbitration agreement could be joined to the arbitration. (See [Legal Update, English High Court remits Russian corporate raid claim to LCIA tribunal.](#))

The New York Convention requires that the agreement to arbitrate be in writing. Therefore, the parties’ consent to the applicability of the arbitration agreement to the non-signatories must be explicit. If it were explicit, then *section 5(3)* of the AA 1996 (which states that “Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing”) would arguably be satisfied. An implied or inferred intention is unlikely to trigger *section 5(3)* and, in the absence of a written agreement to arbitrate, the arbitration would stand outside the AA 1996. In this case, any award in favour of or against the non-signatories would not be enforceable by the English court under *section 66* of the AA 1996 (which relates to the enforcement of awards). Likewise, a foreign award

invoking the group of companies doctrine may not be enforceable under section 100 of the AA 1996 (relating to New York Convention awards). (For an example of refusing enforcement of the award on that basis, see *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46.)

Switzerland

The extension of the binding nature of arbitration to non-signatories in Switzerland depends on the role played by the non-signatory in the performance of the agreement containing the arbitration clause.

Swiss law does not generally extend an arbitration agreement to non-signatories (see [Practice Note, Arbitration in Switzerland: Extension to non-signatories](#)). However, the Swiss Federal Tribunal for the first time took a more liberal approach to non-signatories in 2003 (*Y.S.A.L. v Z Sarl ATF 129 III 727-4P.115/2003*). In this case, three Lebanese companies (X, Y and Z) entered into a construction contract containing an arbitration clause. When a dispute arose, Z commenced proceedings against X, Y and Mr A (who was not a party to the agreement), claiming that Mr A actively participated in the negotiations and performance of the contract. The Federal Tribunal held that the fact that Mr A owned companies X and Y, held the construction permit for the works under the contract between X, Y and Z and represented the relevant construction project personally in the media were not sufficient grounds for extending the arbitration agreement to Mr A. However, the Federal Tribunal, applying the principle of good faith, bound Mr A to the arbitration agreement because he was actively involved in both:

- The management of X and Y.
- The actual performance of the contract with Z.

Under Swiss law, the arbitration agreement must be “evidenced by text” (*Article 178(1), Federal Act on Private International Law 1987 (PIL)*). The Federal Tribunal found that these requirements should be kept to a minimum (that is, the existence of the documents evidencing Mr A’s involvement in the performance of the contract was sufficient). An arbitration agreement is valid if it conforms to the law chosen by the parties, the law governing the subject matter of the dispute or Swiss law (*Article 178(2), PIL*). The Federal Tribunal supported the arbitral tribunal’s application of Lebanese law as the law governing the contract. It relied on the concept of *lex mercatoria* (principles derived from the established customs of merchants and traders rather than the laws of a particular state) and the French arbitral practice of involvement in

the conclusion, performance or termination of the contract containing the arbitration agreement.

The Swiss Federal Tribunal has since rendered similar decisions. In a December 2008 judgment, the Federal Tribunal found that, considering the significant involvement of the non-signatories in preparing the contract, and their role under that contract, they were bound by the arbitration agreement contained in the contract (*DFT 4A_376/2008*).

A non-signatory may also be deemed a party to an arbitration agreement by virtue of being a third-party beneficiary to a contract containing the arbitration agreement. The Swiss Federal Tribunal upheld an arbitral award rendered by a tribunal sitting in Geneva that ruled that it had jurisdiction to hear a claim brought by a non-signatory to the arbitration agreement (Judgment of 19 April 2011, *DFT 4A_44/2011*). The Federal Tribunal agreed with the arbitral tribunal that the non-signatory was a third-party beneficiary to the contract containing the arbitration clause. (For a more detailed explanation, see [Legal Update, Third party beneficiaries entitled to rely on arbitration clause in contract between promisor and promisee](#).)

Additionally, under Swiss law, an arbitration clause generally binds a transferee on a transfer of a contractual obligation or the assumption of a debt (*Federal Tribunal, decision of 7 August 2001, published in ASA Bull. 1/2002, p. 88*). However, in case of a guarantee to a contract, the guarantor, who is not a party to the contract, will be deemed bound by the arbitration clause in the contract only if he assumes joint liability with the contractual debtor (*DFT 4A_128/2008*).

Russia

Russian law provides that an arbitral tribunal only has jurisdiction over non-signatories to an arbitration agreement only if all the parties explicitly agree to include the non-signatory in the proceeding (*Article 19, International Commercial Arbitration Act 1993; Russian S. Arbitrazh Court, 23 December 2011, Case No. A40-56769/07-23-401, 6*). This effectively restricts joinder of non-signatories to limited circumstances. One example is where an agreement is assigned to, and assumed by, the non-signatory (*Russian S. Arbitrazh Court, 20 April 2010, Case No. A56-29770/2009,5*).

Germany

Generally, German courts will not follow the group of companies doctrine. There are only limited instances

where non-signatories to an arbitration agreement can be compelled to arbitrate in Germany. For example, a third-party beneficiary who wishes to enforce a contractual right arising from an agreement that contains an arbitration clause must respect the dispute resolution choice made by the main parties to the contract (*Judgment of 9 September 1999, 1999 BayobLGZ 255, 267*). The arbitration agreement concluded by an agent on its behalf binds the principal, even in cases of apparent authority (*Judgment of 19 December 1967, 1967 Landgericht Hamburg 4*).

German courts have applied the doctrine of piercing the corporate veil in cases where abusive acts of shareholders damaged the assets of the company and led to or deepened the insolvency of the corporation (*Judgment of 10 December 2008, 2008 DNotZ 542; Judgment of 9 April 2008, 2008 DStR 1976*). In addition, the courts established the so-called shareholder's liability due to economically destructive actions under Section 826 of the German Civil Code (*Judgment of 16 July 2007, 2008 DNotZ 213*).

Most recently, the German Federal Supreme Court (*Judgment of 8 May 2014, No. III ZR 371/12*) overturned a decision of the lower court that had rejected a claim against a non-signatory to an arbitration agreement on the ground that the "group of companies doctrine" violated German public policy. The Supreme Court remanded the case back to the appeal court to allow consideration of the question whether the non-signatory was bound by the arbitration agreement under the laws of the seat of the arbitration (in that case, India).

State-owned entities and the state

Extension of an arbitration agreement from a state-owned entity to the state

In general, the intention of the parties and the non-signatory state or states to be bound by the arbitration agreement must be established before the non-signatory state can be required to arbitrate. In one case, an arbitration under ICC Rules in Paris, SPP, a company incorporated in Hong Kong, signed Heads of Agreement with EGOH, an Egyptian state-owned company, and the Egyptian government, for the construction of two tourist centres in Egypt (*S.P.P. (Middle East) Ltd. v Arab Republic of Egypt (Case No. 3493 (1983))*). SPP and EGOH then entered into a contract that contained an ICC arbitration clause with its seat in Paris. The Minister of Tourism of Egypt, his signature appearing underneath the words "approved, agreed and ratified", signed the contract.

When the construction project was cancelled, SPP commenced arbitration against both EGOH and the state of Egypt. The state contested the jurisdiction of the arbitral tribunal on the basis that it had not agreed to be bound by the arbitration agreement. However, the arbitral tribunal held that the signing of the Heads of Agreement and of the actual contract by a government official was clear evidence that the Egyptian government intended to be bound by the arbitration agreement.

The Egyptian government appealed to the Paris Court of Appeals under Article 1502 of the French New Code of Civil Procedure, claiming lack of an arbitration agreement. The court vacated the award, holding that the words "approved, agreed and ratified" did not imply the Egyptian government's intention to be bound by the arbitration agreement, as under Egyptian law the Minister, by virtue of his office, was supposed to grant approvals to the contracts entered into by state-owned entities. SPP appealed to the French Supreme Court (Cassation), which affirmed the Court of Appeals judgment (*First Civil Chamber, January 6, 1987*).

Another arbitral tribunal in an ICC arbitration against a state (*Case No. 8035 (1995)*), held that a signature by a state official of a contract on behalf of a state-owned company does not automatically constitute the state's consent to be bound by the arbitration agreement contained in the contract. In both cases, the arbitrators interpreted the wording before the signature as mere approval of the terms of the contract by the company's supervisory board.

An important factor that may lead a tribunal to decide that an arbitration clause is binding on a non-signatory state is where there are common obligations and interests between the parties and the non-signatory. Another ICC case, with its seat in Switzerland, was between an English company, Westland, and an entity created by four Arab states. Westland joined the four states as respondents, even though they had not signed the agreement under which the dispute arose. In its partial award, the tribunal held that if the obligations arising out of the agreement are also obligations of the states, then the states are bound by the arbitration clause. One of the states successfully challenged the award at the Swiss Federal Tribunal, which concluded that, no matter how obvious it was that the states intended to be bound by the agreement, they could not be forced to arbitrate if they had not signed. However, the arbitrators subsequently rendered a final award against both AOI and the three remaining states. The Swiss Federal Tribunal supported the tribunal's reasoning because in this case:

Joining non-signatories to an arbitration

- The economic interdependence between the states and the company is evident.
- The actions of the states led the claimant to believe that the states intended to be bound by the contract, including the arbitration agreement contained in it.

(Westland Helicopters Ltd. v Arab Organization for Industrialization (AOI) (Case No. 3879 (1984).)

Similarly, another ICC panel heard a dispute related to the joint venture agreement entered into by Svenska and Geonafta, where terms expressly dealt with the rights and obligations of the Lithuanian government (*Svenska Petroleum Exploration AB v Government of Republic of Lithuania (1) AB Geonafta (2) (2001)*). Government officials signed the agreement that contained an arbitration clause and a statement above their signatures specifying that the government approved the agreement and “acknowledges itself to be legally and contractually bound as if the Government were a signatory to the Agreement.” The tribunal in its interim award held that the government agreed to be bound by the agreement. In the enforcement proceedings brought by Svenska before the English courts, Lithuania challenged the tribunal’s jurisdiction. The English Court of Appeal held that the government’s statement that it was bound to the contract as if it were a signatory was sufficient to establish that the parties intended that the government would be bound to arbitrate (*Svenska Petroleum Exploration AB v Government of Republic of Lithuania and another [2006] EWCA Civ 1529*).

Extension of an arbitration agreement from a state to a state-owned entity

Similarly, to extend an arbitration agreement from a state to a state-owned entity, the intentions of the parties when entering the contract must be established. In *ICC Case No. 4727 (1987)*, a Swiss corporation and an African State entered into an agreement signed by a senior manager of a state-owned company on behalf of the state. When the dispute arose, the corporation attempted to include the state-owned company as a co-respondent based on its signature. However, the tribunal rejected the claim because the signature was clearly made “on behalf of the state”, and the company therefore never intended to be bound by the arbitration agreement. The Paris Court of Appeals upheld the award in its decision of 3 April 1987.

The circumstances under which an arbitration agreement can bind a party that was not a party to it differ from jurisdiction to jurisdiction. The European approach is more limited in its scope than the principles that characterise the US approach. Careful consideration should be given to this issue by both:

- **Parties to an arbitration agreement.** They should consider whether non-signatories could potentially claim the benefit of the arbitration agreement.
- **Non-signatories.** They should consider whether their conduct is such that they could be deemed to be bound by an arbitration agreement.

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