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The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent

James M. Hosking

The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent

James M. Hosking[1]

1. Associate, Clifford Chance U.S., L.L.P., New York. This article was originally written as a research paper submitted in May 2000 in completion of the requirements for a Master of Laws degree at Harvard Law School. The original, under the same title, is on file with the author. The paper has been updated to reflect those subsequent changes in law that would impact on the article's accuracy. The author wishes to thank Professor Arthur von Mehren, David Williams, Q.C. and Anne "Parker" Capelle for their advice and encouragement.

An agreement by the parties to submit to arbitration any disputes or differences between them is the foundation stone of modern international commercial arbitration. If there is to be a valid arbitration, there must first be a valid agreement to arbitrate. This is recognized both by national laws and by international treaties.[2]

2. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1-06 (3d ed. 1999) (hereafter "REDFERN & HUNTER").

> Arbitration is contractual by nature - a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit....It does not follow, however, that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. This court has made clear that a non-signatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency.[3]

> Most of the situations discussed in international arbitral practice where one or more parties had not themselves formally signed or countersigned the arbitration clause have one element in common: namely the element that justice would not seem to be done if the only criterion applied and considered was the criterion that a particular third party did not itself sign or countersign the arbitration clause. It is because ... reliance on the merely formalistic argument...that no arbitration clause had been signed by a particular party...would result in such a manifestly wrong and unjust solution that more subtle and more appropriate thoughts had to be given to appropriately consider the situations as they occur in international business practice.[4]

I. INTRODUCTION

As encapsulated in the first quote above, it is irrefutable that the arbitration agreement is the "cornerstone of the arbitration process"[5] and thus "[t]he existence of both parties' consent to submit the dispute to arbitration is clearly a necessity."[6] Yet, the second quote, drawn from the leading United States case, envisages permitting the arbitration agreement to be extended to a "non-signatory,"[7] although only where this is in accordance with "ordinary principles

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3. Thomson-CSF S.A. v. Am. Arb. Ass'n, 64 F.3d 773, 776 (2d Cir. 1995) (citations omitted).

4. Dr. Marc Blessing, *The Arbitration Agreement - Its Multifold Critical Aspects*, in THE ARBITRATION AGREEMENT - ITS MULTIFOLD CRITICAL ASPECTS, A.S.A. Special Series No. 8, 19 (December 1994) (hereafter "AAMCA") (emphasis omitted).

5. TIBOR S. VARADY, JOHN J. BARCELO III, & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 83 (1999).

6. ADAM SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWISS, US AND WEST GERMAN LAW 96 (1989).

7. A terminological distinction needs to be made at the outset. The term "non-signatory" is being used to refer to someone who has not physically signed the agreement within which the arbitration clause is contained. The term "third party" is being used to refer to someone who is not named as a party in such an agreement, usually this person will also be a "non-signatory." Both a "non-signatory" and a "third party" may by application of various legal theories be found to have rights and/or obligations in relation to the arbitration agreement (whether or not this amounts to being a "party" to the agreement). Another necessary definition is what is envisaged in speaking of the "third party problem." For discussion purposes this is reduced to the paradigmatic scenario of a simple (international) contract ("main agreement") between A ("promisor") and B ("promisee") that includes an arbitration agreement. B enters into some kind of relationship with C ("third party"). The "problem" is deciding to what extent C is bound by and/or entitled to enforce the arbitration agreement in the main agreement in respect of disputes with A and/or B.

of contract and agency."[8] Turning now to the third quote, how can we rationalize the commentator's willingness to apply the arbitration agreement to a non-signatory merely because otherwise "justice would not seem to be done" with our initial proposition: that without a valid agreement manifesting the parties' consent there can be no valid arbitration?

This article analyzes the legal theories and other mechanisms employed in international commercial arbitration to achieve a workable compromise among the above-cited propositions. In so doing it touches on larger, more complex questions like the position of third parties in contract law, the jurisdictional foundations of arbitration, and the role of choice-of-law issues in determining the validity of the arbitration agreement. However important these broader concerns may be, they should not undermine the importance of the issue in its own right. As stated by Dr. Blessing, in introducing a seminar on the topic:

> [T]his now brings us to the middle of our most difficult topic of our Conference: the topic of the extension of the arbitration clause to non-signatories - probably one of the most difficult topics in international arbitration, a topic which gains more and more importance as a consequence of the globalization of international business and trade.[9]

A. Objectives and Structure of This Article

The objectives of this article are five-fold: (1) to probe the situation in which third party non-signatories have been permitted to compel arbitration and to dissect and comment on the legal theories advanced in this respect; (2) to investigate the extent to which these legal theories conform with general contract law doctrines; (3) to test how the legal theories offered correspond to competing views on the jurisdictional basis for arbitration; (4) to examine to what degree, if any, different legal systems take the same approach to similar third-party problems; and (5) to offer some observations on the likelihood of the third party problem being resolved by an international coordinated agreement or, alternatively, by reliance on transnational or anational norms.

The first issue is approached by collating published awards and court decisions dealing with third party non-signatories and analyzing the legal theories used by the courts to justify extending or limiting the arbitration agreement to the third party. The inquiry here is to consider if there are alternative explanations available, what factors have influenced courts in reaching their decisions and if the third parties are "extra-contractual." Each case discussed is classified

8. *Thomson*, 64 F.3d at 776 (quoting McAllister Bros., Inc. v. A&S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980)).

9. Blessing, in AAMCA, *supra* note 4, at 18.

within one of the legal theories identified and the decisions are compared and contrasted.

The second issue places third parties in arbitration law within the broader context of third parties in general contract law. It investigates how far legal systems have moved away from a strict privity of contract doctrine to permit third party enforcement in reliance upon one of the available doctrinal exceptions, e.g., assignment or third party beneficiary.

The third issue addresses the question of whether the legal theories employed by the courts in extending the arbitration agreement to third parties withstand scrutiny on general contract principles or does the court or tribunal treat arbitration as a "special case"? For example, is the court influenced by a concern that extending the arbitration agreement will "oust the jurisdiction of the courts"?[10] Conversely, does the court recognize a policy consideration of upholding arbitration clauses as a necessary part of international commerce?

The fourth issue compares legal systems in England, France and the United States and their approaches to third parties in arbitration and contract law. Included is a discussion of the international and transnational attempts to solve the third party problem.

The final objective is to draw together the similarities in the various approaches and comment on what, if anything, should be done to encourage use of a synthesized coordinated solution to the third party problem and, should any such model be national, international or premised on anational norms. This puts the instant issue of non-signatories within the broader vociferous debate of national versus international versus transnational arbitration law.[11]

The structure of this article broadly corresponds to the five objectives. Section I.B provides a framework for assessing the third party problem that is sensitive to the unique characteristics of arbitration. Section II establishes the practical and academic significance of third party non-signatory issues before collating the legal theories employed to try to overcome the third party problem and setting out the scope of the inquiry into those theories in this article. The legal theories are then subjected to comparative analysis undertaken in Sections III to V: Section III summarizes and compares each of the theories identified as applied by courts and arbitrators in each of the subject jurisdictions; Section IV considers factors other than the legal theories that impact on the position of the third party non-signatory; Section V offers broad conclusions from the comparative project. Section VI draws on these conclusions to identify seven possible "solutions" to the third party problem. The appropriateness of these solutions is

10. *See* Kulukundis Shipping Co., S.A. v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942) (discussing the genesis of this concern).

11. *See generally* FOUCHARD, GAILLARD & GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION §§ 1443 et seq. (Emmanuel Gaillard & John Savage eds., 1999) (hereafter "FOUCHARD"). *See also* further discussion below in Section VI.F.

then analyzed in Section VII through the filter of the various jurisprudential theories of arbitration. As a result of this investigation, Section VIII concludes that the preferable option is a solution constrained by domestic contract law and warns that broader approaches imperil the continued credibility of international arbitration.

B. Framework for the Third Party Problem

1. Traditional Approach to the Problem

If it is necessary in some cases to extend an arbitration agreement to a non-signatory, then one view of private international law and international arbitration holds that choice of law rules should answer any questions regarding when this is appropriate. Professor Sandrock advocates what he calls the "traditional approach:"

> [E]ach commercial contract is governed by a set of definite national proper law rules. The same is true of the arbitration agreement. Therefore the question of whether or not an arbitration agreement binds not only a company which is a signatory to it, but also one of several other companies which have not attached their signatures to it, but which belong to the same group as the signatory company, has to be answered under the respective rules of the proper law of contract. In other words: the exceptions to the principle of privity of contract have to be derived from precise, well-defined and largely recognized rules of the respective domestic law to which the arbitration agreement in question is subject.[12]

If correct, this article would be no more than a comparative law project extracting each jurisdiction's applicable rules for choosing the proper law and then discussing the law governing the particular third party situation. However, even Dr. Sandrock acknowledges that the "precise well-defined"[13] rules he envisages may not be so easy to discern. Further, the traditional approach assumes that substantive contract law is the correct model to apply, does not consider whether this is suited to the consensual nature of arbitration and dismisses any transnational or anational dimension to the third party problem.[14] While Professor Sandrock's conclusion has an appealing logical purity, this article seeks to analyze the problem by remaining sensitive to the constraints imposed by the nature of

12. Dr. Otto Sandrock, *Extending the Scope of Arbitration Agreements to Non-signatories*, in AAMCA, *supra* note 3, at 169. Professor Sandrock uses the term "traditional" only to distinguish his position from what he calls the "*lex mercatoria*" concept and specifically in the context of the group of companies doctrine.

13. *Id.*

14. *See, e.g.*, for a discussion of the application of transnational rules, FOUCHARD, *supra* note 11 paras 1443 *et seq.*

arbitration as well as the practical need for international commerce to permit a degree of business flexibility but not so as to undermine the certainty required of international transactions.

2. An Approach Constrained by the Nature of Arbitration

Two fundamental characteristics of general arbitration law frame the third party problem debate. These two characteristics define the *substantive* dimension of arbitration (e.g., does a valid agreement exist to arbitrate the dispute?) and the *jurisdictional* dimension of arbitration (e.g., does a valid agreement exist to confer jurisdiction on the tribunal and foreclose other jurisdictional rights to litigate?). These are explained by way of introduction below, applied in the course of the comparative project, and their relevance reassessed in the conclusion.

Substantive Dimension: Arbitration is Contractual by Nature

"Arbitration is the creature of a contract between the parties."[15] Thus, any solution to the third party problem must be based on, or at least take into account, the contractual nature of the agreement that binds the signatories. However, despite Professor Sandrock's theory that the proper law of the contract will provide a sure result on all third party issues,[16] it is not at all clear that general principles of contract law alone will suffice.

Jurisdictional Dimension: Basis of Arbitration is Consent (Intentions of the Parties)

As a leading commentator notes, "party autonomy is certainly the *differentia specifica* of the arbitration process."[17] In other words, the "crucial difference between arbitration and courts lies in the fact that the basis of the jurisdiction of an arbitral tribunal is the will of the parties, while courts owe their competence to procedural norms of state or of an international convention."[18]

Any solution to the third party problem must also be consistent with the consensual nature of arbitration—the fundamental feature distinguishing the position of third parties in arbitration from third parties in litigation. In courts, substantive law and rules of civil procedure (backed by the jurisdictional authority of the court) create procedural rights, not contingent upon consent, enforce-

15. STEWART MCCLENDON & R. E. GOODWIN, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 3 (1986).

16. Sandrock, *supra* note 12, at 169.

17. VARADY, BARCELO, & VON MEHREN, *supra* note 5, at 61.

18. *Id.*

able by and against a third party. A third party has the power to bring an action against an entity to which it has no contractual relationship (e.g. alleging a tort); may intervene in proceedings merely on the basis that it is an interested party; or may itself be compelled to join a proceeding by way of a third party joinder application. None of these situations involve "consenting" to the jurisdiction of the court. The threshold question in arbitration is: did the parties consent to resolving their substantive dispute by arbitration?

Under normal circumstances, consent to arbitrate is manifested in the arbitration agreement, most often by way of a *clause compromissoire* contained within a larger contract. Sometimes a signatory may argue that she did not in fact intend to consent, or her consent may have been induced by fraud, or given under duress, or is otherwise imperfect. In such a case, in most jurisdictions outside of the United States, the Kompetenz/Kompetenz principle is usually applied to empower the arbitral tribunal to determine the genuineness of this claim. Thus, some form of prima facie consent (e.g. a signature) is sufficient to empower the arbitral tribunal to undertake this investigation. However, sometimes a court or arbitral tribunal is asked to look beyond the question of who signed the arbitration agreement to ascertain whether a third party (i.e. a non-signatory) has in fact given its consent to be bound by the arbitration agreement and that the parties (i.e. the signatories) have also consented to the third party being bound. This can be seen as a corollary to the situation where the signatory claims its signature is not conclusive evidence of consent to arbitrate. Here, the argument is that the signatures of the parties to the contract containing the arbitration agreement are not conclusive evidence of all those who have consented to have their disputes determined by arbitration. If willing to accept the validity of the former inquiry, then why not also the validity of the latter?

This article investigates the circumstances under which the latter situation arises, the justifications given for its appropriateness, and the methods used to determine whether consent exists, and how this fits with the contractual (substantive) dimension. The working thesis of this article is that if the arbitration agreement is not always conclusive on its face, such that "consent" to arbitrate can be divulged from other sources or manifested in some other forms, then there must be clear limits on what other "sources" or "forms" are legitimate. That is, what are the acceptable bounds of the inquiry into consent?

II. THIRD PARTY NON-SIGNATORIES IN INTERNATIONAL COMMERCIAL ARBITRATION

A. Defining the Third Party Problem

1. Practical Significance of the Third Party Problem

The issue of how to deal with the third party non-signatory was described in 1992 as being "among the most delicate and critical aspects in international arbitration."[19] Other commentators have referred to it as "the source of much controversy"[20] and it has been the focus of demands for reform in various businesses, especially construction[21] and reinsurance.[22] The problem is not limited to the classic scenario of arbitration with state entities,[23] as the third party problem has also manifested itself in areas such as software distribution agreements, in which non-signatory purchasers of software have been implicated in arbitration agreements between distributors and manufacturers.[24] Meanwhile, perennial problem areas like bills of lading remain subject to conflicting doctrinal approaches and inconsistent decisions.[25]

The practical significance of the third party problem manifests itself in different ways and at different times. Most frequently, it arises in the context of a dispute in which it must be decided whether the third party is bound to arbitrate; is entitled to arbitrate at that party's discretion; or is excluded from the arbitration agreement and should proceed with litigation. However, it also can be an issue in a range of commercial transactions in which, for example, parties require certainty that when they transfer contractual rights they are also transferring the arbitration agreement. In a different context, the problem may appear where a third party finds that it is affected by the decision in an arbitration in

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19. Blessing, in AAMCA, *supra* note 4, at 7.

20. SAMUEL, *supra* note 6, at 101.

21. Karl-Heinz Böckstiegel, *Practical Problems in Resolving Disputes in an International Construction and Infrastructure Project*, 26 INT'L BUS. LAWYER 196 (May 1999).

22. Stephen W. Schwab, *Caught Between Rocks and Hard Places: The Plight of Reinsurance Intermediaries Under U.S. and English Law*, 16 MICH. J. INT'L L. 485 (1985).

23. *See e.g.* the infamous *Westland Helicopters* decisions, in *Switzerland: Decisions of the Court of Justice of Geneva and the Federal Tribunal (Excerpts) Concerning Award in Westland Helicopters Arbitration (Annulment of Award with Respect to Egypt)*, 28 INT'L LEGAL MAT'L 687 (1989) (upholding a decision of the Court of Justice of Geneva setting aside in part *International Chamber of Commerce Court of Arbitration: Interim Award Regarding Jurisdiction in the Arbitration Between Westland Helicopters Ltd. and The Organization for Industrialization, United Arab Emirates, Saudi Arabia, Qatar, Egypt, Arab British Helicopter Company*, 23 INT'L LEGAL MAT'L 1071 (1984)) (hereafter "Westland Helicopters").

24. *See e.g.* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1976); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

25. *See e.g. infra* note 319 and accompanying text.

which it did not even participate or where a state finds that it is obliged to arbitrate with an investor that has structured its deal to take advantage of an investment treaty. As will be seen in the cases examined, the fact situations involved are as varied as the legal theories employed to address the third party problem.

2. Commentary on the Third Party Problem

The position of third parties in arbitration arises quite frequently in the context of specific areas of practice: the construction industry;[26] maritime arbitrations;[27] arbitrations involving state entities[28] and, more recently, investment treaty arbitrations.[29] It has also been discussed in articles on related procedural topics like multi-contract/multi-party arbitration and consolidation.[30] However, these articles do not attempt to look at the "big picture" of how to deal with third parties outside of the particular doctrinal area at issue.

Until recently, the only broad-ranging discussion of non-signatory issues occurred at two conferences: (1) *L'Arbitrage et les tiers*, convened in Paris on May 5, 1988 by the Comité Français de L'Arbitrage;[31] and (2) *The Arbitration Agreement - Its Multifold Critical Aspects*, convened in Basel on June 17, 1994 by the Association Suisse de l'Arbitrage.[32] Papers at both conferences sought to go beyond superficial identification of the problem to identify doctrinal issues, distinguish between different solutions, and probe these differences to reveal conflicting conceptions of private international law and international arbitration.

As Dr. Blessing noted in the latter, the conference papers sought to go beyond the usual "basics" to "explor[e] the subject matter in its depth."[33] However, having done so he advised that:

> [T]here are no final conclusions which can be drawn from the proceedings at the ASA Conference. Indeed, all of the subject matters are constantly under review in modern arbitration practice, and new jurisprudence is being developed every day. It is the fascination of the top-

26. *See e.g.* Böckstiegel, *supra* note 21.

27. *See e.g.* Jerome C. Scowcroft, *Arbitration - Vouching-In and Third Party Claims*, 19 J. MAR. L. & COM. 605 (1988) (discussing S.C.A.C. Transp. U.S.A. Inc. v. S.S. Danaos, 845 F.2d 1157 (2d Cir. 1988)).

28. *See e.g.* J. Gillis Wetter, *Pleas of Sovereign Immunity and Act of State before Arbitral Tribunals*, 2 J. INT'L. ARB. 7 (1985).

29. *See e.g.* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INV. LAW J. 232 (1995).

30. *See e.g.* Philippe Leboulanger, *Multi-Contract Arbitration*, 13 J. INT'L. ARB. 43 (1996).

31. Papers published as *L'Arbitrage et les tiers*, in REVUE DE L'ARBITRAGE, No. 3, at 429-556 (plus Annex) (July - September 1988) (hereafter "ARBITRAGE").

32. Papers published in AAMCA, *supra* note 4.

33. Blessing, in AAMCA, *supra* note 4, at 7.

> ics herein covered to discover evolving trends in international arbitration, to discover a progression from "classical/old" conceptions (formulated one or more decades ago) and more modern approaches and conceptions which have adjusted their optics to the demands of today and tomorrow. In fact, the ASA Conference and the discussions have revealed a number of fundamental differences of approach.[34]

As the next section discusses, the problem is by no means of academic interest only and is of growing practical importance, as the Paris conference concluded:

> On mesure à la simple enumeration de ces divers cas tires de la pratique des affaires, la diversité et l'ampleur des interrogations que nourrit le thème "L'arbitrage et les tiers": la dimension theorique du problème égale la richesse de ses applications pratiques.[35]

Indeed, in the last couple of years the treatment of non-signatories to the arbitration agreement has become an increasingly common topic for commentators.[36]

B. Legal Theories Employed to Resolve the Third Party Problem

Legal doctrine on the position of third parties in arbitration has been heavily influenced by two recurring fact scenarios: "groups of companies" situations in which it is claimed that companies in the corporate chain other than just the signatory company are bound by the arbitration agreement and "state entity" disputes in which the paradigmatic case involves a claimant seeking to bind a state to the arbitration clause entered into by a state owned (or controlled) commercial enterprise. Various legal principles have been applied to these factual scenarios with widely divergent results.

For example, in *Isover-Saint-Gobain v. Dow Chemical France*,[37] the Paris Court of Appeals refused to set aside an I.C.C. interim award,[38] finding jurisdic-

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34. *Id.*

35. B. Oppetit, *Presentation Générale*, in ARBITRAGE, *supra* note 31, at 436.

36. *See* especially the very comprehensive treatment in Bernard Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts – Parties – Issues*, 18(3) J. INT'L ARB. 251 (2001). *See also e.g.*, Anthony M. DiLeo, *The Enforceability of Arbitration Agreements By and Against Nonsignatories*, 2(1) J. AMER. ARB. 31 (2003); Carolyn .B. Lamm & Jocelyn A. Aqua, *Defining the Party – Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT'L L. REV. 711 (2003); John Savage & Tan Ai Leen, *Family Ties: When Arbitration Agreements Bind Non-Signatory Affiliate Companies*, 16 ASIAN DISP. REV. 16 (2003); Michael H. Bagot, Jr. & Dana A. Henderson, *Not a Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration*, 26 TUL. MAR. L.J. 413 (2002); Charles L. Eisen, *What Arbitration Agreement? Compelling Non-Signatories to Arbitrate*, 56 DISP. RESOL. J. 40 (May/July 2001). As discussed above, this article was originally written in 1999/2000 and pre-dates these later discussions which, while not discussed herein, are recommended to the reader.

37. C.A. Paris, Oct. 21, 1983, Isover-Saint-Gobain v. Dow Chem. France, REVUE DE L'ARBITRAGE 98 (1984).

38. Dow Chem. v. Isover Saint Gobain, I.C.C. Case No. 4131 (September 23, 1982), REVUE DE L'ARBITRAGE 137 (1984).

tion over a claim made by various companies of the Dow Chemical group including the parent company and a related subsidiary, neither of which were signatories to the arbitration agreement entered into by two other Dow subsidiaries. The tribunal recognized the "undivided economic reality" of the group of companies as well as the "mutual intentions of all parties"[39] to be bound. As to the second scenario, in *Arab Republic of Egypt v. Southern Pacific Properties Ltd. & Southern Pacific Properties (Middle East) Ltd.*,[40] a French court set aside an I.C.C. award rendered on the basis that Egypt had been a party to an arbitration agreement evidenced only by the Minister of Tourism's signature appearing at the bottom of the main contract under the words "approved, agreed and ratified". In the latter case, the arbitral tribunal's jurisdiction to rule on its own jurisdiction (Kompetenz-Kompetenz) did not preclude judicial review of whether in fact the arbitration clause was binding on all parties.

The "group of companies" and "state entities" doctrines are jurisprudentially closely related. They have also dominated commentaries on the position of third parties. At the Basel conference one of the papers categorized all third party arbitration scenarios as being one of either "outside the pure group-of-companies-domain," "group-of-companies resembling situations" or "hard core group-of-companies cases."[41] The same paper identified eight criteria which alone or in combination are necessary to extend the scope of the arbitration agreement.[42] These criteria are essentially factual: a "representation . . . which has confused the opposite party as to which company [the agent] represents;"[43] the non-signatory is directly affected by receiving shares or other benefits;[44] or the company representative may be personally liable for fraudulent behavior.[45] One of the themes of this article is that these factual criteria are already indicative of well-recognized legal doctrines[46] and courts and tribunals should apply

39. *Id. See also* FOUCHARD, *supra* note 11, at § 503.

40. *France: Court of Cassation Decision in Southern Pacific Properties Ltd., et al v. Arab Republic of Egypt (Appellate Review of Arbitral Awards Between States and Private Parties)*, 26 INT'L LEGAL MAT'L 1004 (1987) (setting aside *International Chamber of Commerce Court of Arbitration: Award in the Arbitration Between S.P.P. (Middle East) Ltd., Southern Pacific Properties Ltd., and the Arab Republic of Egypt, the Egyptian General Company for Tourism and Hotels*, 22 INT'L LEGAL MAT'L 752 (1983)) (commonly known, and hereafter referred to, as the "Pyramids" case).

41. Sigvard Jarvin, *The Group of Companies Doctrine*, in AAMCA, *supra* note 4, at 181.

42. *Id.* at § 4.2, at 199-201.

43. *Id.* at § 4.2.2, at 199.

44. *Id.* at § 4.2.5, at 200.

45. *Id.* at § 4.2.8, at 201.

46. In the preceding examples, these are, respectively: estoppel by representation; third party beneficiary; fraud (or fraud by an agent).

these established legal principles rather than rely on vaguer notions such as the "group of companies" doctrine.

1. A Compilation of Legal Theories

With this in mind, a review of published arbitral awards, case law and secondary materials reveals an extensive list of legal theories claimed to bind non-signatories to arbitration agreements. The starting point in compiling the following list is the leading United States case of *Thomson-CSF S.A. v. American Arbitration Association,*[47] in which the court "[r]ecognized a number of theories under which non-signatories may be bound to the arbitration agreements of others. Those theories arise out of common law principles of contract and agency law."[48] The theories[49] identified in *Thomson* are the first five listed below, with the rest from other sources:

(1) ***Incorporation by reference*: "a non-signatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the non-signatory which incorporates the existing arbitration clause."**[50]

(2) ***Assumption of obligation*: "in the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate."**[51]

(3) ***Agency*: "traditional principles of agency law may bind a non-signatory to an arbitration agreement."**[52]

(4) ***Veil piercing/alter ego/group of companies/consortium/joint venture*: "In some circumstances, the corporate relationship between the parent and its subsidiary are sufficiently close as to justify piercing the corporate veil and holding**

47. Thomson-CSF S.A. v. Am. Arb. Ass'n, 64 F.3d 773 (2d Cir. 1995). *See also* Cosmotek Mumessillik Ve Ticaret Ltd. Sirkketti v. Cosmotek U.S.A., 942 F. Supp. 757 (D.C. Conn. 1996) (applying the same principles in the context of an international arbitration).

48. *Thomson*, 64 F.3d at 776.

49. The term "legal theories" (rather than "doctrines" or "principles") is used in this article because it appears both in *Thomson*, 64 F.3d at 773, and in commentaries on this topic. *See e.g.* VARADY, BARCELO, VON MEHREN, *supra* note 5, at 200.

50. *Thomson*, 64 F.3d at 777 (citing Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co., 351 F.2d 503, 505-06 (2d Cir. 1965)).

51. *Thomson*, 64 F.3d at 777 (citing Gvozdenovic v. United Air Lines, Inc., 933 F.2d 1105 (2d Cir. 1991) *cert denied*, 502 U.S. 910 (1991)).

52. *Thomson*, 64 F.3d at 777 (citing Interbras Cayman Co. v. Orient Victory Shipping Co, S.A., 663 F.2d 4, 6-7 (2d Cir. 1981)).

one corporation legally accountable for the actions of the other. As a general matter, however, a corporate relationship alone is not sufficient to bind a non-signatory to an arbitration agreement."[53] Similarly, the so-called "group of companies doctrine" provides a precedent for treating a group of companies as a single economic unit for the purposes of being bound by an arbitration agreement to which not all individual companies within the group are signatories. The arbitral tribunal will "[c]onsider closely the structure and organization within a Group of Companies. The fact that such a group . . . may form a so-called *unité economique* would be a significant element and as such may justify a conclusion that not only a particular subsidiary "C" must be considered bound by the arbitration clause, but also its sister "B" or its parent "A" etc."[54] A similar argument is made in cases of "consortium," partnerships and joint ventures.[55]

(5) ***Estoppel*: "This Court has also bound non-signatories to arbitration agreements under an estoppel theory . . . by knowingly exploiting the agreement, the [plaintiff] was estopped from avoiding arbitration despite having never signed the agreement."[56] The Court also referred to "an alternative estoppel theory" where "[a] signatory was bound to arbitrate with a non-signatory and the non-signatory's insistence because of the 'close relationship' between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and [the fact that] the claims**

53. *Thomson*, 64 F.3d at 777 (citing In re Arb. between Keystone Shipping Co. & Texport Oil Co., 782 F. Supp. 28, 31 (S.D.N.Y. 1992); Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc., 2 F.3d 24, 26 (2d Cir. 1993)).

54. Blessing, *Extension of the Arbitration Clause to Non-signatories*, in AAMCA, *supra* note 4, at 151, 161.

55. *See e.g. International Chamber of Commerce Court of Arbitration: Interim Award Regarding Jurisdiction in the Arbitration Between Westland Helicopters Ltd. and The Organization for Industrialization, United Arab Emirates, Saudi Arabia, Qatar, Egypt, Arab British Helicopter Company*, 23 INT'L LEGAL MAT'L 1071 (1984).

56. *Thomson*, 64 F.3d at 778 (citing Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993)).

were 'intimately founded in and intertwined with the underlying contract obligations.'"[57]

(6) ***Assignment*: "This situation frequently arises in practice. The claimant or the defendant party is the assignee of the rights and benefits of a contract, including its arbitration provision."[58]**

(7) ***Novation*: "In this situation the claimant or defendant in the arbitration is a person who has replaced the original party to the arbitration agreement; the original person has ceased to have any rights or liabilities under the contract."[59]**

(8) ***Succession by operation of the law*: "This situation occurs in bankruptcy. The receiver adopts the contract and seeks as claimant in an arbitration to enforce it in the place of a bankrupt party, named in the contract. Or the receiver is attacked as defendant . . . and has to answer in the arbitration since he has succeeded in the place of the bankrupt party."[60] This may also arise in certain testamentary and similar disputes.[61]**

(9) ***Subrogation*: Closely related to the above, this arises mainly in the insurance and reinsurance in which the subrogee "stands in the shoes" of the original party to the agreement containing the arbitration clause.[62]**

(10) ***Third party beneficiary*: "The parties to a contract may expressly stipulate that, in addition to themselves, a third party shall acquire rights thereunder. Even if no express stipulation has been made by the parties to a contract whereby a party acquires rights, including the right to arbitrate, circumstances may indicate that the parties have such intention. The third party beneficiary will then de-**

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57. *Thomson*, 64 F.3d at 779 (citing Sunkist Softdrinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-758 (11th Cir. 1993) *cert denied* 513 U.S. 869 (1994)).

58. Jarvin, in AAMCA, *supra* note 41, at 183.

59. *Id.*

60. *Id.*

61. *See e.g.* T. Reueede, *Gueltigkeit von Schiedsklauseln in Letztwilligen Verfuegungen*, in AAMCA, *supra* note 4, at 142.

62. Smith v. Pearl Ins. Co. Ltd., [1939] 1 All E.R. 95.

> **rive his right to be a party to the arbitration from a tacit agreement."[63]**

In reviewing this list note, first, that there is some overlap between theories (e.g. it is difficult to distinguish how the Court in *Thomson* considered "assumption of responsibility" to be different from "estoppel"). Second, the list does not include examples of fact-specific extensions of the arbitration agreement to third parties (e.g. where an arbitration agreement is extended to a guarantor[64]). Sometimes these fact-specific scenarios require applying a "one off" legal theory or even statutory rule (e.g. the law of *cautions* in France) but more often they can be explained on the basis of one of the aforementioned general legal theories (e.g., subrogation is at the heart of insurance cases; incorporation by reference is employed in the guarantee context).

2. An Attempt at Categorization

In order to analyze the legal theories identified it is tempting to try to group them into different categories based on common characteristics that are inherent to each doctrine. However, as is demonstrated in the following four diagrams, this is a difficult task.

(1) Contract Law v. Other Legal Rationales

(A categorization based on the jurisprudential basis for the legal theory employed.)

Rights grounded in contract law	Rights explained by other rationales
Assignment	Assumption of obligation
Subrogation	Estoppel
Third party beneficiary	Agency
Novation	Succession
Incorporation by reference	Veil piercing

(2) Status of C vis à vis B

63. Jarvin, in AAMCA, *supra* note 39, at 185-186.

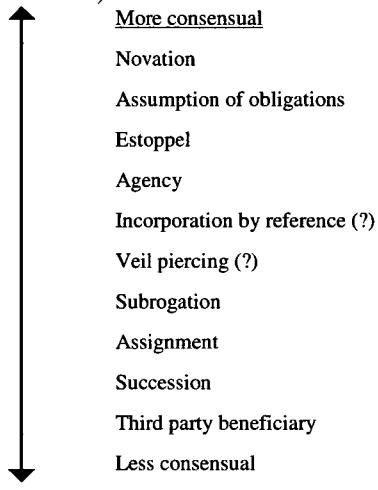
64. *Id.* at 185; *see also* RUSSELL ON ARBITRATION § 3-013, at 98 (David St. John Sutton et al. eds., 21st ed. 1997).

(A categorization based on whether the legal theory involves mere transfer of rights and duties from B to C or the creation of rights and duties different to those held by B.)

Transfer from B to C	C has rights/duties in addition to B
Subrogation	Third party beneficiary
Assignment (?)	Assumption of obligation (?)
Novation (?)	Estoppel (?)
Veil piercing (?)	Incorporation by reference
Agency	
Succession	

(3) Spectrum of Consent

(A categorization based on the notion that consent is the basis for arbitration and that each of the legal theories is inherently more consensual or less consensual than another.)



(4) Introduction of a Stranger

(Put slightly differently, a categorization focused on the likelihood that A will be obligated to arbitrate with C even though C was unknown to A.)

C unlikely to be known to A	C more likely to be known to A
Succession	Novation
Third party beneficiary (?)	Agency

Assignment	Assumption of obligation
Subrogation	Estoppel
	Veil piercing
	Incorporation by reference

Clearly, none of the categorizations is entirely satisfactory. The legal theories in categorization (1) do not fall neatly into contract as opposed to other legal doctrines. Categorization (2) suffers from the uncertainty of what is meant by the "transfer of rights" and the fact that the results are highly fact-specific and the theories vary between jurisdictions. Categorization (3) plagued by the fact that while novation is clearly consensual the degree of consent associated with the other theories is highly dependent on specific facts. For example, in some scenarios, succession may be wholly non-consensual but in others the parties may have explicitly consented (e.g., to a corporate acquisition) or should have anticipated the possibility of succession (e.g. an executor of an estate upon the original party's death). Categorization (4) at least accurately reflects a real and identifiable concern that A will be bound to arbitrate with a stranger who was beyond reasonable contemplation at the time of entering into the arbitration agreement. Yet, this categorization focuses only on one aspect of the third party problem and in any event is equally dependent on factual variables. For example, not all third party beneficiaries will be unknown (e.g., the beneficiary could even be named in the agreement) and in some veil piercing situations the ro les of all corporate actors may not be clear at the time of consenting to arbitration.

The failure of this exercise suggests that an overall categorization of theories is impossible. Indeed, it is perhaps indicative of the jumble of doctrinal and factual rationales that characterize this aspect of arbitration. For this reason (as well as that of space), the comparative project in Section III will be the subject of two delimitations.

3. First Delimitation: Focus is on Non-Signatory Compelling Arbitration

Several cases[65] and academic commentaries[66] distinguish between situations where one of the original parties to the contract is seeking to compel the third party to arbitrate and where the third party is seeking to compel arbitration against the signatories. Similarly, another important distinction is the procedural

65. *Thomson*, 64 F.3d at 779 (referring especially to the estoppel context).

66. *See e.g.* Blessing, *supra* note 4, at 151; *but cf.* FOUCHARD, *supra* note 11, at n.200 (in the context of "group of companies" doctrine).

history of the claim (i.e. who has brought the substantive claim and is it by way of litigation or arbitration and in what circumstances has the court or arbitral tribunal been asked to rule?).

With this in mind (and using the same general scenario of parties A and B being signatories to an arbitration agreement and C being a non-signatory) the following five basic scenarios can be identified:

(1) A brings arbitration claim against C (and maybe B) - C opposes jurisdiction of arbitral tribunal on the basis that it is not a party to the arbitration agreement, i.e. the burden is on A to establish that C is a party.

(2) C sues A (and/or B) - A (and/or B) seeks stay of litigation claiming that C is a party to the arbitration clause, i.e. seeks to compel C to arbitrate.

(3) A sues C - C seeks stay of litigation, claiming benefit of the arbitration clause and compels arbitration.

(4) C brings arbitration claim against A (and maybe B) - A (and maybe B) oppose jurisdiction on the basis that C is not a party to the arbitration agreement.

(5) A commences arbitration proceedings against B - C seeks to join arbitration proceedings on the basis that it is a party to the arbitration agreement.

On anecdotal evidence, situations (1) and (2) above are the most common, i.e. A or B seeks to compel C to arbitrate.[67] Situation (1) typically involves a scenario where B is an unattractive respondent and A is seeking a more liquid respondent to increase the chances of obtaining an enforceable award.[68] Situation (2) is essentially a defensive measure by A.[69] However, for the following reasons the more interesting situation is that where the non-signatory seeks to compel arbitration (situations (3) and (4)) or seeks to join the arbitration (situation (5)).

First, while situation (1) usually arises as a device to lure a more attractive respondent on the argument that it was always the "real" party to the agreement, in (3)-(5) the non-signatory is seeking to become part of an arbitration agreement as a genuine third party not as a "stand in" for the signatory. Second, as the parties could always consent to the third party taking part in the arbitration,

67. This situation is "far more common." VARADY, BARCELO & VON MEHREN, *supra* note 5, at 203.

68. *See e.g.* Fisser v. Int'l Bank, 282 F.2d 231 (2d Cir. 1960) (holding that signatory could seek to compel arbitration on the basis that non-signatory solvent bank was the alter ego of signatory counterparty but on the facts finding it was not the alter ego).

69. *See e.g.* Schwabedissen Maschinen & Anlagen GmbH, 206 F.3d 411 (4th Cir. 2000) (manufacturer compelling buyer claimant to arbitrate claims).

the fact that compulsion is used indicates that they have refused to do so. This goes to the heart of the notion of arbitration as a consensual process. Third, and related to the aforementioned, it is interesting because it involves the use of these common law "legal theories" to force a third party's way into having arbitral jurisdiction, thereby fulfilling a role similar to third party intervener in litigation. Fourth, situation (1) is usually dominated by factual interpretations of a corporate structure, network of contracts or the degree of control exercised by a state, whereas the third party claim to entitlement requires more of a "legal" approach. This in turn provides insight into the extent to which the availability of arbitration is constrained by the (in)flexibility of contract law and jurisdiction principles. Fifth, as will be discussed, the ability of a third party to enforce contractual rights in general contract law is a dynamic concept that has been the subject of recent reforms and is arguably achieving some degree of international convergence.

For these reasons, it is situations (3)-(5) that will be the subject of the detailed country-specific comparative analysis which follows. However, situations (1) and (2) will be included in considering international developments and options for reform.

4. Second Delimitation: Legal Theories Examined

Rather than analyze each of the ten legal theories identified, this article addresses five theories that are representative of types of doctrines most frequently used to justify extension of the arbitration agreement to a third party. The selected theories are, first, *assignment*, as the most common example of the subsequent transfer of rights (and sometimes obligations) arising under the agreement to a third party. Second, *subrogation,* a frequent occurrence in international commercial arbitration (and the backbone of insurance arbitration), as an example of the subsequent transfer to a third party of the right to represent the original promisee/subrogor. Third, the *third party beneficiary doctrine*, which is highly topical and is a unique example of the vesting of an independent right in the third party. Fourth, *equitable estoppel*, a doctrine frequently invoked in commercial arbitration (especially in the United States), represents the extension of the arbitration agreement to create a right based not on being a party but by conduct which resembles undertaking contractual obligations. Fifth, the doctrine of *incorporation by reference* will be examined as it is a longstanding problem in international commercial arbitration in the bills of lading context and conceptually raises interesting issues in the scope of evidence permitted to bind the third party.

The exclusion of the agency and group of companies theories is not as important as might at first appear, due to his article's focus on the non-signatory's ability to compel arbitration. Unlike in the reverse situation of a signatory seeking to bind a non-signatory, it is relatively rare for a third party non-signatory to make such an argument. Further, where such an argument has been made it has almost always been rejected because a court or tribunal is unsympathetic to a non-signatory relying on its own (or its agent's) conduct in failing to disclose that it was acting on behalf of the non-signatory.[70] As to novation, this is uncontroversial as the original promisee simply drops out and a new contract is formed with the third party. As to succession, this raises the same sorts of arguments as will be discussed in the analysis of assignment. Similarly, "assumption of obligation" is really no more than either estoppel or the creation of a separate oral contract. In any event, these other theories will be revisited in the final conclusion.

III. THIRD PARTY NON-SIGNATORIES IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS

In this section, each of the selected legal theories is discussed by analyzing its application in England, the United States, France and then in international law (including international arbitral institution rules). This is followed by a commentary section in which the approaches of the different jurisdictions are contrasted with reference to the key research objectives identified in Section I.A.

Due to the scope of this project the jurisdictions analyzed are limited to three. However, it is suggested that each offers a unique perspective on the third party problem. English common law has traditionally been hostile to general contractual third party rights and restrictive of arbitration, but has been the subject of fairly recent reforms in both (i.e., the Contracts (Rights of Third Parties) Act 1999 and the Arbitration Act 1996). The United States offers an example of a less restrictive general contract law and a strong judicial pro-arbitration policy. France, the sole civil law representative, is chosen both because of its academic contribution to the third party debate and its more liberal approach to binding third parties to arbitration agreements. All three countries are heavy users of international commercial arbitration[71] and a rich source of material.

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70. Minera Alumbrera Ltd. v. Fluor Daniel, Inc., No. 98CIV5673, 1999 WL 269915, *3 (S.D.N.Y. May 4, 1999) ("it would be inequitable to permit [non-signatory parent] to take advantage of any blurring of the line between it and [subsidiary signatory], and we decline to mandate arbitration based upon that rationale"). *See also Non-Signatory Guarantor Cannot Enforce Arbitration Agreement*, 10 WORLD ARB. & MED. REP. 200 (1999). In such a case a claimant non-signatory in the United States is more likely to rely on estoppel doctrine. *See* Fluor Daniel Intercont'l, Inc. v. Gen. Elec. Co., No. 98Civ.7181, 1999 U.S. Dist. LEXIS 12983 (S.D.N.Y. Aug. 20, 1999).

71. *See* SAMUEL, *supra* note 6, at 29 n.61.

A. Assignment

A general exception to the privity doctrine exists where a contract contemplates that a party may assign his or her rights or obligations to a third party. The development of assignment as an exception to the privity rule is borne of commercial necessity[72] and as a mainstay of international business dealings is an area ripe for consideration in international commercial arbitration.[73]

Two preliminary issues should be mentioned. First, assignment should not be confused with closely analogous situations such as succession by law or change in legal form of the original party (e.g., through corporate restructuring) unless such changes actually involve assignment.[74] Second, in an effort to distinguish the often inconsistent terminology used in this area, assignment issues arise where there is: (1) assignment of the rights of action arising out of a contract including a *clause compromissoire;* (2) assignment of a *compromis*; (3) assignment of both the rights and obligations (i.e. including performance of the contract) in a contract containing a *clause compromissoire*; and (4) an assignment agreement of any type which itself includes a *clause compromissoire.*

1. Assignment: England

Conflicting early authorities suggested that as the rights between the original contracting parties and the arbitrator were personal, an arbitration agreement was not capable of assignment.[75] However, the *obiter* comments in that case have been discredited[76] and, despite some occasional doubts,[77] the position now seems quite clear that:

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72. *See e.g.* Sir William Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 1997 (1920).

73. For discussion *see* FOUCHARD, *supra* note 11, at §§ 690 et. seq. (noting that "In spite of both its importance in practice and the particularly difficult issues it raises, the assignment of arbitration agreements was long ignored by authors and commentators. Recently, however it has been the subject of several major studies."). *Id.* at n.2. *See also* Jacques Werner, *Jurisdiction of Arbitrators in Case of Assignment of an Arbitration Clause* 8 J. INT'L ARB. 13 (1991); Jean L. Goutal, *Le droit des contrats* in *L'arbitrage et les tiers* in ARBITRAGE, *supra* note 31, at 439; and the comprehensive theoretical treatment in Daniel Girsberger & Christian Hausmaninger, *Assignment of Rights and Agreement to Arbitrate*, 8 ARBITRATION INT'L 121 (1992) (but note that the jurisdictional overview is out of date).

74. *See e.g.* IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 18.7.1.2, N.6 (1994); *see also* FOUCHARD, *supra* note 11, at § 690.

75. Cottage Club Estates Ltd. v. Woodside Estates Co. Ltd., [1928] 2 K.B. 463.

76. *E.g.* Shayler v. Woolf, [1946] Ch. 320 (Eng. C.A.).

> Where the assignment is the assignment of the cause of action, it will, in the absence of some agreement to the contrary include as stated in section 136 [Law of Property Act 1925] all the remedies in respect of that cause of action. The relevant remedy is the right to arbitrate and obtain an arbitration award in respect of the cause of action. The assignee is bound by the arbitration clause in the sense that it cannot assert the assigned right without also accepting the obligation to arbitrate. Accordingly, it is clear both from the statute and from a consideration of the position of the assignee that the assignee has the benefit of the arbitration clause as well as other provisions of the contract.[78]

Unlike United States law,[79] an assignment may be either legal or equitable. For an assignment to be legal, it must meet the conditions set out in section 136 of the Law of Property Act 1925, i.e. the assignment must be absolute, must be in writing by the assignor, and express notice must have been given to the other party. If satisfied, the assignee is entitled to enforce the arbitration clause in his or her own name. If these conditions have not been met, then the equitable assignee must join the assignor to the action or perfect the assignment by fulfilling the requirements of the Law of Property Act.[80]

Because of the statutory scheme, slightly different considerations apply where the assignment occurs after the commencement of arbitration proceedings (a less common situation). Even there, it was authoritatively decided in *The Jordan Nicolov*[81] that the assignee may simply take over the assignor's proceedings without having to commence new proceedings. This has subsequently been applied to situations involving subrogation rather than assignment, even though the subrogee would have had the option of simply proceeding in his own name.[82] Similarly, the assignee must give notice of the change of claimant to the arbitral tribunal if it has been convened.[83] Further, the assignee must fulfill the evidential burden of establishing that any assignment meets the test in section 136 of the Law of Property Act.[84]

The doctrinal position is put very clearly by Hobhouse J in *The Jordan Nicolov:*

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77. *See* London Steamship Owners Mut. Ins. Ass'n. Ltd. v. Bombay Trading Co. Ltd., "The Felicie," [1990] 2 Lloyd's Rep. 21, 25 (supporting *Cottage Club Estates* dictum).

78. Montedipe S.P.A. v. JTP-Ro Jugotanker "The Jordan Nicolov," [1990] 2 Lloyd's Rep. 11, 15-16. Note that although the assignment occurred after the commencement of the arbitration, Judge Hobhouse reasserted his position in Schiffahrtsgesellschaft Detlev von Appen GmBH v. Voest Alpine Intertrading GmBH, [1997] 2 Lloyd's Rep. 279 (Eng. C.A.).

79. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 1233 (3d ed. 1993).

80. Difficulties will arise if the assignor has ceased to exist. *See* Baytur S.A. v. Finagro Holding S.A., [1991] All E.R. 129 (assignee unable to enforce award made after claimant ceased to exist).

81. *See The Jordan Nicolov*, [1990] 2 Lloyd's Rep. at 19.

82. *See Schiffahrtsgesellschaft Detlev von Appen*, [1997] 2 Lloyd's Rep. at 286.

83. *See The Jordan Nicolov*, [1990] 2 Lloyd's Rep. at 19.

84. *See* R.M. MERKIN, ARBITRATION ACT 1996: ANNOTATED GUIDE § 2.37 (2000).

> In my judgement, the application of principle to this factual situation demonstrates that, absent some special factor . . . the assignee is entitled to an award from the shipowners if he, the assignee, can prove his case on the merits including his case on title to sue. His claim is not time barred. He is entitled under the Law of Property Act to exercise all the legal remedies of the assignor. The remedy by way of arbitration having been invoked by the assignor in time, the assignee can enforce that remedy. It is the same remedy not a new or different remedy.[85]

Also consistent with general contract law, where the main contract involves personal services or is otherwise not assignable (e.g., if it contains a non-assignment clause effective to prevent any interest being assigned), then no valid assignment can take place.[86] English law also provides for assignment by operation of law (as opposed to voluntary assignment) in certain circumstances, e.g., death, bankruptcy, liquidation.

2. Assignment: United States

With respect to arbitrations governed by the Federal Arbitration Act ("FAA"),[87] third party arbitration issues are determined on the same basis as other issues concerning validity of an arbitration agreement, i.e. by applying "ordinary state-law principles that govern the formation of contracts" and the "federal substantive law of arbitrability."[88] The general position with respect to assignment is that stated by MacNeil, Speidel and Stipanowich:

> It is unquestionable FAA doctrine that arbitration agreements are to be treated like other contracts, subject to the policy favoring arbitration. In light of this, the law respecting rights and duties of assignees to arbitrate should follow standard contract doctrine respecting the rights and duties of assignees generally. If there are deviations from such standard contract doctrine, they should be in the direction of arbitrability.[89]

However, some courts have failed to pay adequate attention to standard contract doctrine and in doing so also have ignored the supposed policy favoring arbitration.

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85. *The Jordan Nicolov*, [1990], 2 Lloyd's Rep. at 19.

86. MERKIN, *supra* note 84, at § 2.33.

87. "Enforceability of an arbitration agreement is determined pursuant to the FAA if '(1) the parties have entered into a written arbitration agreement, (2) there exists an independent basis for federal jurisdiction and (3) the underlying transaction involves interstate commerce.'" Cosmotek Mumessillik VE Ticaret Ltd. Sirkketi v. Cosmotek U.S.A., Inc., 942 F. Supp. 757, 759 (D.C. Conn. 1996) (citing In re Chung, 943 F.2d 225, 229 (2d Cir. 1991)).

88. First Options v. Kaplan, 514 U.S. 938, 944 (1995); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

89. MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 74, at § 18.7.1.1.

In situations involving the assignment of rights only, an effective assignment of a contract right extinguishes the assignor's right to performance and transfers that right to the assignee.[90] Thus, an assignee of contract rights may insist on arbitration under the contract just as the assignor could have in the absence of the assignment.[91] Applying general contract law, the assignee takes the rights subject to all the terms of the contract and, subject to the following, is bound to observe the arbitration clause.[92]

However, precedents suggest there are three possible qualifications to this. First, there are authorities supporting the proposition that a mere assignment of a contractual right alone does not carry with it the obligation to fulfill duties. The duty to arbitrate is considered one such nontransferable duty.[93] Second, Girsberger & Hausmaninger suggest that on the basis of general contract doctrine, an assignment may not extend to a "personal" obligation. The authors also suggest that there is old authority for the proposition that this may extend to an arbitration agreement where, for example, the arbitration clause calls for personal appointment of an arbitrator.[94] Thirdly, the same authors suggest that a *compromis* cannot be the subject of an assignment because it is purely "personal."[95] However, these authorities seem out of step with common business practice and are probably of little real limitation on the assignment of rights and duties to arbitrate.

The more common and uncontroversial situation is where the assignment involves the passing of both rights and obligations. If the assignment is valid, then the arbitration clause binds both the original promisee and the assignee as "[b]y taking the assignment, the assignee has consented to become subject to the arbitration clause . . . and there seems little reason not to infer consent to arbitrate disputes respecting assumption of duties as well."[96]

A complication is added by three variables. First, the exact wording of the assignment may be relevant to its validity under various state law and federal common law doctrines. Second, the applicable law which governs the validity and effect of the assignment (which may or may not be the same as that of the contract containing the arbitration agreement or the arbitration agreement itself)

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90. RESTATEMENT (SECOND) OF CONTRACTS § 317(1) (2003).

91. Chatham Shipping Co. v. Fertex ATP Corp., 352 F.2d 291, 294 (2d Cir. 1965).

92. MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 74, at § 18.7.1.2.

93. *See* Lachmar v. Trunkline L.N.G. Co., 753 F.2d 8 (2d Cir. 1985) (applying New York state law). *But see* Hart Enters. Int'l Inc. v. Anhui Provincial Import & Export Corp., 888 F. Supp. 587, 590 (S.D.N.Y. 1995) (assignee bound to arbitrate where it has taken any affirmative actions under the assigned contract to demonstrate an intent to assume obligations). *See* also discussion generally in Girsberger & Hausmaninger, *supra* note 73, at 125-126.

94. Girsberger & Hausmaninger, *supra* note 73, at 125.

95. *Id.* (citing In re Lowenthal, 199 App. Div. 39, 191 N.Y.S. 282 (1st Dep't 1921), *affirmed in* 233 N.Y. 261, 135 N.E. 944 (N.Y. 1922)).

96. MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 74, at § 18.7.1.3.

may impact on the matter. Third, there are conflicting decisions as to whether this is a matter to be determined by the court or the arbitral tribunal.

Bell-Ray Company, Inc. v. Chemrite Ltd. and *Lupritene*[97] touches on all three of these issues. Briefly, Bell-Ray (a New Jersey company) and Chemrite (a South African company) entered into a series of trade agreements containing arbitration clauses to facilitate blending. Chemrite assigned the trade agreements to another South African company, Lubritene Limited. Some time later, Bell-Ray commenced arbitration proceedings against Chemrite and Lubritene and obtained an order from the United States District Court in the District of New Jersey compelling arbitration. Both defendants appealed, alleging that each was not party to any arbitration agreement on the basis that the assignment was invalid. Their argument was that since the trade agreements unequivocally stated that Bell-Ray's consent was required before any assignment, and Bell-Ray gave no such consent, the assignment was invalid. The District Court, applying New Jersey law, held that the contractual consent provision operated only to limit a party's *right* to assign a contract but did not limit its *power* to do so in the absence of a contractual "intent to the contrary with due specificity."[98]

Despite the consent requirement, in the absence of a contractual provision that any such assignment would be void, the assignment was valid and enforceable against both the assignor and the assignee. Thus Chemrite was bound to arbitrate.[99] The importance of the applicable law in deciding such matters is well illustrated here: the parties had failed to prove the content of South African law in the District Court and thus the law of the forum (New Jersey) was applied by the Court by default.[100] Interestingly, it is questionable whether the court's determination will be binding on the matter at any subsequent arbitration where applicable law will presumably need to be argued.[101]

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97. Bell-Ray Co., Inc. v. Chemrite (Pty.) Ltd. and Lupritene (Pty.), 181 F.3d 435, 445 (D.N.J. 1999).

98. Based on RESTATEMENT (SECOND) OF CONTRACTS § 322(2), incorporated into New Jersey state law.

99. *Bell-Ray Co.*, 181 F.3d at 445. The decision was partially reversed and remanded to the District Court on other grounds.

100. *Id.* at 441.

101. There are conflicting decisions on whether this is a matter for the court or arbitral tribunal. *See* Elzinga & Volkers, Inc. v. LSSC Corp., 47 F.3d 879, 882 (7th Cir. 1995) (validity of assignment was for the arbitrator to decide). *See* subsequently *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402, 2407 (2003) ("In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of 'clea[r] and unmistakabl[e]' evidence to the contrary). *AT&T Technologies Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986). These limited instances typically involve matters of a kind that 'contracting parties would likely have expected a court' to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79,

Assignment issues in United States arbitration law are often decided by applying other legal theories. Many international arbitrations involve complex contractual relationships that may divert attention from assignments at issue. For example, *Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration International, Inc.*[102] involved a joint venture agreement to build a power plant in the Dominican Republic. The joint venture was contained in more than one agreement and had been the subject of at least two sets of assignments necessitated by changes in corporate structure and financing arrangements. The relationship soured and SCI launched court proceedings in the Dominican Republic against "the Enron Group" (being the original contracting parties), but excluding the subsequent assignees which were also in the Enron Group. The Enron defendants (i.e. the assignors) sought and obtained an order in the Southern District for New York compelling arbitration. SCI appealed on the basis, *inter alia*, that the only Enron parties to the arbitration agreement were the final assignees.

The Court of Appeals for the Second Circuit upheld the District Court decision, both on the basis of "piercing the corporate veil," to find that the "Enron Group" (i.e. all the Enron defendants) could rely on the arbitration agreement, and also on the basis of equitable estoppel. The Court stated:

> Unquestionably, there were a number of enforceable agreements between SCI . . . and various Enron entities, each of which contained an agreement to arbitrate. The assignment of rights under the 1994 agreement from one set of affiliates to another set of affiliates does not negate the prior existence of a contract to arbitrate between the parties, and thus do not fall comfortably within the inquiry into the making of an agreement. The question before us is not whether SCI and the Enron petitioners entered into an agreement to arbitrate - they did (and more than once) - but whether subsequent events deprived all of the Enron petitioners of the right to compel SCI to live up to that agreement.[103]

While perhaps a convenient short-cut, the characterization of the assignments as merely "subsequent events" is contractually unsound. A better approach would have been to ascertain on which of the agreements each of the plaintiff's claims was based and when it arose. On the basis of the judgment, most appear to relate to allegations of fraud and tortious interference with contractual negotiations arising in the early stages of the joint venture relationship. Parties to the joint venture agreements at that stage should logically be entitled to rely on the arbitration agreement (regardless of the subsequent assignments). It is suggested that this is preferable to the Court's rather vague treatment of all the various

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83 (2002). They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy."

102. Smith/Enron Cogeneration Ltd. P'ship Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88 (2d Cir. 1999) (unusual finding where the non-signatory was able to compel arbitration on a variation of the group of companies doctrine, but justified as an estoppel argument).

103. *Id.* at 95.

corporate entities (but not the ultimate assignees) as entitled to rely on the arbitration agreement at any given time because of their "identity of interests."[104]

A further characteristic of United States case law on assignments is the invocation of the "pro-arbitration policy" of the FAA to permit arbitration with third parties even where the relevant contract(s) appear unequivocally to restrict the arbitration provision to the original parties only. Thus, in the context of a domestic arbitration, the arbitration agreement specifically stated, "[n]o arbitration, arising out of or relating to this Agreement shall include, by consolidation, joinder or in any other manner, any additional person, not a party to this Agreement, except by written consent."[105] Despite this clause, the Court held the assignee compelled to arbitrate, citing policies favoring arbitration and the free assignment of contract rights. Thus, it appears that even express contemplation of limiting the arbitration agreement to the original contracting parties may not prohibit the court's expansive application of a pro-arbitration policy. Such a result may arguably protect the assignor's "freedom of contract" but it places the assignee in a position where it is deemed to have accepted the obligation of arbitration and the original promisor in a position where it has accepted an obligation to arbitrate with a new defendant, both despite a clear limitation on the face of the agreement (remembering that it is quite likely the assignment would have occurred without any contact between the assignee and the promisor; or - even worse - one or both of the parties might have accepted the assignment on the basis that there would be no transfer of the arbitration clause).

3. Assignment: France

There is no explicit provision in the French Civil Code dealing with assignment of an arbitration clause.[106] As to the validity of an assignment, Fouchard and Gaillard state that in the case of "voluntary assignments," the assignee "[w]ill become a party to the arbitration agreement, and in the event of a dispute will be bound by that agreement."[107] The authors support the proposition that acceptance of the assignment of the main contract raises a "presump-

104. *Id.* at 97.

105. Robert Lamb Hart Planners & Architects v. Evergreen Ltd., 787 F. Supp. 753 (S.D. Ohio 1992).

106. Girsberger & Hausmaninger, *supra* note 73, at 130.

107. FOUCHARD, *supra* note 11, at § 708 (distinguishing between "voluntary assignments" and "other means of assigning" the arbitration agreement such as statutory subrogation or succession). This is typical of the overlap between concepts which occur in trying to compare common and civil law jurisdictions.

tion" of acceptance of the arbitration agreement in cases where the entire contract has been transferred.[108] Girsberger & Hausmaninger support this proposition by analogy to Article 1122 of the French Civil Code.[109]

As to the concomitant question of the enforceability of the assignment of the arbitration agreement against the original contracting party, Fouchard and Gaillard state the following proposition:

> [I]f the identity of the co-contractor [the original contracting party] was not a determining factor on signature of the initial arbitration agreement, there is a presumption that such agreement included the initial co-contractor's implicit acceptance of any assignment to a third party.[110]

The authors state that where it is a case of the entire contract being assigned, there is no difficulty in enforcing the arbitration clause against the original party.[111] Discussing this case, the authors state the broad logic used to justify the conclusion:

> The Court added that the assignment "necessarily implies that the assignor transfers the benefit of the arbitration clause - which forms part of the economics [of the] contract - to the assignee," although this did not suffice in itself to justify a presumption of acceptance on the part of the initial co-contractor. Given the generality of the terms of the arbitration clause in dispute and the fact that arbitration has now become a normal method of resolving disputes in international trade, it was legitimate to assume that the initial co-contractor had accepted the possibility of an assignment of the arbitration agreement.[112]

Thus, where the presumption is not enough, the Court will treat a broad arbitration clause and the mere fact of international commerce as sufficient to arrive at the "assumption" that consent to assignment exists. Girsberger and Hausmaninger justify this approach on an analogy to Article 1692 of the French Civil Code, which provides that the assignment of a claim "includes all accessories attaching thereto, such as a right against the surety and any right of property or mortgage securing the same," thus the arbitration agreement is analogous to a "right attaching to the claim" and automatically forms part of the assignment.[113]

An exception to the presumption applies where the initial contracting party is able to establish that the arbitration agreement was entered into *intuitus personae*, that is, in consideration of the identity of the original contracting party (i.e. the assignor). This may be established either from the factual circumstances[114] or from an express term of the contract (including that the agreement

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108. *Id.* at §§ 711-12.
109. *Id. See* n.55 for authorities cited.
110. FOUCHARD, *supra* note 11, at § 716 (emphasis added).
111. *Id.* at § 718 (citing C.C.C. Filmkunst v. E.D.I.F., REVUE DE L'ARBITRAGE 565 (1988), 116 JOURNAL DU DROIT INT'L 1021 (1989)).
112. FOUCHARD, *supra* note 11, at § 718 at 432.
113. Girsberger & Hausmaninger, *supra* note 73, at 131.
114. FOUCHARD, *supra* note 11, at § 721.

is not assignable).[115] As to the former, the authors suggest that the initial contractor would have to establish that "[i]t viewed the assignor as possessing the good faith and procedural loyalty necessary for an arbitration to run smoothly, and that the assignee might not share those qualities. That will, of course, be very difficult to establish, given that arbitration is a common means of resolving international disputes."[116]

As a final comment on the French position, French courts have been strict in holding that the assignee obtains rights only as good as those held by the assignor. Thus, the Cour de Cassation has held that in a contract concluded outside France between two non-French companies, the arbitration clause was enforceable against the French company to which the rights had subsequently been assigned, but that it was not permitted to rely on its rights as a French company to have jurisdiction conferred on the French courts.[117]

4. Assignment: International Law/Institutional Rules

Neither the New York Convention, the European Convention on International Commercial Arbitration (1961) nor the UNCITRAL Model Law specifically deal with the issue of assignment of the arbitration agreement.[118] The reason for this presumably is that the issue is left to the domestic law to be applied pursuant to the conflict of law rules.[119]

As to institutional rules, the ICC Rules of International Arbitration (1998) are similarly silent and arbitral tribunals have instead applied the applicable law relevant to the dispute.[120] One procedural difference with an ICC arbitration is that it is the Court which must first decide that the arbitration is to proceed "if it is *prima facie* satisfied that an arbitration agreement under the Rules may ex-

115. *Id.* at § 722.

116. *Id.* at § 721.

117. *Id.* at § 724 (citing Cass. Civ., Montané v. Compagnie de Chemin de Fer Portugais, 77 JOURNAL DU DROIT INT'L. 1206 (1950).

118. To the extent that these conventions and the UNCITRAL Model Law refer to the requirement of an "agreement in writing" and a "defined legal relationship" this is discussed below at Section IV.C

119. For an alternative view that the issue is addressed in Article II of the New York Convention see Zimmer (USA) Europe S.A. (Belgium) v. Giuliana Crenascoli (Italy), June 3 1985, XI YEARBK. COMM. ARB'N 518 (1986), cited in Girsberger & Hausmaninger, *supra* note 73, at n.62 and accompanying text.

120. For example, I.C.C. Award No. 1704 (1977), JOURNAL DU DROIT INT'L. 977 (1978), applying French law to find that the assignee was bound by the arbitration clause. *See generally* CRAIG, PARK & PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION §5.09 (2d ed. 1990).

ist."[121] This is a very low hurdle to clear and the ICC will not enter into a consideration of the legal position of the asserted assignee at this preliminary stage.

5. Assignment: Commentary

All three of the domestic legal systems analyzed lack specific rules to deal with assignment of arbitration agreements, but conform on one broad proposition (not always consistently applied): the arbitration agreement is *prima facie* assigned with the entire contract in the absence of an express prohibition or some factual manifestation of intent that the agreement was of a personal nature between the original contracting parties. The unique characteristics of the English system stem mainly from requirements imposed by the Law of Property Act. This, in turn, is an historical necessity to overcome the strict English approach to the privity doctrine. However, the notice and writing requirements can be seen as two addressing concerns. First, to ensure that the assignee has consented to the assignment and second, that the original promisor has been sufficiently notified of the assignment. These concerns are apparently of less importance in the "presumption" approach under French law and in the more generous position in the United States. The harshness of the English approach is significantly mitigated by the opportunity of assignment in equity, although such cases are likely to be rarer in international commercial arbitration.

The United States position is somewhat conflicting and suffers from the added complication of multiple state jurisdictions. However, the assignability of arbitration clauses seems to be treated as a matter of general contract law but without the formality burdens imposed by the stricter English approach and with the added variable of the invocation of the "pro-arbitration policy," applied here to weigh in favor of presuming consent.

The French courts have a longer tradition of the so-called "automatic" transmission of the arbitration agreement as part of the assignment of the entire contract. Girsberger also suggests that civil law systems are more willing to see the arbitration agreement as "generally incorporated into the main contract" and are therefore more willing "to analogize arbitration agreements to security interests or accessory rights which attach to the claim they relate to."[122]

Both Fouchard & Gaillard and Girsberger note French resistance to the "automatic" assignment of the arbitration agreement, premised on the basis that the principle of the autonomy of the arbitration agreement (i.e. separability) demands that it be seen as independent of the main contract, especially where the arbitration agreement may be governed by a different applicable law to the main contract.[123] However, Fouchard & Gaillard state that the "French courts

121. ICC RULES OF INTERNATIONAL ARBITRATION (1998), Art. 6(2).
122. Girsberger & Hausmaninger, *supra* note 73, at 138.
123. *See* authorities cited in Girsberger & Hausmaninger, *supra* note 73, at 137.

have consistently rejected" such arguments.[124] Those authors agree with the French courts' insistence that, in the absence of a clear indication to the contrary, the assignee is presumed to have accepted the contract as a whole and no proof is required that the parties had "two distinct intentions - one regarding the main contract, one regarding the arbitration agreement."[125] This willingness to infer intention to arbitrate from intention to be bound by the main agreement is doctrinally questionable and is discussed later.[126]

Another trend noticeable in all three jurisdictions is the willingness to protect the practical efficacy of international arbitration. This is evident in a French commentary:

> [I]t would hardly be in keeping with the needs of international trade if one were entirely to dissociate the substantive aspects of the contract from the provisions concerning jurisdiction. To allow the assignees to avoid those provisions would be to disregard the parties' intentions, irrespective of whether one is dealing with a straightforward waiver of Articles 14 and 15 or a positive choice of jurisdiction, or even an arbitration clause.[127]

A similar pragmatism is evident in England in *Detlev von Appen,*[128] in which the Court was able to invoke its inherent equitable powers to grant an injunction that gave effect to the arbitration agreement, despite the fact that the result in terms of the effect of assignment as a matter of contract doctrine is questionable. So too in the *Smith/Enron Co-Generation* case in the United States, in which the contractual effect of assignment was downplayed to prevent the plaintiff signatory from "trying to escape its obligation to arbitrate."[129]

As a final comment, cases from all three jurisdictions combined with the absence of rules in international agreements and institutional rules dealing with assignment, suggest that the applicable law is fundamentally important. This is discussed elsewhere.[130] So too is the question of whether or not the validity of assignment is a matter for the tribunal or a court.[131]

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124. FOUCHARD, *supra* note 11, at 427.

125. *Id.* at 427.

126. *See infra* at notes 207 and 266 and accompanying text.

127. FOUCHARD, *supra* note 11, at § 724, at 435 (citing A. Pomsard in note 4 Cass. 1e civ., March 21, 1966, La Metropole v. Muller, REVUE CRITIQUE DE DROIT INT'L. PRIVÉ 670-677 (1966)).

128. *Schifffahrtsgesellschaft Detlev von Appen*, [1997] 2 Lloyd's Rep. at 292 ("The application of the time charters for an injunction has been made to protect a contractual right of the time charterers that the dispute be referred to arbitration, a contractual right which equity requires the insurance company to recognise.").

129. *Smith/Enron Co-Generation*, 198 F.3d at 97.

130. *See infra* at Section IV.B.

131. *See generally supra* note 101.

B. Subrogation

A discussion of subrogation suffers in the international commercial arbitration context from two potential difficulties. First, the phrase "subrogation" has subtle differences of use in different legal systems. Second, awards, international agreements, institutional rules, and commentaries often confuse the concept with assignment and novation.

1. Subrogation: England

In the words of a leading commentator: "[s]ubrogation is literally 'substitution.' The term is used in the context of English and Commonwealth law to describe a process by which one party is substituted for another so that he may enforce that other's rights against a third party for his own benefit."[132]

The more expansive definition provided in CHITTY ON CONTRACTS cites applications of the concept that exemplify how important subrogation is in the context of international commercial arbitration:

> By virtue of 'subrogation,' a person may , in certain situations, 'step into the shoes' of another so as to enjoy the latter's legal position or his rights against a third person. These rights are akin to other restitutionary rights and are based on general principles of natural justice but subject to statute. Thus, an insurer who pays a claim under an indemnity policy in respect of a particular loss is entitled to enforce the rights of the insured person arising out of the loss against any third person; a guarantor who pays the debt of the principal debtor is entitled to require the creditor to give him the benefit of any security given by the principal debtor to the creditor; an endorser of a bill of exchange who pays the bill may claim analogous rights.[133]

The straightforward position in England is that the subrogee is both bound by and can enforce an arbitration agreement contained in the principal contract. However the doctrine vests no cause of action in the subrogee and thus the arbitration claim must be pursued in the name of the subrogor.[134] The subrogee receives rights only as good as those enjoyed by the subrogor.[135] However, it may also arise (particularly in the insurance context) that the subrogee enters into a formal assignment of the claim and can then pursue the arbitration in its own name as an assignee.[136]

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132. CHARLES MITCHELL, THE LAW OF SUBROGATION 1 (1995) (citations omitted).

133. CHITTY ON CONTRACTS, Vol. 1, § 29-121, at 1482 (A.G. Guest ed., 1994) (citations omitted).

134. "The Ailos," [1983] 2 Lloyd's Rep. 25, 25-30. The situation is different where it is a case of "reviving" a cause of action by way of subrogation but this is unlikely to be the subject of international commercial arbitration. *See generally* MITCHELL, *supra* note 132, at 37.

135. This has caused difficulties in the reinsurance context. *See* Mercantile & Gen. Reins. Co. Plc. v. London Assurance, (unreported, Eng. C.A., 1989), cited in MERKIN, *supra* note 84, at § 15.1; *see generally* Schwab, *supra* note 22, at 485.

136. *See Schiffahrtsgesellschaft Detlev von Appen*, [1997] 2 Lloyd's Rep. 279. *See also supra* note 80 and accompanying text.

In the specific arbitration context, section 82(2) of the Arbitration Act 1996 provides that the Act applies to all persons acting "under or through" a party to the arbitration proceedings. This mirrors section 4 of the Arbitration Act 1950 and section 1 of the Arbitration Act 1975, although in those Acts the provision applied only in the limited context of jurisdiction to apply for a stay of proceedings pending arbitration. Earlier case law had held that a subrogee is a party claiming "under or through" a party to the arbitration agreement, although the subrogee obtains no rights of its own but is simply "standing in the shoes" of the subrogor.[137] Professor Robert Merkin states that it is "now clear" that an insurance company exercising subrogation rights and pursuing the insured's claim in arbitration is not a party to the arbitration in its own right and cannot claim the benefit of the "through or under" jurisdiction.[138] It is perhaps worth noting that the case Professor Merkin cites for this proposition, *The Frotanorte*,[139] was concerned with whether the insurer had reached a separate arbitration agreement with the third party against whom the claim was being made so as to avoid allegations of delay. Indeed, the court of first instance specifically stated that it would not proceed to the alternative argument that the insurer was capable of bringing an arbitration agreement in its own name.[140] The issue of the extent to which the "through or under" provision may impact on third party enforcement of arbitration provisions is considered below.[141]

Finally, certain statutes grant rights analogous to subrogation. The most important is the Third Parties (Rights Against Insurers) Act 1930, permitting a third party to bring a claim directly against an insurer who, for example, refuses to pay out on a claim in certain specified circumstances, e.g. insolvency. It is clear that in doing so, the Act "transfers to the plaintiffs not the claim but the contractual rights of the insured" subject to any arbitration clause contained in the policy, i.e. it is subrogated thereto.[142]

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137. *See e.g.*, Smith v. Pearl Ins. Co. Ltd., [1939] 1 All E.R. 95.

138. Merkin, *supra* note 84, at § 1.37.

139. Frota Oceanica Brasiliera SA v. Steamship Mut. Underwriting Ass'n (Bermuda), "The Frotanorte," [1995] 2 Lloyd's Rep. 254 *affirmed* [1996] 2 Lloyd's Rep. 461 (Eng. C.A.).

140. *The Frotanorte*, [1995] 2 Lloyd's Rep. at 260. Although the court does state *obiter* that "[i]t is elementary law (at any rate in England and in Wales) that any such [subrogated] claim must be pursued in the name of the insured. Any agreement to arbitrate must therefore be with the insured . . . if it is to be effective."

141. See *infra* note 362 and accompanying text.

142. Charterers' Mut. Assurance Assoc. Ltd. v. British & Foreign & TMM Transcap, [1998] I.L. Pr. 838, § 38 (Q.B.D., Comm. Ct.) (citing Fanti & the Padre Island (No. 2), [1990] 2 Lloyd's Rep. 191 (HL); *London Steamship Owners*, [1990] 2 Lloyd's Rep. at 21 (discussing position where arbitration proceedings have already commenced)).

In *Charterers' Mutual Assurance Assoc. v. British & Foreign & TMM Transcap*,[143] an English court had to resolve an alleged conflict between the English approach of granting limited rights of subrogation in the Third Party (Rights Against Insurers) Act 1930 and the French law governing this situation. After members of a charterers' liability insurance association failed to pay out on claims made by certain third parties, the third parties commenced litigation in France against not only the members but also the association. The association sought and obtained an anti-suit injunction in London on the basis of an arbitration agreement between it and its members providing that all disputes be arbitrated. Pursuant to French law the third party plaintiffs were arguably entitled to pursue an *action directe,* by which an injured party is permitted to proceed directly against the insurer of the party that caused the harm. However, the English court found that as a matter of French law the right of the injured party is governed by the limits and defenses available under the terms of the relevant liability policy and that the policy was to be construed according to the applicable law. The policy had specifically chosen English law and, applying English law, the Court concluded that "any rights which the [third parties] may have acquired...are rights which are subject to the arbitration clause."[144] Accordingly, the French litigation "must be regarded in English law as unconscionable and so unjust" such as to necessitate the anti-suit injunction.[145]

2. Subrogation: United States

As stated by a leading text on insurance law:

> Whether legal or conventional, subrogation places an insurer in the place of the insured with respect to any claim the insured has against a third party for causing the loss. To reach this point, the insurer is required to have paid its insured under the terms of the policy. The insurer gets no greater rights than the insured had to give so far as a claim against a third party is concerned.[146]

This basic contract law approach applies also to an arbitration agreement in the head contract, which will bind the subrogee both as a potential claimant and respondent. Thus, in *Tencara*, the Court of Appeals for the Second Circuit held

143. Charterers' Mut. Assurance Assoc. Ltd. v. British & Foreign & TMM Transcap, [1998] I.L. Pr. 838.

144. *Id.* at § 44.

145. *Id.* at § 46. However, it appears that this result is in fact consistent with French law on the *action directe*, which is also limited by the existence of an arbitration clause.

146. KENNETH H. YORK, JOHN W. WHELAN & LEO P. MARTINEZ, CASES, MATERIALS AND PROBLEMS ON GENERAL PRACTICE INSURANCE LAW 364 (3rd ed., 1994).

an insurer bound to arbitrate, as it is "clearly established that an insurer-subrogee stands in the shoes of its insured."[147]

United States case law evidences a pragmatic approach to the position of subrogees in arbitration. For example, in *Hammermills* the District Court for the District of Columbia rejected a challenge to enforcement of an arbitral award under the New York Convention premised on an argument that the enforcement action by Hammermills was barred because it was not the "real party in interest."[148] Hammermills had filed for bankruptcy and the arbitration was permitted to proceed on the basis that its insurer (Argonaut) would fund the arbitration costs. The unsuccessful party in the arbitration argued that Argonaut and not Hammermills must bring the enforcement action. The Court accepted that Federal Rule of Civil Procedure 17(a) provides that "every action shall be prosecuted in the name of the real party and interest" and accordingly "if the insurer has paid the entire claim it is the real party and interest and must sue in its own name."[149] However, the Court concluded that such an interpretation would be contrary to the New York Convention which "creates a substantive right on behalf of a party to an arbitration proceeding to bring a federal action for confirmation of that award."[150] Thus, despite the fact that Argonaut was, for the purposes of federal law, the "insurer subrogee" and therefore, the "real party in interest," this did not preclude Hammermills bringing the enforcement action in its own name.

Even in the absence of a direct action statute, there are precedents permitting a third party non-signatory to bring claims against an insurer alleged to have failed to pay out on a policy that would have benefited the third party. In the leading case of *Asmaa*,[151] seamen brought asbestosis claims directly against their employers' insurer (although there was no direct action statute) on the basis that they were entitled to stand in the shoes of the former employers and recover for their injuries under the indemnity contracts with the Association. However they were held bound to the arbitration clause contained in the policy with the Association because:

147. Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349 (2d Cir. 1999). Note that added complications arise where there are direct action statutes and the possibility of limited application of the FAA in favor of state regulation of insurance matters.

148. Compagnie des Bauxites de Guinee v. Hammermills Inc., No. CIV.A.90-0169, 1992 WL 122712 (D.D.C. May 29, 2002).

149. *Id.* at * 7.

150. *Id.* at * 8.

151. Aasma v. Am. S.S. Owners Mut. Prot. and Indem. Ass'n., 95 F.3d 400 (6th Cir. 1996).

> When a plaintiff 'bases its right to sue on the contract itself, not upon a statute or some other basis outside the contract, the provision requiring arbitration as a condition precedent to recovery must be observed.'[152]

However, where the third party has sought to argue that its claims are based not on the policy itself but some other claim against the insurer, it is not bound by the arbitration agreements in the policy. Thus, in *Powell v. Sphere Drake Insurance Plc*,[153] the Court of Appeals of Washington overturned a lower court authority to hold that plaintiff Powell was not bound by an arbitration clause in the insurance policy between Sphere Drake and the owners of a vessel on which Powell was injured (the corporate owners of the vessel having being dissolved).[154] Interestingly, the Court relied heavily on *Thomson*[155] and the five "theories" by which a non-signatory could be bound to an arbitration agreement. Noting that none of those included subrogation theory[156] and drawing on federal case law that confirms that "despite the strong policy in favor of arbitration, parties to a dispute will generally not be compelled to arbitrate unless they have agreed to do so,"[157] the Court concluded that Powell's claims based on state consumer protection and fraudulent conveyance statutes were not bound by the arbitration agreement.[158]

These cases are indicative of two often conflicting general trends in the United States courts' approach to the third party problem. First, concern not to bind the subrogee to arbitrate where he "clearly did not bargain to do so."[159] Second, a conceptual uneasiness where the claim can be brought on a basis other than relying on the contract containing the arbitration agreement, such that there is no other foundation for consent to arbitrate. Both concerns can be answered by more careful analysis of the relationship between claimant and respondent. If

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152. *Id.* at 405 (quoting Cheshire Place Associates v. West of England Shipowners Mut. Ins. Ass'n, 815 F. Supp. 593, 597 (S.D.N.Y. 1993), *see* Wells Fargo Bank Int'l Corp. v. London Ship Owners' Mut. Ins. Ass'n, 408 F. Supp. 626, 630 (S.D.N.Y. 1976) (mortgagee who was a loss payee on an insurance policy, sued for payments allegedly due under that policy and was bound by the arbitration provision in the policy).

153. Powell v. Sphere Drake Insurance Plc., 988 P.2d 12 (Wash. Ct. App. 1999).

154. *Powell*, 988 P.2d at 16.

155. *Thomson*, 64 F.3d at 776, as discussed herein at note 47 and accompanying text.

156. *Powell*, 988 P.2d at 15. Note, however, that, as already discussed, it is suggested that the five "theories" listed in *Thomson* do not constitute a comprehensive catalog of possible applicable doctrines (nor do the courts feel bound by the *Thomson* categories where it suits them to depart therefrom).

157. *Powell*, 988 P.2d at 16, citing Zimmerman v. Int'l Cos. & Consulting Inc., 107 F.3d 344, 346 (3d Cir. 1997); Morewitz v. West of England Ship Owners' Mut. Prot. and Indem. Ass'n., 62 F.3d 1356, 1365 (11th Cir. 1995) (stating "although we recognize that Morewitz now 'stands in the shoes' of General Development, we are reluctant to mandate arbitration where the claimant clearly did not bargain to do so"), *cert. denied* 516 U.S. 1114 (1996); In re Talbott Bigfoot Inc., 887 F.2d 611, 614 (5th Cir. 1989).

158. *Powell*, 988 P.2d at 16.

159. *Morewitz*, 62 F.3d at 1365.

it is truly one arising out of subrogation, then all claims *within the scope of the arbitration agreement* should be arbitrated. In contrast to criticism from some commentators,[160] it is suggested here that in *Powell* either the plaintiff had an independent claim against the insurers (and thus was not a subrogee) or, if his claim was as a subrogee, his action based on fraudulent misrepresentation with respect to the security provided may well have been outside the scope of the arbitration agreement with the insured (whose shoes plaintiff stood in).

3. Subrogation: France

As noted by Fouchard & Gaillard, in cases where an insurer succeeds to the right of an insured, the courts have "consistently held that the insurer is bound by the arbitration agreement accepted by the insured from whom it derives its rights."[161] French courts have not hesitated in holding that, in the absence of a provision to the contrary, the initial promisor accepts that it will be bound to arbitrate against any eventual subrogee. Indeed, this logic has been applied not only in the insurance context, but also where a bankrupt foreign company sold its assets to a new third party,[162] and where a bank succeeded to the rights of the beneficiary to a bill of exchange endorsed in its favor.[163] French law appears to differ from the English or United States' position in that the "insured retains the right to commence arbitration against the party with which it concluded an arbitration agreement, and it will still have standing to take such actions if the insurer requires it to do so, or if the action is wholly or partially for its benefit."[164] Thus, it is not the complete subrogation that characterizes the common law model. As noted by Girsberger & Hausmaninger, this exposes the promisor to potential claims from both the promisee and the subrogor.[165] On the other hand, it may allow a promisor claimant to pursue both promisee/subrigor and subrogee, thereby increasing the chance of recovery.

160. *See* MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 74, at § 18.7.1.2., n.6.

161. FOUCHARD, *supra* note 11, at § 714, (referring to Cass. Comm, May 13, 1966, Société d'approvisionnements textiles v. Compagnie de navigation 'Fraissinet et Cyprien Fable,' 1967 REV. CRIT. DIP. 355).

162. FOUCHARD, *supra* note 11, at § 719. (citing C.A. Paris, Oct 8, 1997, Solna International AB v. SA Destouche, DALLOZ INFORMATIONS RAPIDES 233 (1997)).

163. FOUCHARD, *supra* note 11, at § 719 (citing French Bank v. Indian Company, I.C.C. Case No.1704 (1977), 105 JOURNAL DU DROIT INTERNATIONAL 977 (1978)).

164. FOUCHARD, *supra* note 11, at § 719 (citing I.C.C. Award No. 6733 (1992)).

165. Girsberger & Hausmaninger, *supra* note 73, at 138.

4. Subrogation: International Law/Institutional Rules

While subrogation is not specifically dealt with in any of the international agreements on model contract clauses, it has arisen in the context of international law as applied by certain international arbitral tribunals. The UN Compensation Commission to Administer Claims arising out of the Gulf War is authorized to apply the "rules of international law" and its jurisprudence recognizes a number of "international usages" and "general principles of law," including subrogation.[166] Subrogation arguments have also been made in the Iran-United States Claims Tribunal.[167] Similarly, the claims of a subrogee insurer failed in the same Tribunal where it could not prove that it was a true subrogee so as to be entitled to the benefit of the US nationality of the original claimant.[168]

5. Subrogation: Commentary

There is a broad consensus that subrogation involves the replacement of the original contracting party/subrogor with the third party subrogee who can be in no "better" position than the subrogor, and therefore is bound by any arbitration agreement. This result is not surprising, as the non-signatory is simply picking up the rights of the original contracting party. Thus, in the paradigm situation of the subrogee insurer, it is clear that the insurer is bound by the arbitration agreement and can enforce the arbitration agreement in the subrogor's name.

While the logic is unsurprising, the result is that the original promisor is bound to arbitrate with a new party (or the old party as represented by its subrogee) even in the absence of consent and even though the promisor may well have had no control over the contractual arrangements between the subrogor and subrogee. The French justification is that the promisor has initially accepted the possibility of arbitration with any future subrogee and in the typical case of insurance, this seems plausible as being within the range of foreseeable commer-

166. *See* B.G. Affaki, *The United Nations Compensation Commission: A New Era in Claims Settlements?* 10 J. INT'L. ARB. 10, 21 (1993) (citing case law and the claim forms themselves as well as I BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 483 n.7 (1981) (recognizing subrogation as a general principle of law)).

167. *See e.g.*, I.C.C.A. YEARBK. Vol. XXII, 1997, at 482-496, (citing Case 381 where equitable subrogation claim failed because subrogation had not occurred before the relevant date which gave the Tribunal jurisdiction).

168. Ocean-Air Cargo Claims Inc. v. Islamic Republic of Iran, Award and Case No. 11429, Dec. 15, 1989, I.C.C.A. YEARBK. Vol. XVI, 1991, at 377. This issue has become very controversial in the context of arbitration claims brought pursuant to investment treaties. *See e.g.* The Loewen Group, Inc. v. U.S., ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, at ¶¶ 220-240, available at www.naftaclaims.com (finding no jurisdiction over Canadian corporate claimant where pursuant to a bankruptcy reorganization it was reincorporated in the U.S. and also refusing to acknowledge legitimacy of purported assignment of claim to a Canadian shell company).

cial possibilities. Outside of insurance one can understand some hesitancy in binding the promisor and/or subrogee to arbitrate.

Generally speaking, all three jurisdictions view subrogation as a "transfer" of the subrogor's rights to the subrogee with the transfer governed as a matter of contract law. Certainly in both France and the United States (and probably in England), separate manifestation of an intent to be bound by the arbitration agreement is not necessary as the arbitration agreement is a "condition precedent" (*Aasma*) to the substantive claim being pursued. This can be justified on the basis that the subrogee obtains only those rights of the subrogor (and must in England pursue the claim in the subrogor's name).

There are, however, two qualifications to this. First, under French law, the promisor can still bring a claim against the original promisee/subrogor, in addition to a claim brought against the subrogee. This is different from the position in the United States and England (although this may depend on the extent of the rights granted to the subrogee).

Second, where the non-signatory third party pursues a claim against the original contracting party (usually an insurer) in circumstances in which the original promisee (usually an insured) has become unavailable due to liquidation etc., this has been termed "subrogation." While the English *Charterers' Mutual Assurance* case achieved a similar result to that which would apply in a French *action directe*, i.e. the third party is bound by the arbitration clause, it is suggested that subrogation may not be the correct legal concept to apply. Rather, this may better be analyzed as an application of the third party beneficiary principle or reliance on the conceptually distinct rights accrued by invoking a direct action statute. Recognizing this distinction helps explain those apparently inconsistent cases in which United States courts have applied a direct action statute without also enforcing an arbitration provision contained in the underlying insurance policy.[169]

169. *See* In re Talbott Bigfoot, Inc., 887 F.2d 611, 614 (5th Cir. 1989) (applying direct action statute and stating that the federal policy favoring arbitration does not apply where the third party was not contractually bound to arbitrate).

C. *Third Party Beneficiary Doctrine*

1. Third Party Beneficiary: England

Until reforms enacted in 1999, English law adamantly refused to recognize a general rule of contractual rights for the benefit of third parties.[170] Thus, the quintessential statement of the supremacy of the privity doctrine is that of Viscount Haldane in *Dunlop v. Selfridge*, who referred to the fundamental principle of English law "that only a person who is a party to a contract can sue on it" and that "English law knows nothing of a *jus quaesitum tertio* arising by way of contract."[171]

However, the privity doctrine was the subject of much criticism and legislators and judges continuously extended the range of exceptions to it. Reform efforts were attempted in 1937[172] and 1965[173] but failed to be implemented. Finally, in 1991 the Law Commission released a consultation paper[174] and, following public submissions, its 1996 final report: *Privity of Contract: Contracts for the Benefit of Third Parties*,[175] which recommended implementing a statutory right for third parties to enforce contractual benefits where such was the intention of the original contracting parties (hereinafter "Law Commission Report"). The Law Commission Report led to the drafting of a 1998 bill which was ultimately enacted[176] as the Contracts (Rights of Third Parties) Act 1999 (hereinafter "C(RTP) Act 1999), which came into force on November 11, 1999 (although, unless explicitly agreed, does not apply to contracts entered into before May 11, 2000[177])

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170. References are to England rather than to the United Kingdom as Scottish law has traditionally recognized the concept of *jus quaesitum tertio*. However the position in Wales and Ireland is the same as that in England. *See* H.L. Hansard, 11 Jan. 1999, Cols. 26-27.

171. Dunlop Pneumatic Tyre Co. v. Selfridge & Co. Ltd., [1915] A.C. 847 (HL).

172. THE LAW REVISION COMMITTEE, SIXTH INTERIM REPORT, 1937, CMD. 5449, cited in KONRAD ZWEIGERT & HEIN KOETZ, INTRODUCTION TO COMPARATIVE LAW - VOL. II: THE INSTITUTIONS OF PRIVATE LAW 13, n.52 (trans. by Tony Weir 1987).

173. FIRST PROGRAM OF LAW REFORM, ITEMS ONE AND THREE, cited in THE LAW COMMISSION, CONSULTATION PAPER 121, PRIVITY OF CONTRACT: CONTRACTS FOR THE BENEFIT OF THIRD PARTIES § 1.43 (1991).

174. THE LAW COMMISSION, CONSULTATION PAPER 121, PRIVITY OF CONTRACT: CONTRACTS FOR THE BENEFIT OF THIRD PARTIES (1991).

175. THE LAW COMMISSION, REPORT 242, PRIVITY OF CONTRACT: CONTRACTS FOR THE BENEFIT OF THIRD PARTIES (1996) (hereafter "LAW COMMISSION REPORT 242").

176. The Bill was introduced into the House of Lords on December 3, 1998, ultimately passed by the House of Commons on November 1, 1999, passed in its amended form by the House of Lords on November 10, 1999 and received the Royal Assent on November 11, 1999.

177. C (RTP) Act 1999, section 10.

Arbitration and Third Party Beneficiaries: Pre-C(RTP) Act 1999

Prior to the C(RTP) Act 1999, the position of a third party beneficiary seeking to enforce an arbitration clause to which it was not a party essentially reflected the general contract law position: strict enforcement of the doctrine of privity with piecemeal exceptions.[178] Thus, arbitration would be compelled only in limited circumstances such as where the third party was able to establish the promisee contracted as his trustee[179] or agent.[180]

Occasionally, parties were able to persuade courts to enforce an arbitration clause which could have been justified on third party beneficiary principles. Thus, in *Northern Regional Health Authority*[181] (NRHA) the court had to resolve an issue where there were separate arbitration agreements in a head contract between NRHA and Crouch and a subcontract between Crouch and Crown. The subcontract contained a poorly designed mechanism that entitled Crown to bring arbitration proceedings against NRHA in relation to any dispute arising between them but such arbitration was to be brought in Crouch's name. On a dispute arising, Crown lodged an arbitration notice in Crouch's name. NRHA sought an injunction on the basis that it was not a party to any arbitration agreement with Crown. The Court of Appeal declined to grant the injunction, holding that even though there was no privity between Crown and NRHA, Crown's only remedy in the absence of arbitration would be to sue Crouch on the subcontract, seeking a declaration that Crouch commence arbitral proceedings against NRHA in order to obtain benefits due to Crown. This would amount to a "serious injustice" as it ignored the "special arbitration machinery" that had been provided in both contracts.[182]

The case relies heavily on the particular facts and the result essentially rested on the basis of the "network of contracts" that existed between the three parties.[183] However, this rather vague reasoning could have been avoided if the third party beneficiary principle had been available. It seems likely all parties intended for Crown to resolve any contractual dispute with NRHA by arbitra-

178. For a comprehensive list of "exceptions to or circumvention of" the privity doctrine, *see* Law Commission Report, at §§ 2.8-2.62.

179. *See, e.g.*, Lynch & Templeman v. Clemence, (1699) 1 Lutw. 571.

180. *See, e.g.*, Fagan v. Harrison, (1849) 8 C.B. 383.

181. Northern Reg. Health Auth. v. Derek Crouch Const. Co. Ltd., [1994] 2 All E.R. 175.

182. *Id.* at 183.

183. The result may also be justified on the basis that the court was exercising its equitable powers in considering an injunction application.

tion.[184] This case is an interesting example of the kind of "legal gymnastics" the law required of courts faced with third party beneficiaries seeking to enforce a contractual benefit by way of arbitration.[185] It is therefore surprising that the question of whether or not the C(RTP) Act 1999 should apply to arbitration agreements became such a contentious topic.

Arbitration and the C(RTP) Act 1999: Legislative History

The Law Commission's initial 1991 Consultation Paper did not mention the consequences of privity reform for arbitration. However, in response to submissions, the Law Commission Report sought not only "to rectify that omission" but also acknowledged that it was "one of the most difficult issues we have faced in this project."[186]

The Law Commission ultimately recommended that: "[a] third party shall have no rights of enforceability under our proposed reform in respect of an arbitration agreement or a jurisdiction agreement."[187] The Commission used the following rationale:

> [S]uch agreements cannot operate satisfactorily unless any entitlement of the third party to enforce the arbitration agreement carries with it a duty on the third party to submit to arbitration . . . Yet our reform is concerned only with conferring of rights and benefits on third parties and not with the imposition of duties and burdens. In our view, a third party should in general only be bound by an arbitration . . . agreement if it has agreed to be so bound in which case it becomes a true contracting party to the agreement and is no longer a third party to it.[188]

The Law Commission Report records that the Committee was "originally attracted by the idea that an arbitration agreement ...could operate as a procedural benefit to the third party and could also constitute a procedural condition on the third party's right to enforce the substantive benefit."[189] But it:

> [R]eluctantly c[a]me to the view that arbitration and jurisdiction clauses must be seen as both conferring rights and imposing duties and do not lend themselves to a splitting of the benefit and the burden. Following on from that, one radical approach would be to bind the third party to those agreements in respect of a dispute affecting a third party's rights as if he were a

184. Under the C(RTP) Act 1999, *supra* note 177, the court's inquiry would have been directed more to this question. In this respect there is some evidence that the NRHA may have been able to rebut the presumption of an intention to benefit, e.g., it was exempted from liability to subcontractors under the NRHA/Crouch head contract. There would also have been a question as to whether Crown was sufficiently "identified" for the purposes of the Act.

185. This result might have also been obtainable by applying subrogation principles of the broader sort seen in the insolvent employer/insurer cases. *See e.g.*, Aasma v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc., 95 F.3d 400 (6th Cir. 1996).

186. LAW COMMISSION REPORT 121, *supra* note 175, at § 14.14.

187. *Id.* at § 14.19.

188. *Id.* at § 14.15.

189. *Id.* at §§ 14.16-17.

> party to them. While we have considered this possibility at length, we have ultimately rejected it essentially because it would contradict a central philosophy of our reform in that we are concerned only with the conferring of rights, and not the imposition of duties on third parties.[190]

Despite this clear conclusion, during debate on the Bill's second reading, Lord Wilberforce advised that the clause specifically excluding arbitration clauses from the reach of the proposed legislation had been deleted from the Bill.[191] The justification given by the Lord Chancellor was that "on further reflection" the Law Commission had concluded:

> Although in theory the third party might seek to rely on an arbitration clause to stay court proceedings without being bound to arbitrate, in practice no stay would be granted by the court unless he had shown willingness to go to arbitration. On that basis, the conclusion was that there was no good reason to exclude these clauses from the operation of the reform.[192]

This led to further debate when reporting back from the Committee stage. The Lord Chancellor explained, that once the Law Commission had "[c]hanged its mind and accepted that arbitration agreements should not be excluded . . .[i]t was then necessary to decide whether any amendment to the Bill was needed to enable a third party to refer a dispute to arbitration."[193] The key problem was that the "third party is not a party to the arbitration agreement" for the purposes of Part I of the Arbitration Act 1996, and thus the Bill was amended to "provide that where a third party has the right under Clause 1 to refer a dispute to arbitration and chooses to do so, there shall be deemed to be an arbitration agreement between himself and the promisor, so triggering Part I of the Arbitration Act."[194]

At this stage the Law Commission made further amendments to extend to arbitral tribunals the courts' powers to enforce benefits on behalf of third parties. The Lord Chancellor also rejected amendments proposed by Lord Hacking that would have expanded the obligations of a third party to rely on the arbitration clause.[195] The Lord Chancellor successfully opposed such amendments on the basis that there should be:

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190. *Id.* at § 14.18.
191. H.L. Hansard, 11 January 1999, Vol. 596, Cols. 27-28.
192. *Id.* at Col. 33.
193. H.L. Hansard, 27 May 1999, Vol. 601, Cols. 1058-1059.
194. *Id.* at Col. 1059. Note that it was arguable whether this was necessary given section 82(2), Arbitration Act 1996 which provides that any reference to "a party to an arbitration agreement includes any person claiming under or through a party to the agreement" (emphasis added). See discussion *infra* at note 362 and accompanying text.
195. *Id.* at Col. 1053.

[N]o question of the third party being bound to refer a dispute to arbitration. The proposed amendment applies only in relation to a matter which the third party himself requires to be referred to arbitration. That is consistent with the Bill's purpose of *conferring rights and benefits on third parties* (albeit that a benefit may be conditional) and *not duties and burdens.*[196]

Remarkably, this stands in stark contrast to the eventual form that the Act took. It was not until the Bill's final reading in the House of Commons on November 1, 1999 that a last minute amendment passed, substantially rewriting the arbitration provisions. A new clause was added (which became present section 8), which reads as follows:

> (1) Where -
>
> (a) a right under section 1 to enforce a term ("the substantive term") is subject to a term providing for the submission of disputes to arbitration ("the arbitration agreement"), and
>
> (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996,
>
> the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.
>
> (2) Where -
>
> (a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration ("the arbitration agreement"),
>
> (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, and
>
> (b) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,
>
> the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right.[197]

196. *Id.* at Col. 1059 (emphasis added).
197. Arbitration Act 1996, section 8.

The Commission justified the changes on the basis that "concerns . . . were raised during the recess [that] have made us examine the wording carefully."[198] However, the amendments seem remarkably unclear in their scope and potential application.

Arbitration and the C(RTP) Act 1999: Commentary

There has not yet been any reported judicial consideration of the effect of the C(RTP) Act 1999 on arbitration and only limited commentary on the C(RTP) Act 1999, largely discussing specific fields like insurance, reinsurance and shipping law,[199] with very little analysis of the specific arbitration provisions.[200] However, there are at least five points worth noting. First, section 8 of the C(RTP) Act 1999 is unique in the Act in that it actually deems the third party to be a "*party* to the contract." This is also in contrast to section 7(4) that specifically states that a "third party shall not . . . be treated as a party to the contract for the purposes of any other act...." This was presumably considered a practical convenience so as to synchronize properly with the Arbitration Act 1996;, however, it does cut against the notion of the third party beneficiary as enjoying only certain limited benefits (as opposed to being a "party" as could only occur by way of novation, etc).

Second, the Arbitration Act 1996 offers no guidance on how the third party should practically be treated. Questions such as how to deal with appointment of arbitrators and the position of "consumer arbitration agreements" are left to be sorted out either by contract draftspeople or by the courts.

Third, the "benefit" versus "burden" dichotomy has been rejected and replaced with a theory based on the English Court of Appeals' decision in *Detlev*

198. H.C. Hansard, 1 November 1999, Vol. 337, Col. 23.

199. *See e.g.*, A.M. Bowyer, *Contracts (Rights of Third Parties) Bill and Insurance*, [1997] J. BUILDING L. 230, 239; A. Salamat, *Reform of Privity of Contract, in* Mealey Litigation Reports: INSURANCE INSOLVENCY 11 (1999); D. Arthur & S. Phippard, *Contracts (Rights of Third Parties) Act - Implications for Insurers,* ANDREWS INT'L. REINSURANCE DISP. REP. Vol. 4, No. 17, 3 (February 11, 2000). More recently, *see* Rizvan Khawar, *Reinsurance and Privity in the Past, Present and Future: Privity of Contract in Reinsurance and the Contracts (Rights of Third Parties) Act 1999*, 77 TUL. L. REV. 495 (2002); Tony Vlasto and Julian Clark, *The Effect of the Contracts (Rights of Third Parties) Act 1999 on Voyage and Time Charter Parties*, 25 TUL. MAR. L.J. (2001).

200. See Philip Wright, *Contracts (Rights of Third Parties) Bill - What Impact on Arbitration Clauses?* 2(4) INT'L ARB. L. REV. 137-139 (1999) (however the article apparently predates the final Act). More recently, *see* Tanya Melnyk, *The Extent to Which Non-Contracting Parties Can Be Encouraged or Compelled to take Part in Arbitral Proceedings – The English (Arbitration Act 1996) Perspective*, INT. ARB. L. REV., 6(2), 59 at 60 (2003); Rizvan Khawar, *supra* at note 199, at 503.

von Appen.[201] There, Lord Justice Hobhouse upheld the validity of an arbitration clause included in an assigned contract thereby requiring the assignee to submit its dispute to arbitration. His Lordship rejected counsel's argument that this amounted to an assignment of a burden on the assignee. He stated:

> The burden of the contract was not transferred. The [third party] came under no actionable liability to the [promisors]. In my judgement this argument fails to understand the nature of the equitable remedy which is being sought in this action. The simplest way in which to illustrate this is to take a simple analogy. If the assignee of a legal right in action seeks to enforce that right against the debtor without taking into account an equitable set-off which the debtor was entitled to raise against the assignor, the debtor's remedy . . . would have been to apply in the Chancery Court of Chancery for an injunction to restrain the assignee from asserting the common law right . . . unless and until he recognized the equitable right of the debtor.[202]

The Explanatory Notes to the C(RTP) Act 1999 state that section 8(1) is based on a "conditional benefit approach," meaning that "[i]t ensures that a third party who wishes to take action to enforce a substantive right is not only able to enforce effectively his right to arbitrate, but is also 'bound' to enforce his right by arbitration."[203] "Thus the "conditional benefit" supposedly mitigates against the original concern not to impose a "burden" on the third party.[204]

Section 8(2) is justified on the basis that it is necessary where the "conditional benefit approach" does not apply, e.g. where the third party is given a unilateral right to arbitrate in the agreement or the right to arbitrate a dispute other than one concerning a right conferred on a third party for the purposes of subsection 1. Again, to overcome the perceived problem of imposing a "pure burden," the subsection requires a third party to have chosen to exercise the right before it is so bound.[205]

Fourth, there are several major uncertainties about the scope of section 8. For example, despite the Law Commission's avowed concerns about the scope of the "intention" inquiry,[206] there is no separate intention test in section 8. Thus, the arbitration obligation is presumably automatically transferred with the substantive benefit based only on the intention test for the substantive right con-

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201. *Schiffahrtsgesellschaft Detlev von Appen*, [1997] 2 Lloyd's Rep. 279.

202. *Id.* at 286. However, that case involved the Court exercising its equitable jurisdiction and it is questionable whether this is a sound basis for a general contract rule.

203. Explanatory Notes to C(RTP) Act 1999 at § 34.

204. *Id.* The Explanatory Notes further explain that "[t]o avoid imposing a "pure" burden on the third party, it does not cover, for example, a separate dispute in relation to a tort claim by the promisor against the third party for damages." *Id.*

205. *Id.* In this respect it follows the same questionable logic as the United States line of authority in Spear, Leeds & Kellogg v. Central Life Assurance Co., 85 F.3d 21 (2d Cir. 1996).

206. *See* LAW COMMISSION REPORT 242, *supra* note 175, at § 4.18-4.19 (expressing concern that the expansive "intention to benefit" test in the United States has failed to provide consistent results and, even where limited to intention expressed within the agreement, has not been consistently applied).

ferred by section 1(2).[207] This may undermine the traditional requirement of consent to arbitrate. Further, there is no explicit mention whether the promisee is also bound to arbitrate in a position where a dispute arises between the promisee and the third party. Similarly, it is unclear whether subsection (1) is also intended to apply where the claim is brought by the promisor against the third party (a distinction United States case law clearly draws). In short, much has been left to the courts to develop. In so doing, it will be interesting to see to what extent these issues are resolved by reference to analogous laws in other jurisdictions.

Finally, one might suggest that the concerns about extending the C(RTP) Act to arbitration originally expressed by both the Law Commission and the House of Lords arise from a traditional English reticence to "oust the jurisdiction of the courts."[208] It is only in this light that one can understand characterizing the arbitration agreement as a "burden." However, in a situation where the third party obtains statutory recognition of its contractual benefit only where it has consented to it, it seems only reasonable that enforcing the benefit is conditional on using the dispute resolution mechanism contemplated by the parties in the contract.

2. Third Party Beneficiary: United States

Since the 1859 case of *Lawrence v. Fox*[209] recognized that, despite the privity doctrine, a third party beneficiary of a contract is entitled to sue on the contract to obtain performance, the United States common law has developed in a direction decidedly different from that of England. Third party recovery on a contract is now accepted in all states.[210] The Restatement (Second) of Contracts, §§302 and 304 seeks to emphasizes the distinction between "intended" benefici-

207. As to the distinction between the intention vis à vis the substantive right and the arbitration agreement see *supra* notes 126 and 118; and *infra* note 266 and accompanying text.

208. *See, e.g., Kulukundis Shipping*, 126 F.2d at 982-985 (summarizing the English history of judicial antagonism towards arbitration clauses). In fact, the same concern with preventing access to the courts is evidenced in at least one commentator's suggestion that the C(RTP) Act 1999 arbitration provisions might be in breach of the European Convention on Human Rights. *See* LAW COMMISSION REPORT 242, *supra* note 175, § 4.18, n.26. However, this seems unlikely to be correct and, as required by law, the responsible Minister confirmed that the legislation was not in conflict with the Convention. *See e.g.* HL Bill 5-EN, note prepared by Lord Chancellor's Department.

209. Lawrence v. Fox, 20 N.Y. 268 (N.Y. 1859).

210. *See* KNAPP, CRYSTAL & PRINCE, *supra* note 79, at 1200 (noting Massachusetts was the last to adopt the rule and citing Chote, Hall and Steward v. SCA Services, Inc., 392 N.E.2d 1045 (Mass. 1979)).

aries (who enjoy a direct right of action) and "incidental" beneficiaries (who do not).[211] Section 302 provides:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if . . . a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.[212]

Two factors arising out of this statement of general contract law are especially relevant in the arbitration context. First, a third party beneficiary need not be the intended beneficiary at the time of the contract commencement, nor must the promisee be motivated solely by its desire to bestow a benefit on the third party.[213] Second, the question of whether the third party was an intended beneficiary may be determined by examining both the writing itself as well as the surrounding circumstances known to the parties.[214]

Some courts[215] have stated that third party beneficiary status does not, by itself, create a right to enforce an arbitration clause.[216] Rather, one must establish that the contracting parties "intended for the defendants to have the benefit of the arbitration clause."[217] This may be established by the express language of

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211. *Id.*

212. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979).

213. Cited in the arbitration context in Collins v. Int'l Dairy Queen Inc., 2 F. Supp. 2d 1465, 1469 (M.D. Ga. 1998) (citing Beverly v. Macy, 702 F.2d 931, 941 (11th Cir. 1983)).

214. KNAPP, CRYSTAL & PRINCE, *supra* note 79, at 1200.

215. Before proceeding further, it is necessary to acknowledge that many of the cases mentioned in this section are between domestic parties rather than "international parties."[215] However, there is no general reason that these cases are any less applicable to international commercial arbitration, except to the extent that the Federal Arbitration Act's pro-arbitration policy applies "with special force in the field of international commerce." *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985). Furthermore, third party issues are as likely to arise in the international commercial arena as in the domestic. See e.g., Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmBH, 206 F.3d 411 (4th Cir. 2000) (international sale of goods); *Morewitz*, 62 F.3d at 1356 (international insurance).

216. *Collins v. Int'l Dairy Queen, Inc.*, 2 F. Supp. 2d 1465, 1469 (M.D. Ga. 1998).

217. Price v. Pierce, 823 F.2d 1114, 1121 (7th Cir. 1987).

the agreement itself. Thus in *Gilmer*, the United States Supreme Court held that a brokerage firm (Interstate/Johnson) was entitled to compel arbitration of a dispute with its former employee (Gilmer) on the basis of Gilmer's application for registration with the New York Stock Exchange, which included an obligation to arbitrate disputes arising out of his brokerage activities.[218] Thus, the broad wording of the arbitration provision was clearly intended to include third party beneficiaries such as Interstate/Johnson.

However, the relevant inquiry has been expressed in broader terms than this. The Court of Appeals for the Third Circuit stated in *Prudential*:

> The identification of the parties bound by the agreement to arbitrate need not be confined to the limited inquiry of identifying the signatories to the arbitration agreement. Rather, the dispositive finding is an "'express' and 'unequivocal'" agreement between parties to arbitrate their disputes. *Kaplan v. First Options of Chicago Inc.* 19 F.3d 1503 (3d Cir. 1994) . . .
>
> As this court has previously recognized, "a variety of non-signatories of arbitration agreements have been held to be bound by such agreements under ordinary common law contract and agency principles." *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752, F.2d 923, 938, (1985) . . . Indeed, courts have been willing to apply third party beneficiary law in examining the contractual standing of a non-signatory party to a dispute, provided there is an expression of the requisite intent between the third party and the plaintiff to arbitrate their claims. See *McPheeters v. McGinn, Smith & Co.*, 953 F.2d 771,772-73 (2d. Circ. 1992).[219]

Thus, the Court examined the relevant security industry registration application forms "[t]o see if there is an express and unequivocal intent that the plaintiffs would arbitrate their claims" against the defendant and whether "both parties to the contract express an intention to benefit the third party in the contract itself."[220] The relevant clause was drafted in wide terms to require arbitration with "any other person" where the claim would be subject to arbitration under the NASD Code. The plaintiff employees fell within the Code, which in turn required arbitration of disputes "between or among members and/or associated persons". Therefore, the Court concluded there was "clear and unequivocal intent to arbitrate claims with third parties" such as the defendant.[221]

While both *Gilmer* and *Prudential* involved finding the requisite intent in background documents and both required a relatively high test of a "clear and unequivocal" intent to arbitrate, there are myriad other precedents that have accepted less "unequivocal" evidence. Indeed, the FAA's pro-arbitration policy has at times been invoked as a kind of "reverse onus," i.e., the party seeking to

218. Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647 (1991).
219. In re Prudential Ins. of Am. Sales Prac. Litig., 133 F.3d 225, 229 (3d Cir. 1998).
220. *Id.* at 229.
221. *Id.* at 230.

deny arbitration was forced to prove that no intent to create a third party beneficiary of the arbitration clause existed.

Thus, in *Collins*,[222] the defendants (IDQ and ADQC) sought to compel arbitration against the sub-franchisee plaintiffs on the basis of an arbitration clause contained in the sub-franchise agreements (to which they were not signatories). The Court had to deal with variations in the wording used in the different sub-franchise agreements. In respect of the agreements that contained an arbitration clause stating that disputes between the franchisee, sub-franchisor, and the sub-franchisee were to be arbitrated, the Court found that "the language indicates clearly and unambiguously that the sub-franchisees did not intend the arbitration provisions to apply to the defendants."[223] However, relying on the marginally different wording in the other sub-franchise agreements which referred simply to disputes "between the parties," the Court found the defendants entitled to invoke the arbitration clause as third party beneficiaries:

> Nevertheless, keeping in mind the benefits conferred upon defendants by the subfranchise agreements and the repeated references to ADQ throughout the body of the agreements, the court cannot hold that the agreement to arbitrate disputes "between the parties hereto" *has the necessary precision and unambiguity to clearly indicate that the [subfranchisors] and the subfranchisees did not intend for ADQ to benefit from it.* The language used in the arbitration provision *fails to demonstrate clearly and unambiguously a specific intention by the subfranchisees* that the *benefits of arbitration* "arising under, out of, in connection with or in relation to" the subfranchise agreement was limited to disputes with the [subfranchisors]. Consequently, *in light of the federal policy favoring arbitration*, the courts holds that the defendants are entitled to invoke the mandatory arbitration clauses in those subfranchise agreements which make reference to disputes "between the parties hereto" without any additional limiting language.[224]

The appropriateness of this "reverse onus" has been criticized by others[225] and is discussed below.[226]

Indeed, courts have been willing to lower the threshold of intent considerably. In *Spear, Leeds & Kellogg*,[227] the Court of Appeals for the Second Circuit reversed the District Court's finding that the plaintiff insurance companies were not entitled to compel arbitration of their tort claims against a brokerage house (SLK) concerning the fraud of one of their policy holders who had maintained an account at SLK. The insurers sought to enforce an arbitration clause contained in the New York Stock Exchange Rules (although they were not members). The majority concluded:

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222. *Collins v. Int'l Dairy Queen, Inc.*, 2 F. Supp. 2d 1465 (M.D. Ga. 1998).

223. *Id.* at 1471.

224. *Id.* at 1471 (emphasis added).

225. *See e.g.*, Jeff DeArman, *Resolving Arbitration's Nonsignatory Issue: A Critical Analysis of the Application of Equitable Estoppel in Alabama Courts* 29 CUMB. L. REV. 645, 656 (1999).

226. See generally *infra* Section V.C.

227. Spear, Leeds & Kellogg v. Central Life Assur. Co., 85 F.3d 21 (2d Cir. 1996).

> Although the trial court held that the defendants failed to show a transactional nexus between themselves and plaintiffs sufficient to warrant arbitration . . . defendants' lack of direct contact with the plaintiff does not prevent them from asserting their rights as third party beneficiaries. While identification of a beneficiary may help resolve whether he is an intended or incidental beneficiary, see Restatement (Second) of Contracts §308 . . . a beneficiary need not be identified prior to seeking enforcement of its rights under a contract . . .
>
> Neither a transactional nexus between plaintiff and defendants, nor identification of these specific defendants as third party beneficiaries, is required to compel [SLK] to arbitrate a dispute in accordance with NYSE procedures.[228]

The minority dissent strongly criticized the majority's approach.[229] Certainly, the third party was beyond the reasonable contemplation of SLK as an intended beneficiary of the arbitration provision; indeed SLK had no reason even to know of the insurance policy. The dissent suggests that even where there is a broadly-worded arbitration provision some kind of "limitation" thereon is required in "the form of either a direct contract between the parties, or a relationship between the parties, such that they stand in the [same] chain of commerce."[230]

Thus, as MacNeil, Speidel & Stipanowich have stated, where the third party is an intended beneficiary of the arbitration clause, it is *required* to arbitrate any disputes it has respecting its rights under the contract.[231] The authors suggest the "position of a beneficiary is comparable to that of an assignee after knowledge of the assignment by the obligor" and, as such, the beneficiary's "right, like that of an assignee, is subject to limitations inherent in the contract, and supervening defenses arising by virtue of its terms."[232] This may either mean that the third party brings its claim by way of a reference to arbitration (e.g. SLK above) or it sues and is forced by the signatory to go to arbitration as a "defensive" measure.[233]

However, where the third party was intended to take the benefit of the arbitration clause, it is not required to arbitrate claims *against* it. The same authors state:

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228. *Id.* at 27.
229. *Id.* at 29-43.
230. *Id.* at 43.
231. MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 74, at § 18.7.213.
232. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS, § 309, cmt. c).
233. *See, e.g.*, Ex parte Dyess, 709 So. 2d 447 (Ala. 1997) (requiring claimant injured while test driving a car to arbitrate with defendant car dealer's insurer based on arbitration clause in dealer/insurer's arbitration policy where insurer refused to pay out to dealer) (claimant's claim was premised on the insurance policy and a "[p]arty may not pick and choose the provisions of the policy that he wants to follow." *Id.* at 450).

> Under well-understood general contract law a party acquires no obligations under a contract simply by being a third-party beneficiary. Thus, the mere status of the third-party beneficiary imposes no duty to arbitrate, although . . . doing so is a condition to the third-party beneficiary's enforcing its rights. 'The conduct of the beneficiary however, like that of any obligee, may give rise to claims and defenses which may be asserted against him by the obligor, and his right may be affected by the terms of an agreement made by him.' [citing Restatement (Second) of Contracts, §309 cmt. c]. Thus, in circumstances where a third-party beneficiary acquires obligations under a contract and not merely rights subject to conditions, under general contract law those obligations include that of arbitration.[234]

The authors' distinction between "obligations" and "rights subject to conditions" is highly ambiguous. As will be discussed below,[235] the courts often avoid this conceptual problem by instead jumping to an argument that a non-signatory is "estopped" from denying the applicability of the arbitration agreement.[236] This is an unsatisfactory outcome because it leaves a third party unsure of how to respond to preserve its rights without incurring the "burden" of an arbitration agreement.[237]

As a final comment, courts and commentators have been wary to extend the third party beneficiary principle to "innovative" arguments. Two international arbitration examples will suffice. First, in *Recold,*[238] the Court of Appeals for the Eighth Circuit rejected an attempt by a manufacturer (Recold) to compel arbitration of litigation brought by a purchaser (Monfort) in reliance on an arbitration clause contained in the contract between Recold and its distributor (Central Ice). Monfort's action depended upon a Colorado statute which permitted direct action on a seller's warranty (i.e., the privity bar is removed). Recold argued that Monfort, as the statutory beneficiary of the seller's warranty under the Colorado statute, was bound by the arbitration provision contained in the Recold/Central Ice contract. Further, it alleged the agreement arose out of a "legal relationship" for the purposes of Article II of the New York Convention and as such the FAA required the litigation to be stayed. The Court rejected the claim on the basis that the Colorado Code "does not require Monfort to sue under the Recold/Central Ice contract, but rather gives Monfort warranty rights against Recold independently of any contract . . . the [FAA] does not require parties to arbitrate when they have not agreed to do so."[239] However, it is seriously questionable whether this situation is any different from the "direct ac-

234. MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 74, at § 18.7.214.

235. See generally Section III.D and *infra* notes 293 and 298 and accompanying text.

236. *See Tencara Shipyard S.P.A.*, 170 F.3d at 349; *Int'l Paper Co.*, 206 F.3d at 417-418.

237. *See Int'l Paper Co., id.* (situation in which the non-signatory plaintiff faced a "Catch 22" of being estopped if it asserted its rights against defendant in any forum).

238. Recold, SA de CV (Mexico) v. Monfort of Colorado, Inc. (US), 893 F.2d 195 (8d Cir. 1990), I.C.C.A. YEARBK. Vol. XVII, 1992, at 610.

239. *Id.* at §§ 12-13, citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 109 S. Ct. 1248 (1989).

tion" statutes which allow plaintiffs to bring an action against insurers[240] and on which there is (inconsistent) case law that the third party plaintiff "is no less bound by the arbitration clause than the insured would have been."[241]

Second, in the *Pavel Dybenko,*[242] one of two plaintiffs (CVV) sought an order compelling Novorossiysk to arbitrate in London on the basis that CVV was entitled to bring such action as a third party beneficiary to the charter party between the other plaintiff (CISA) and Novorossiysk. The District Court had refused to entertain such argument because it lacked subject matter jurisdiction on the basis that Novorossiysk was a sovereign entity. The Court of Appeals accepted CVV's argument that if it were a third party beneficiary it would be entitled to rely on the exception in the Foreign Sovereign Immunity Act which provides for waiver of sovereignty where a sovereign or state trading entity (within the definition) has agreed to arbitrate its dispute.

3. Third Party Beneficiary: France

French jurisprudence provides yet another variation on the third party beneficiary principle. The following is a very "broad-brush" summary of the general contract law position before discussing the somewhat complex situation in arbitration law.

Articles 1165 of the *Code Civil* reads, "Agreements only take effect as between the contracting parties: they do not impose any burdens on third parties and they only benefit them in the case foreseen by Article 1121." Article 1121 in turn provides that "One may also in the same way stipulate for the benefit of a third party when such is the condition of the stipulation that one makes for oneself or the gift which one makes for another. The person who has made that stipulation may not revoke it if the third party has declared that he wishes to benefit from it."[243]

However, from what appears to be a strict version of the privity doctrine in Article 1165 and a narrow exception in Article 1121, French courts have developed a very broad and flexible doctrine recognizing third party beneficiary rights. Zweigert & Koetz state:

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240. *See supra* note 152 and accompanying text.

241. Heikkila v. Sphere Drake Ins. Underwriting Mgmt., Ltd., No. Civ. 96-00047, 1997 WL 995625, at *8 (Aug. 29, 1997 D. Guam). Also cited in *Powell*, 988 P.2d at 15.

242. Cargill Int'l S.A. & Cargill P.V. v. M/T Pavel Dybenko & Novorossiysk Shipping Co., 991 F.2d 1012 (2d Cir. 1993).

243. Translation from PVD MARSH, COMPARATIVE CONTRACT LAW ENGLAND, FRANCE, GERMANY 272 (1994).

> Under Art. 1121 the 'stipulation au promis d'un tiers' is only valid if the person who promises to render performance to the third party simultaneously promises something to the other contractor as well, or if the contracting party makes the promisor some gift in connection with the transaction . . . nowadays, however, it is established that a contract for the benefit of third parties may be perfectly valid even if these requirements are not satisfied. The performance which the promisee must make to the promisor under Art. 1121 need no longer be a gift: any economic transfer will suffice, and the alternative requirement of the Code, that the promisee must at the time of the contract always stipulate something for himself, has been understood by the courts as being satisfied if any 'profit moral' accrues to him as a result of the transaction.[244]

As to the jurisprudential justification for this, the authors state:

> With regard to the theoretical explanation of the 'stipulation pour autrui' even the modern French textbooks follow the old doctrines to the effect that the beneficiary is a fictive assignee of the promisee's right or that the beneficiary ratifies the unauthorized agency... of the promisee in undertaking the matter on his behalf. All these theories are now of merely historical interest; it is no longer necessary to refer to other institutions of law since it is simply admitted that it is a practical necessity that the beneficiary acquire a direct claim in his own name.[245]

For the purposes of comparison, note that French case law establishes that the *stipulation pour autrui* may be "implied" and this has been given a wide interpretation.[246] Similarly, the wide interpretation given to a *stipulation pour autrui* permits a claimant under French law to bring an action in contract where English law may, if at all, direct an action in tort.[247]

Professor Jean-Louis Goutal specifically considered the *stipulation pour autrui* in the arbitration context in the "L'arbitrage et les tiers" symposium.[248] While Professor Goutal's discussion of "les problèmes de relativité" (roughly equivalent to the privity doctrine) provides an interesting jurisprudential analysis, French courts have superceded his work by the more recent pragmatic approach to such "problèmes." Fouchard & Gaillard summarize the position:

> The arbitration agreement binds only those parties that have entered into it. However, a party need not be physically present in order to be bound - an arbitration agreement can be entered into by an agent or, more generally, by any form of representation . . . In contrast, a stipulation in favor of a third party does not entail representation, and the beneficiary of that provision will therefore only be bound if it subsequently agrees to the specified method of dispute resolution . . . similarly, a party guaranteeing an obligation arising from a contract containing an arbitration clause, will not be bound by that clause, unless it can be established from other

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244. ZWEIGERT & KOETZ, *supra* note 172, at 148.

245. *Id.* at 149.

246. MARSH, *supra* note 243, at 277-278, citing an (unnamed) case in which a traveler on a train killed in an accident was held to have impliedly stipulated for the benefit of his widow and children that they could recover damages directly from the railway company. Cass. Civ. 6 December 1932, GP 1933.1.269.

247. *See generally*, MARSH, *supra* note 243 (referring to the "building inspector" type of cases).

248. J. L. Goutal, *Le droit des contrats*, in ARBITRAGE, *supra* note 31, at 439, 447-449.

> circumstances that the parties' true intention in drawing up the guarantee was that the guarantor - often the parent company - would be a party to the arbitration agreement.[249]

Thus, French arbitration law is less concerned with finding the legal ingredients for a "benefit" and more concerned with giving effect to the intentions of the parties. Indeed, a *stipulation pour autrui* will not bind a third party to arbitrate unless she otherwise accepts the arbitration agreement. This is a position broadly similar to that of the United States.

Unlike the United States, French courts have gone further, essentially obviating the need for a rule regarding the arbitration clause vis-á-vis the third party beneficiary of a *stipulation pour autrui.* A cogent example of this pragmatism is the Paris Court of Appeals' decision in *V2000 (formerly Jaguar France) v. Renault.*[250] In discussing the case, Fouchard & Gaillard state:

> Aside from any representation mechanism, difficulties may arise in determining the exact scope of an arbitration agreement wherever a contract has been entirely or partially negotiated or performed by a party that did not actually sign the contract. In such cases, arbitrators, as well as the French courts, have developed the approach that such involvement can *raise the presumption that the contracting parties' true intention was that the non-signatory party would be bound* by the arbitration agreement. Thus, a long line of similar decisions led to the rule of the Paris Court of Appeals, in the 1994 *V2000* case that: "In international arbitration law, the effects of the arbitration clause *extend to parties directly involved in the performance of the contract,* provided that their respective situations and activities raise the presumption that they were aware of the existence and scope of the arbitration clause so that the *arbitrator can consider all economic and legal aspects of the dispute.*[251]

While Fouchard & Gaillard suggest that this type of problem usually arises only in situations involving groups of companies and state owned entities, the logic of the approach has much broader implications. Essentially, the *V2000* doctrine is an invitation to the tribunal or court, in deciding whether or not to bind a third party to arbitration, to investigate any entity "involved in the performance of the contract" (thereby necessitating analysis of "all economic and legal aspects of the dispute") so as to interpret whether the parties intended to so bind the third party.

However, *V 2000* deserves closer attention. Essentially, the French courts declined jurisdiction to hear a suit brought by the French purchaser of a car from an English company where the purchaser was also suing the French distributor. There was an arbitration provision in the purchase agreement between the Eng-

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249. FOUCHARD, *supra* note 11, at § 498, at 280 (citations omitted).

250. C.A. Paris, Dec. 7 1994, V2000 (formerly Jaguar France) v. Renault, REVUE DE L'ARBITRAGE 245 (1996); *affirmed* Cass. 1e civ., May 21, 1997, Renault v. V2000 (formerly Jaguar France), REVUE DE L'ARBITRAGE 537 (1997) (hereafter "*V2000*").

251. FOUCHARD, *supra* note 11, § 499, at 281 (citations omitted) (emphasis added).

lish company and the French purchaser, but the French distributor was not a party. The Court declined jurisdiction on the basis that the arbitration agreement was valid and enforceable qua both the English manufacturer and the French distributor. Fouchard & Gaillard's commentary on the case may slightly overstate its potential for application. On a closer reading of the Court of Appeals' decision, the Court also made the alternative finding that the French distributor was a "co-contractante" and therefore directly interested in the litigation.[252]

Nevertheless, the alternative finding based on international arbitration law is still a sweeping mandate to include third parties as bound by, or entitled to rely on, arbitration clauses. Surprisingly, commentators have accepted this result without criticism. Professor Jarrosson's note on *V2000* simply states that it is now well established that the arbitration agreement can be extended to "parties directement impliquées dans l'exécution du contrats".[253] This particular aspect was not discussed in the subsequent appeal and has similarly not been the focus of these commentaries.[254] Fouchard & Gaillard also note a similar case where the supplier of the main contract had assigned the contract.[255] The Court's approach in *V 2000* has subsequently been extended to a situation where a contract had been circulated amongst parties and an oral agreement reached but one of the parties had not signed it.[256] The court held that the non-signatory was bound to the agreement to arbitrate.

Fouchard & Gaillard draw a passing analogy between the *V2000* line of cases and the equitable estoppel approach of the United States courts.[257] However, while both share the same focus on intent and permit a broad inquiry in this respect, the equitable estoppel doctrine (when properly applied) has the fundamental difference that it operates only to prevent a party from denying jurisdiction to arbitrate; it is not the basis for jurisdiction. This is discussed below.[258]

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252. *V2000*, REVUE DE L'ARBITRAGE 249-250 (1997).

253. *Id.* at 254.

254. *See* FOUCHARD, *supra* note 11, *Note*, REVUE DE L'ARBITRAGE 545 (1998); Gaillard, *Note*, REVUE DE L'ARBITRAGE 538 (1997); Horchani, *Note*, REVUE DE L'ARBITRAGE 222 (1998) (criticizing failure to extend the concept into a contemporaneous case involving foreign investment and insurance law).

255. C.A. Paris, Oct 26 1995, SNCFT v. Voith, REVUE DE L'ARBITRAGE 553 (1997) *cited in* FOUCHARD, *supra* note 11, at 282 n.187.

256. C.A. Paris, 1e C, 8 June 1995, Sarl Centro Stoccaggio Grani v. Societé Granit, REVUE DE L'ARBITRAGE 83 (1997).

257. FOUCHARD, *supra* note 11, at n.187 (citing *Deloitte Noraudit A/S*, 9 F.3d at 1060).

258. *See infra* note 289 and accompanying text.

4. Third Party Beneficiary: International Law/Institutional Rules

The Iran-US Claims Tribunal has recognized a claimant's right to enforce a contract as a third party beneficiary.[259] In contrast, in *Ocean-Air Cargo Claims*,[260] the Tribunal held that a third party beneficiary could only enforce a contract if that was the parties' intention and that no such intention was evidenced on the present facts where the claim was brought by a subsequent insurer.

5. Third Party Beneficiary: Commentary

Perhaps the most striking aspect of the general contractual third party beneficiary concept is that all three jurisdictions started from a similar jurisprudential understanding of the principle of *alteri stipulari potest*, but then each took a dramatically different route to avoid its "unjust" consequences before finally (and remarkably recently in the case of England) reaching a broadly similar position. The trend in all three jurisdictions is towards greater recognition of third party beneficiary rights and application of a test which has at its touchstone the "intention" of the parties. This general trend seems to hold true also on the question of whether or not the third party is bound to an arbitration clause, i.e. if the party is able to enforce the contractual benefit then it is also bound by the arbitration clause unless this is inconsistent with the parties' intentions.

However, when one begins to examine the details of the practical application of the doctrine in the arbitral context, real differences (and uncertainties) emerge. Consider a simple hypothetical in which manufacturer A licences distributor B to sell to retailer C. An arbitration clause to resolve "all disputes arising out of this contract" exists in the distributorship agreement between A and B but no such clause exists in the sale agreement between B and C.[261] In the United States, C will be able to compel arbitration against A, inter alia, if it can establish that it was an intended beneficiary and (in some circuits) if the dispute can broadly be characterized as involving the distributorship agreement. A cannot compel arbitration against C for any claims it has unless C brings a claim (or presumably a counter-claim) involving the distributorship agreement.[262] In

259. Land Serv. Inc. v. The Gov't of the Islamic Republic of Iran, Award No. 135-331-1, at 16-7, reprinted in 6 IRAN-US CLAIMS TRIBUNAL REP. 160-161.

260. Ocean-Air Cargo Claims Inc. v. The Islamic Republic of Iran, Award No. 11429, *reprinted in* I.C.C.A. YEARBK VOL. XVI 1991, at 377-380.

261. One should assume that the transaction is "international."

262. This conclusion is subject to the estoppel discussion below.

England, relying on the narrower test in the C(RTP) Act 1999 it is less likely that A or C will be able to establish C as an intended beneficiary so as to trigger the Act.[263] In France, at least on the authority of the *V2000* decision, it seems likely that C would be bound by the agreement on the basis that it is directly involved in performance of the distributorship agreement (as supported by economic and legal aspects of the dispute). In deciding the matter, the tribunal or court would also have a different focus. For example, the nature of the substantive dispute (i.e. the legal basis for the claim) would be of little or no relevance in France, of some relevance (in some jurisdictions) in the United States and would be decisive in England[264] (in as much as it automatically triggers the arbitration obligation).

Another important distinction is the extent to which a focus on the intention to bind the beneficiary to the arbitration provision is a separate question from the intention of the parties to bind the beneficiary to the agreement as a whole. From the doctrinal stand point of separability it seems that these are separate issues. Yet in England the statutory test simply applies the arbitration provision where the *substantive* right is extended to the third party (s8(1)) including the intention to benefit the third party thereby (s1(2)). This is inconsistent with other English precedents, for example in the bill of lading context, which treat the arbitration agreement as a "collateral contract."[265] In the United States, courts have generally focused on intention to extend the arbitration agreement only (e.g. by focusing on the wording of the arbitration clause, as in *Gilmer*, *Prudential* and *Collins*), but one commentator has acknowledged that the separability doctrine is hard to maintain because the "factual and conceptual nexus between the arbitration clause and the principal contract is . . . sometimes difficult to overlook."[266] Moreover, the application of the separability doctrine is undermined by those courts which pursue a "reverse onus" test of intent. Particularly where the "scope" of the arbitration clause determines intent (confounding subject matter scope with intended party scope, as in *Spear, Leeds & Kellogg*). In France, the separability distinction is consciously collapsed by undertaking the broad *V2000* "intention" test, but including as evidence such factors as economic interconnectedness, etc.

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263. This is especially true if a restricted interpretation of the identification requirement is taken.

264. Of course, the result in each of the jurisdictions is likely to be influenced by factual matters not included in this simplified hypothetical, especially the other terms of both agreements.

265. *See* Aughton Ltd. v. M.F. Kent Services Ltd. 57 BUILDING LAW REP. 1 (1991).

266. JACK J. COE, JR, INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 133 (1997) (citing, for general confusion over the doctrine, Filanto SpA v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1239 (S.D.N.Y 1992)) (also citing, as an example of the principle being undermined in the context of the third party beneficiary rule, McPheeters v. McGinn, Smith & Co., 953 F.2d 771, 773 (2d Cir. 1992)). *See* also Spear, Leeds & Kellogg v. Cent. Life Assurance Co., 85 F.3d 21 (2d Cir. 1996) (majority willing to consider broader business relationship as relevant to intention to bind third party beneficiary).

A final important difference is the test for the "designation" requirement (i.e. the third party must be adequately designated) in the English Act as a limit on its potential application in international commercial arbitration. However there is still room for movement within the confines of this limitation. For example, the Law Commission's Report recommends that the third party must be "capable of being ascertained with certainty at the time when the promisor's duty to perform in the third party's favor arises, or when a liability against which the provision seeks to protect the third party is incurred."[267] While similar provisions have been interpreted restrictively elsewhere,[268] United States doctrine has been wholly unconstrained on this point such that designation is of relatively little concern in applying the more general intention test.[269]

However, these differences should not be overstated. As seen by the English legislator's conversion to the need to include arbitration provisions within the C(RTP) Act 1999,[270] there is a general recognition that third party beneficiaries must have a co-requisite obligation to accept arbitration as the chosen dispute resolution mechanism. In the United States, exceptions to this general trend seem to appear only in "special" circumstances such as where the benefit arises by statute (e.g. *Recold*). The challenge is to fashion a third party beneficiary principle flexible enough to overcome the injustices wrought by the strict application of the privity doctrine but certain enough to permit efficient allocation of risk within the relevant contracts. Greater clarity in the application of the third party beneficiary principle - and resisting the temptation to rely on the vagaries of estoppel - should provide parties with sufficient information to address the position of the third party and its relationship to the dispute resolution clause within the confines of the contracts at issue.

D. Estoppel/Equitable Estoppel

While arguably conceptually different from the purely contract-based principles already discussed, this legal theory deserves discussion here because it is broadly applied in the United States in the non-signatory arbitration scenario and

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267. THE LAW COMMISSION, REPORT NO. 242, PRIVITY OF CONTRACTS: CONTRACTS FOR THE BENEFIT OF THIRD PARTIES, §§ 8.17-8.18, at 100 (1996).

268. *See* Rattrays Wholesale Ltd. v. Meredyth Young & A'Court [1997] 2 N.Z.L.R. 363 (H.C. of New Zealand) discussed in Brian Coote, *Of Nominees, Specific Performance, Subjective Belief, and Things*, 4 N.Z. BUS. L.Q. 44 (1998); James Hosking, *Nominees Under the Contracts (Privity) Act 1982: A Reply to Professor Coote*, 4 N.Z. BUS. L.Q. 197 (1998); Brian Coote, *Nominees Under the Contracts (Privity) Act 1982: A Response*, 5 N.Z. BUS. L.Q. 3 (1999).

269. *See generally* ARTHUR CORBIN, CORBIN ON CONTRACTS, Part 5, §781, at 70-75 (1971).

270. Id. *See* Section III.C.1, *supra* note 192 and accompanying text.

in fact has been characterized by some commentators as a "potential alternative to consent" as the foundation for a binding arbitration agreement.[271] However, this characterization is disputed. Indeed, Speidel suggests that in the leading United States authority of *McBro*,[272] the Court, in estopping a signatory from denying its obligation to arbitrate disputes with a non-signatory,[273] "[c]ould just as well have put the result in terms of consent . . . The decision is probably most useful in broadening out conceptions of consent, rather than in introducing any truly separate doctrine."

The following comments are not designed as a comprehensive guide to situations in which equitable estoppel has been applied. Rather, they are intended to indicate that, to the extent that equitable estoppel exists as an "alternative" to consent, the same result could better be achieved by applying accepted contractual principles such as the third party beneficiary rule. The cases discussed also evidence a shift away from the traditional Equity-based rationale for estoppel, which further threatens to undermine "consent" as the keystone of arbitration.

1. Equitable Estoppel: England

The broad application in the United States of equitable estoppel as a tool to bind a non-signatory to an arbitration agreement, is not known in England. While the English legal system accepts the general doctrines of issue estoppel and estoppel by representation, they are unlikely to be used to overcome privity problems in the arbitration context.

Having said that, estoppel has been applied in a more limited setting. Thus, in *Jones*,[274] in a subsequent challenge to an award, the court found that, in the absence of a reservation on the point, a party was estopped from arguing claims based on a valid contract while at the same time disputing the validity of the contract and the arbitration clause.[275] Section 73 of the Arbitration Act 1996 now covers this scenario, which requires an early objection to jurisdiction.

The English courts have also employed the idea of an "ad hoc" arbitration agreement arising where the parties have gone some way towards arbitrating without creating an enforceable agreement, thereby addressing a similar situation to that which the United States courts resolve by applying equitable estoppel.[276]

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271. MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 74, at § 18.2.3.

272. McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342 (11th Cir. 1984).

273. MACNEIL SPEIDEL & STIPANOWICH, *supra* note 71, at § 18.2.3 (citations omitted).

274. Jones Eng'g Serv. Ltd. v. Balfour Beatty Bldg. Ltd., 42 CONSTRUCTION LAW REP. 2 (1992).

275. *Id.* at 12-13.

276. *See* Willie & Co. v. Ocean Laser Shipping Ltd., "The SMARO," [1999] 1 Lloyd's Rep. 225 (Q.B.D. Comm.).

2. Equitable Estoppel: United States

The doctrine of equitable estoppel applies where "a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had.[277] In the present context, the non-signatory arbitration issue arises where a party by its own conduct is prevented from denying that the other party at issue is entitled to rely on an arbitration agreement. Some contend that equitable estoppel should be used for this "narrow" purpose - it should not be a way of "[c]reating such agreements where none exist."[278] The courts' use of estoppel to bind third parties in the domestic arbitration context has already been the subject of a number of commentaries, many of which are concerned that the doctrine's overuse undermines consent.[279] Such criticism is equally applicable in the international commercial arbitration sphere.

At the outset, some commentators have drawn a distinction between "traditional" estoppel and "equitable" estoppel.[280] Thus, in an international case,[281] an international accounting firm entered into contracts with its regional affiliates containing an arbitration clause. Although the firm had begun negotiations , a Norwegian affiliate never actually signed the agreement even though it was aware that use of the international firm's name was conditional upon acceptance. In the ensuing dispute, the international firm sought to compel arbitration based on the terms of the unsigned agreement. The Court of Appeals for the Second Circuit compelled arbitration on the basis that the Norwegian affiliate had never objected to the agreement's terms, was aware of the terms, and knowingly derived a benefit by using the international firm's name.

In discussing the *Deloitte* case, Sawrie defines this as the application of "traditional" estoppel, noting this is an example of "[c]onsiderations of equity perfectly coincid[ing] with considerations of assent. The affirmative derivation of a benefit from a contract establishes assent to the terms of that contract."[282]

277. BLACK'S LAW DICTIONARY 538 (6th ed. 1990).

278. *Monfort of Colorado, Inc.*, 893 F.2d at 195 (rejecting the proposition that the "liberal federal policy favoring arbitration agreements" could extend to the instant case).

279. See David F. Sawrie, *Current Issues in Arbitration: Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51 VAND. L. REV. 721 (1998); S.M. McKinnes, *Enforcing Arbitration with a Non-Signatory: Equitable Estoppel and Defense of Piercing of the Corporate Veil*, 1995 J. DISP. RESOL. 197 (1995); DeArman, *supra* note 225.

280. The terminology is used in making the distinction by Sawrie, *supra* note 279, at 726.

281. *Deloitte Noraudit A/S*, 9 F.3d at 1060.

282. Sawrie, *supra* note 279, at 726.

While this is an appropriate "estoppel" case, the outcome could also have been justified on the basis that the "assent" was simply recognition that Noraudit had by its conduct assumed the obligation to arbitrate[283] or had formed an oral agreement incorporating the terms of the written contract (including the arbitration agreement).[284] This is just one example where applying "normal" contract principles, rather than estoppel, might achieve a more conceptually sound result.

As to what Sawrie would define as "equitable" estoppel, the case law has come to draw an important distinction between a claim by the signatory seeking to compel the non-signatory to arbitrate and a claim by the non-signatory seeking to compel arbitration against the signatory. *Thomson* outlines the starting point for analysis of equitable estoppel doctrine.[285] In that case, the signatory supplier commenced arbitration proceedings against both its original contracting party and that party's parent company (Thomson). On analogy to the *Deloitte* case, the court noted that Thomson had notice of the agreement in question, that the supplier had indicated its intention to bind Thomson, and that Thomson had proceeded to incorporate the purchaser into its corporate structure and had received benefits from that incorporation.[286] However, the court then distinguished *Deloitte* by saying that Thomson received only an "indirect benefit" from its relationship to the purchaser and that this is not the benefit which is the basis of the claim by the supplier.[287] The court continued:

> Had Thomson *directly* benefited from the . . . Agreement by seeking to purchase equipment from [the supplier] or enforcing the exclusivity provisions of the Agreement, it would be estopped from avoiding arbitration . . . However Thomson received no benefit at all from the Agreement (as opposed to the acquisition). Thus, Thomson is not bound by its subsidiary's arbitration agreement ...[288]

However, this distinction between an "indirect" and "direct" benefit seems weak as Thomson was in effect enforcing the exclusivity provisions of the agreement. Further, an analysis of the case suggests the Court was more concerned about the direct uncontroverted evidence that Thomson had specifically advised the supplier at the time of purchasing the subsidiary that it would not consider itself bound by the agreement. Thus, the correct focus should have been on *lack of consent to the agreement.*

However, the crucial lesson from *Thomson* general doctrinal purposes, is the Court's recognition of the distinction between estopping a non-signatory as

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283. *See Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991) (non-signatories' conduct manifested intent to be bound by the arbitration agreement).

284. It is acknowledged that such analysis may raise issues under the applicable law as to whether an oral arbitration agreement is valid and, further, may impact on the enforceability of the award. *See infra* at Section IV.C.

285. *Thomson*, 64 F.3d at 778.

286. *Id.* at 778.

287. *Id.* at 779.

288. *Id.*

opposed to signatory claimant . As the court recognized, "Thomson . . . cannot be estopped from denying the existence of an arbitration clause to which it is a signatory because no such clause exists. At no point did Thomson indicate a willingness to arbitrate with [supplier]."[289] The logic of this is compelling. Yet courts routinely overlook this distinction, usually where the courts (especially the Eleventh Circuit) have applied a "hybrid" or "two-prong" test for equitable estoppel.[290]

The genesis of the "two-prong" test lies in *McBro*,[291] in which separate agreements existed between, on the one hand, St Margaret's Hospital (Hospital) and its electrical contractor (Triangle) and, on the other hand, Hospital and its construction manager (McBro). Both contracts contained identical arbitration provisions, but the agreement between Hospital and Triangle expressly denied there was any contractual relationship between Triangle and McBro. Despite this denial of any contractual relationship, the court compelled Triangle to arbitrate its claims with McBro on the basis that it was equitably estopped from denying arbitration. This was based on a two-step analysis. The court examined, first, the relationship between the signatory's claim and the contract containing the arbitration provision and, second, the nexus between the parties.[292]

This two stage test is most usual in situations where the non-signatory is seeking to compel arbitration against the signatory. Thus, in *Sunkist Soft Drinks*,[293] the Court of Appeals for the Eleventh Circuit found Del Monte entitled to compel arbitration of claims brought by Sunkist where Del Monte was the parent corporation of a newly acquired subsidiary (SSD) with which Sunkist had a licensing agreement. Sunkist had brought litigation against both SSD and Del Monte. The Court found that the "nexus between Sunkist's claims and the license agreement, as well as the integral relationship between SSD and Del Monte, leads us to the conclusion that the claims are 'intimately founded in and intertwined with' the license agreement . . . [such that] Sunkist is equitably estopped from avoiding arbitration of its claims."[294] Commentators have drawn an analogy between the latter reasoning and traditional "piercing of the corporate veil."[295] While some consider this an exciting application of corporate veil

289. *Id.*
290. The "two-prong" characterization is widely discussed by commentators. *See e.g.* Sawrie, *supra* note 279, at 737.
291. *McBro Planning & Dev. Co.*, 741 F.2d at 342.
292. *See id.* at 343-44.
293. *Sunkist Softdrinks Inc.*, 10 F.3d at 753 *cert denied* 513 U.S. 869 (1994).
294. *Id.* at 758, citing *McBro*, 741 F.2d at 344.
295. *See* Sawrie, *supra* note 279, at note 135; and McKinnes, *supra* note 279, at 207.

piercing theory,[296] this author's criticism is that this is a "back-handed" way of undermining the corporate personality doctrine. Moreover, one could apply the same doctrine of equitable estoppel in a different sense and argue that it was inequitable for Del Monte, having chosen to structure its acquisition of SSD in such a way that it remained a separate corporate entity, to then claim the "benefit" of the arbitration clause in the licensing agreement with Sunkist. Sunkist, on the other hand, could never have intended at the outset to have entered into an arbitration agreement with anyone other than the subsidiary (which at that time had nothing to do with Del Monte). This raises important consent issues. A better approach would have been to apply a third party beneficiary analysis, which might have produced the same result as, on the Court's own logic, Sunkist considered Del Monte received benefits from the licensing agreement and Sunkist continued to sell products to SSD even after Del Monte became involved. Importantly, however, the conclusion would have been dependent on establishing that the parties intended for Del Monte to receive the benefits. Such analysis is less likely to offend the consensual nature of arbitration.

As a result of the "hybrid" test, courts gave come to focus increasingly on the "integral relationship" of the non-signatory and the signatory to the detriment of the consensual basis of arbitration, with the consequence that he consensual basis of arbitration has been weakened. Indeed, this shift of focus has been exacerbated by the attitude of some courts and commentators that the much-quoted "pro-arbitration policy of the Federal Arbitration Act" justifies further expanding both "prongs" of the hybrid test. As one commentator puts it:

> Not all courts have been willing to apply this liberal concept to allow a non-signatory to compel arbitration against a contracting party simply because the claims are closely related to its existing contractual obligations. However, such a broad interpretation is necessary to coincide with the policy of the FAA. The FAA's policy encourages fairness and efficiency by including all necessary parties within a dispute. After all, how is it that a claimant could ever receive a fair outcome when he has to arbitrate part of his claim and then go to court against another party of the same dispute? Therefore, in observing the FAA's policy, the agreement is specifically enforced according to its terms as required by general contract law.:[297]

However, a result in which a signatory is equitably estopped from denying the applicability of an arbitration agreement to a non-signatory merely because that non-signatory is "closely related" is consistent with neither "general contract law" nor "the policy of the FAA."

Whether applying the "direct benefit" approach or the "two-prong" test, the overuse of the doctrine of equitable estoppel has led to conceptual confusion and potential injustice. In the international sphere, this is evidenced in two representative cases. First, in *Tencara,* [298] marine surveyor (ABS) provided "classifica-

296. *See* McKinnes, *id.*
297. DeArman, *supra* note 225, at 672.
298. *Tencara Shipyard S.P.A.*, 170 F.3d at 349.

tion" (i.e. a seaworthiness certificate) to a boatbuilder (Tencara) who had manufactured a yacht under contract to a group of investors. The yacht proved to be faulty and the investors (and their insurers) brought suit against Tencara while Tencara sued ABS. The contract between Tencara and ABS contained an arbitration clause that was expressly incorporated into the certificate of classification. The Court of Appeals for the Second Circuit upheld the order of the District Court compelling arbitration of claims between Tencara and ABS and extended it to the investors' claim as well. The Court ordered that the investors were estopped from denying their obligation to arbitrate as they had received a "direct benefit" from the contract containing the arbitration clause because the classification had enabled them to obtain lower insurance rates and the ability to sail under the French flag.[299] However, this factual basis for a "direct benefit" in fact seems far less direct than any benefit in *Deloitte* or *Thomson*. Moreover, the result could better be explained by applying third party beneficiary doctrine, i.e., the classification contract between ABS and Tencara was intended to benefit the eventual owners as third parties such that any claim they made based on the classification must trigger the arbitration agreement. Alternatively, one might be able to argue that the arbitration agreement incorporated in the certificate of classification was also incorporated in the sale agreement with the owners. By contrast, the result of the Court's reasoning is that all subsequent owners would also be bound to arbitrate any claim relating to manufacture.[300]

Second, *Schwabedissen*[301] provides an example of a signatory compelling arbitration against a non-signatory. Here, buyer (IPC or its predecessor) bought an industrial saw from a distributor (Wood) of the German manufacturer (Schwabedissen). The saw proved faulty and IPC's claim against Wood was of little use as the latter had subsequently filed for bankruptcy. IPC brought suit against Schwabedissen alleging breach of contract and warranties in the Wood-IPC purchase order and on the basis that Wood was Schwabedissen's agent. It subsequently amended its claim to include allegations of similar breaches based on the Schwabedissen-Wood purchase order relating to the saw and claimed that it was a third party beneficiary of that agreement. However, the Schwabedissen-Wood purchase order was found to incorporate an arbitration provision. Although IPC contended that it had no knowledge thereof, the District Court com-

299. *Id.* at 353. In fact, the Court went further to also extend the duty to arbitrate to the separate claim brought by the investors' insurer which as "subrogee stands in the shoes of its insured." *Id.*

300. Even if the claim was only in relation to Tencara it could presumably trigger the clause by joining ABS on the basis that it provided the seaworthiness classification.

301. *Int'l Paper Co.*, 206 F.3d at 411

pelled it to arbitrate its claims.[302] This it duly did and subsequently lost; the tribunal finding that Wood was not an agent for Schwabedissen and that IPC was not a third party beneficiary of the Schwabedissen-Woof contract. When Schwabedissen sought to enforce the arbitral award, IPC defended on the basis that it was never a party to the arbitration agreement.[303] The Court of Appeals for the Fourth Circuit upheld the District Court's order enforcing the award. Citing the *Tencara* test of receiving a "direct benefit," the Court concluded that IPC was estopped from refusing to arbitrate its dispute with Schwabedissen as "its entire case hinges on its asserted rights under the Wood-Schwabedissen contract — it cannot seek to enforce those contractual rights and avoid the contract's requirement that 'any dispute arising out of' the contract be arbitrated.'"[304] However, if analyzed purely as a third party beneficiary claim or agency claim, as discussed above, IPC – as the party bringing the claim – would have had a strong argument that it was not bound by the arbitration provision. It seems incongruous that IPC had to arbitrate its claim against Schwabedissen on the basis of an arbitration clause in an agreement of which IPC had no knowledge and in which the arbitrators eventually found it had no rights recognized by contract law.[305]

3. Equitable Estoppel: France

While French law recognizes an analogous principle of "consistency", premised on the notion that a party cannot contradict itself to the detriment of another,[306] this has not been applied in the context of a non-signatory being bound to arbitrate in the sense it is used in the United States.[307] However, Fouchard & Gaillard posit the principle as being part of a larger "principle of interpretation in good faith," which means simply that "a party's true intention should always prevail over its declared intention, where the two are not the same."[308] Thus, under the French law of obligations a party may be bound to an arbitration agreement by some form of representation made to this effect[309] or some other conduct evidencing consent.[310] Therefore, the function served by

302. *Id.* at 414-415.
303. *Id.* at 415.
304. *Id.* at 418.
305. IPC should, of course, have challenged the District Court's initial order compelling arbitration rather than seeking to raise these arguments as a challenge to enforcing the award rendered in the arbitration it initiated. Indeed, this in itself might be grounds for IPC to be estopped from denying that it is bound by the arbitration provision.
306. FOUCHARD, *supra* 11, § 1462, at 820, n.187.
307. *Id.* at § 1462, at 820, n.188 and cases cited therein.
308. *Id.* at § 477, at 257.
309. *Id.* at § 498, at 280.
310. J. BELL, S. BOYRON & S. WHITTAKER, PRINCIPLES OF FRANCH LAW 337 (1998) (under French law a "party to a contract" is simply the person who by his act of will (*sa volonté*) is found at

estoppel in United States cases like *Deloitte*,[311] is to some extent fulfilled by the broad test of contractual intention applied in cases like *V2000*.[312]

4. Equitable Estoppel: International Law/Institutional Rules

The general principle of estoppel is regularly recognized as a "general principle of international law" or, more arguably, a rule of the *lex mercatoria* (again subsumed within a larger "good faith" principle).[313] For example, the principle has been applied in the Iran-US Claims Tribunal,[314] although not in the context of extending the arbitration agreement to non-signatories.

5. Equitable Estoppel: Commentary

As described above, this article expresses concern with the broad application of the doctrine of equitable estoppel and the doctrinal confusion and marginalization of consent to the arbitration agreement that this encourages. As a summary of criticisms of the United States position, first, in as much as the courts are concerned with investigating the scope of the arbitration clause[315] and the nexus of relationships between the parties, these are relevant inquiries in terms of ascertaining the intention of all parties to bind the non-signatory. However, it is this test that should ultimately be the touchstone of whether to bind the parties. Second, many of the results obtained by way of "equitable estoppel" could instead be obtained by application of general contract law as required by the FAA. Third, to the extent that an expansive estoppel doctrine is justified by the concern that a party will sue a non-signatory to seek to avoid an arbitration

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the origin of the formation of the contract) (citing J. Mestre, R.T.D. Civ. 125, 1988). *See generally* S. Whittaker, Privity of Contract and the Law of Tort: The French Experience, 15 OXFORD J. LEG. STUDIES 327 (1995).

311. *Deloitte Noraudit A/S*, 9 F.3d at 1064.

312. C.A. Paris, Dec. 7 1994, V2000 (formerly Jaguar France) v. Renault, REVUE DE L'ARBITRAGE 245 (1996); *affirmed* Cass. 1e civ., May 21, 1997, Renault v. V2000 (formerly Jaguar France), REVUE DE L'ARBITRAGE 537 (1997), discussed *supra* at note 251. An analogy identified in FOUCHARD, *supra* note 11, at § 187, at 282.

313. *See* FOUCHARD, *supra* note 11, at § 1462, at 820 and cases cited therein.

314. *See* Case No. 73-67-3, Woodward Clyde Consultants v. The Republic of Iran, 3 IRAN-U.S. CL. TRIB. REP. 239 (1983); REVUE DE L'ARBITRAGE 1982 (1985).

315. This term is sometimes used inconsistently but generally refers to an examination of the arbitration clause to decide, first, the scope of the arbitration agreement in terms of which parties are bound by it and, second, scope concerning whether the instant dispute falls within the terms of the clause.

clause, it should be noted that there are procedural mechanisms for dealing with this (e.g. staying the litigation pending the outcome of the arbitration).[316]

Interestingly, the expanded "second prong" of the equitable estoppel test applied in certain circuits in the United States places courts in a similar position to French courts applying the *V2000* doctrine. That is, they are given a broad mandate to consider non-signatories who may be "[d]irectly involved in the performance of the contract . . .[if] their respective situations and activities raise the presumption that they were aware of the existence and scope of the arbitration clause, so that the arbitrator can consider all economic and legal aspects of the dispute."[317] However the fundamental difference is that the United States courts do so on the conceptually different basis that they are preventing the other party from denying that it is bound by a valid arbitration agreement. Where exercised against a non-signatory and on the basis of a mere benefit received from the main contract, this amounts to *creating* rights that would not otherwise exist.

E. Incorporation By Reference

An arbitration agreement can be "incorporated by reference", i.e. where a contract does not specifically include the arbitration clause but does include a term which refers to another document (often another contract or a set of standard form terms) which includes the arbitration clause. Thus, it is different from the other scenarios studied in this article in that it is simply a case of interpreting the sufficiency of the reference and whether or not it forms part of the contract. However, it deserves mention for three reasons. First, it arises very frequently in international arbitration, most often in two areas: construction and engineering disputes (due to the prevalence of standard forms and chains of contracts)[318] and bills of lading (incorporating terms of a charter party).[319] Second, because it almost always involves situations where it is the non-signatory third party seeking to bind either another non-signatory or two signatories to another agreement. Third, courts' attitudes to incorporation by reference arguments often reveal a tendency to treat arbitration as a "special situation" rather than applying general contract law principles.

316. *See* discussion *infra* at Section IV.A.

317. *See V2000*, *supra* at note 250 and accompanying text.

318. *See* PETER SHERIDAN, CONSTRUCTION AND ENGINEERING ARBITRATION, Chapter Two, at 21ff (1999).

319. *See* Idil Elveris, *Binding Third Parties with Arbitration Clauses in the Charter Parties: A Comparison of Turkish and American Cases*, 22 TUL. MAR. L. J. 625 (1998).

1. Incorporation by Reference: England

A leading English contract text simply states that "an arbitration clause may be incorporated in a contract by reference, e.g. to the standard terms of the trade association or by course of dealing between the parties."[320] In the bill of lading context the same source suggests in very general terms that "[i]t is a question of construction in each case" whether a bill of lading incorporating some or all the terms of a charter party is sufficient to incorporate the arbitration clause.[321] This masks a vociferous debate in the English courts. The debate has centered on, first, whether one must specifically refer to the arbitration agreement in the incorporating reference in order for it to be valid and , second, whether an arbitration agreement incorporated by reference constitutes an "agreement in writing" for the Arbitration Act 1996 (and its predecessors).

On the first question there are two approaches, both of which were advanced in judgments by the Court of Appeal in *Aughton*.[322] On the one hand, Lord Justice Ralph Gibson advocated that one looks at the precise words of the document doing the incorporating and the precise terms of the arbitration clause said to be incorporated and from there decides whether it was the intention of the parties to incorporate the arbitration agreement. [323] On the other hand, Lord Justice Megaw took the view that there must be "distinct and specific words" specifically referring to the arbitration clause in order for it to be incorporated and that "the mere reference to the terms and conditions of the contract to which the arbitration clause constitutes a collateral contract" is insufficient.[324]

Lord Justice Megaw's analysis relies heavily on older precedents[325] and evidences great concern that in the absence of clear language of consent an arbitration agreement should "oust the jurisdiction of the court." He states:

> First, it would require very clear language to oust the jurisdiction of the Court and secondly the requirement under s7(1)(e) of the Arbitration Act 1979 that an arbitration agreement must be in writing was to emphasize that a party was not to be taken as having agreed to relinquish resort to the Courts for the protection of his rights unless he had consciously and diffidently agreed to do so.[326]

320. CHITTY ON CONTRACTS, *supra* note 133, at § 15-011, at 723.
321. *Id.*
322. Aughton Ltd. v. M.F. Kent Services Ltd. 57 BUILDING LAW REP. 1 (1991).
323. Taking the approach of the court in *The Annefield*, P. 168 at 173 (1971).
324. *Aughton*, 57 BUILDING LAW REP. at 32.
325. *See* especially *Thomas v. Portsea Steamship Co. Ltd.* [1971] A.C. 1 (H.L.).
326. *Aughton*, 57 BUILDING LAW REP. at 87.

Courts have wavered between the two approaches.[327] Interestingly, courts appear to have interpreted Lord Justice Megaw's words as requiring something less than an express reference to the arbitration clause but rather only a specifically manifested intent to incorporate.[328] The Law Commission committee charged with drafting the Arbitration Act 1996 criticized the stricter view.[329] Further, a leading arbitration commentator and then judge of the Supreme Court of Hong Kong questioned the policy rationale behind requiring specific reference to the arbitration provision:

> [T]here has been a sea change of opinion and attitude as exemplified by the 1979 Act in England, the 1982 and 1999 amendments in Hong Kong and the adoption of the model law in Hong Kong and other jurisdictions . . . the expressions of reservations ousting the jurisdiction of the court in [*Thomas v. Portsea*] fall on unfertile ground in Hong Kong at the end of the twentieth century, *a fiori*, when the legislature has enacted the model law which relegates the role of the court to basically one of support for the arbitral process and gives full effect to the principle of full party autonomy.
>
> [I]nsofar as *Thomas v. Portsea* is authority for the proposition that the arbitration clause must be specifically referred to before it can be satisfactorily incorporated, it has no application in Hong Kong.[330]

As to the second question, section 5 of the Arbitration Act 1996 states that the agreement must be "in writing" to bring it within Part One of the Act. However, section 6(2) provides:

> The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

The agreement need not be signed by the parties (s5(2)(a)), the agreement can be found in the exchange of communications (s5(2)(b)) and the "written agreement" may also arise on the basis of any of the exceptions created by earlier case law such as when it arises out of a course of dealing.[331] The requirement can also be satisfied by the arbitration agreement being "evidenced in writing" (s5(2)(c)), which includes being recorded by only one of the parties or a third party with the authority of the parties to the agreement; or it may be recorded in some other medium (s5(3)) or in an exchange of submissions (s5(5)). Thus, the

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327. *See e.g.* Lexair Ltd. v. Edgar Taylor Ltd. 65 BUILDING L. REP. 87, 102 (1992); Star-Trans Far East Pte. Ltd. v. Norske-Tech, 2 SINGAPORE L. REV. 409 (1996).

328. *See* SHERIDAN, *supra* note 318, § 2.14, at 27.

329. DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW (U.K.), A NEW ARBITRATION ACT?, § 42 (Dep't of Trade & Indust. 1989), (hereafter "DAC REPORT") however the Committee eventually decided that the matter should be left to the common law.

330. Astel-Reiniger Joint Venture v. Argos Eng'g & Heavy Indus. Co. Ltd., ALTERNATIVE DISPUTE RESOLUTION LAW J. 41, 48 (1995) (per Kaplan, J).

331. *See* Frank Fehr & Co. v. Kassam Jivraj & Co., Ltd., [1949] 82 Lloyd's L. Rep. 673 (C.A.).

"formality" requirements have been significantly loosened.[332] It remains to be seen whether the Arbitration Act 1996 will have a similar effect on the express incorporation controversy.

2. Incorporation by Reference: United States

MacNeil, Speidel & Stipanowich share the author's view that incorporation by reference is essentially a matter of whether or not the parties intend to create an arbitration agreement:

> Incorporation by reference is a particularly important consensual concept. It is, however, simply a way of consenting to a term in a contract without actually repeating in the contract what has been incorporated. As such it is indistinguishable from other methods of manifesting consent.[333]

While this article will not address the convoluted case law on this topic, there is ample authority for the proposition that incorporation by reference is acceptable both where the term is incorporated from another contract containing an arbitration agreement[334] and where the contract incorporates a designated set of rules that includes an arbitration clause.[335]

There is, however, disagreement over whether the clause incorporating the arbitration agreement need mention the arbitration agreement. Thus, in an international case, the Court of Appeals for the Second Circuit concluded that no trial was necessary to establish whether or not there was a valid arbitration agreement where an insurance policy signed by both parties stated that it was "subject to Facultative Reinsurance Agreement"(FRA) and where the FRA contained an arbitration clause though there was no mention of this in the policy.[336] The court cited the pro-arbitration policy of the FAA. However, it was not cited in a case in which the court refused to find an arbitration agreement had been incorporated into a bill of lading. In *Cargill*,[337] the incorporation clause was sufficiently ambiguous to be held invalid; the court stating that a bill of lading must "specifically refer to the charter party" for there to be an incorporation by reference.

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332. Of course this does not necessarily overcome the requirements of Article II.2 of the New York Convention. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 217 (1981) and discussion *infra* at Section IV.C..

333. MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 74, at § 17.3.2.1.

334. *E.g.*, Coffey v. Dean Witter Reynolds, Inc., 891 F.2d 261 (10th Cir. 1989).

335. *See e.g.*, R.J. O'Brien & Ass'n. Inc. v. Pipkin, 66 F.3d 257 (7th Cir. 1995).

336. Progressive Casualty Ins. Co. v. CA Reaseguradora Nacional de Venezuela, 991 F.2d 42 (2d Cir. 1993).

337. Cargill Inc. v. Golden Chariot, 31 F.3d. 316 (5th Cir. 1994).

Despite these fact-specific instances, the general position is that "a Charter Party is just a species of contract, subject to the same rules of interpretation as any other binding agreement" and the existence of an arbitration agreement will be determined accordingly.[338]

It is also worth noting that what might otherwise be considered an incorporation by reference case has frequently been considered on the basis of other contract law agency principles. Thus, in *Alamria v. Telcor*[339] the court held there was a triable issue as to whether a subsidiary could by a separate document be bound to an agreement containing an arbitration clause. Arguably, the court might have raised an incorporation by reference argument but the agreement contained an "entire agreement" clause. One can infer that it is for that reason that the claimants based their successful arguments instead on agency law. Similarly, in another international case, the Court of Appeals for the Second Circuit remanded to the district court to determine whether or not a bill of lading created a third party beneficiary that could enforce an arbitration agreement.[340]

3. Incorporation by Reference: France

Fouchard & Gaillard characterize French law as having rejected principles of strict interpretation of arbitration agreements of the sort characterized by the English traditional position[341] and insist that French courts have instead followed an approach to incorporation by reference much the same as any contract:

> Arbitration agreements incorporated by reference must therefore be analyzed in terms of the existence and extent of the parties' consent to have their disputes resolved by arbitration. The existence and extent of that consent should be interpreted using the general principles of interpretation of arbitration agreements, that is, neither extensively nor restrictively.[342]

Having said that, the authors do acknowledge the well known series of decisions of the French courts arising out of the *Bomar Oil* arbitration. In short, a Tunisian oil company (ETAP) contracted to sell crude oil to Bomar by way of an exchange of telexes referring to the general conditions of ETAP's standard contract containing an ICC arbitration clause. After a dispute arose, Bomar refused to take part in the arbitration on the basis that there was no binding arbitration agreement; ETAP alleged that it had been incorporated by reference. The subsequent award upheld the validity of the incorporation by reference.[343] The Paris

338. *M/T Pavel Dybenko*, 991 F.2d at 1019 (citing A/S Custodia v. Lessin Int'l Inc., 503 F.2d 318, 320 (2d Cir. 1974) (overturning a district court refusal to compel arbitration without hearing evidence on the existence/validity of the arbitration agreement)).

339. Alamria v. Telcor Int'l Inc., 920 F. Supp. 658 (U.S.D.C Md. 1996).

340. *See M/T Pavel Dybenko*, 991 F.2d at 1019.

341. FOUCHARD, *supra* note 11, at § 480 (citing, *inter alia*, Cass. Comm. March 13, 1978, Hertzian v. Electronska Indeustrija, REVUE DE L'ARBITRAGE 339 (1979)).

342. FOUCHARD, *supra* note 11, at § 496.

343. *Id.* at § 495 (referencing Award of Jan 25 1985, ETAP v. Bomar Oil (unpublished)).

Court of Appeals upheld the validity of the award, stating that Article II of the New York Convention was no hurdle in that "the said convention admits the adoption of an arbitration agreement by reference only to the extent that the agreement of the parties does not involve any ambiguity" and that here there was none as all parties had considerable oil industry experience.[344] This was overturned by the Cour de Cassation on the basis that the New York Convention did not exclude incorporation by reference but rather that it required that the clause be mentioned in the contract in the absence of a long standing business relationship which ensures that the parties are aware of the usual written conditions.[345] However the Versailles Court of Appeals subsequently refused to set aside the award holding:

> [I]f the existence of such clause, however, is not mentioned in the main agreement, the principle of consensualism requires the party invoking the arbitration agreement to prove that the other party knew about the arbitral clause at the time it entered into the main agreement. As both parties in this case are merchants, all types of evidence are allowed.[346]

Accordingly, the Versailles Court of Appeal referred to the exchange of telexes and the business acumen of the parties and concluded that the parties were aware of the arbitration clause and the incorporation by reference was valid.

The Versaille Court of Appeal's broad fact-based inquiry into consent is consistent with the approach of French courts in many of the areas under investigation in this article. Thus, Fouchard & Gaillard note that the "only case in which a French court has refused to recognize the existence of an arbitration clause incorporated by reference was where the factual circumstances left genuine doubt as to the existence of the consent."[347] In that case, one of the parties had made unilateral changes to the contract without the other party's knowledge and thus there was insufficient consensus for the arbitration agreement to have been validly incorporated.[348]

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344. C.A. Paris, Jan. 29, 1987, Bomar NV v. ETAP, REVUE DE L'ARBITRAGE 482 (1987).

345. Cass. Premier 1e civ., October 11, 1989, Bomar Oil v. ETAP, REVUE DE L'ARBITRAGE 134 (1990).

346. C.A. Versailles, Jan. 23, 1991, Bomar Oil v. ETAP, REVUE DE L'ARBITRAGE 291 (1991).

347. FOUCHARD, *supra* note 11, at § 496, citing Cass. Comm. Jan. 7, 1992, Psichikon Compania Naviera Panama v. SIER, REVUE DE L'ARBITRAGE 553 (1992).

348. *Id.*

4. Incorporation by Reference: International Law/Institutional Rules

The United Nations Convention on Contracts for the International Sale of Goods[349] may provide assistance in upholding arbitration agreements incorporated by reference. Thus, in *Filanto v. Chilewich,*[350] the defendant Chilewich was an American trading company. It had contracted to supply footwear to a buyer in the then Soviet Union. To meet its obligations under that contract, Chilewich entered into a series of transactions with the plaintiff Filanto, an Italian footwear manufacturer. The agreement with Filanto at issue contained a term incorporating by reference provisions of the Russian sale contract including an arbitration provision. In holding Filanto bound by the arbitration agreement, the court referred to a number of canons of interpretation contained within the Convention, including Article 8(3) (permitting consideration of negotiations, trade usages, etc) and Article 18(1) (a statement or conduct of the offeree indicating assent to an offer may constitute acceptance). In that case, the court also cited the pro-arbitration policy of the FAA to uphold the validity of the arbitration agreement.[351]

5. Incorporation by Reference: Commentary

While English law still retains some vestiges of its traditional suspicion of arbitration agreements, all three legal systems seem to have moved towards an acceptance of incorporation by reference of arbitration agreements judged on normal principles of contract law. Therefore, the primary focus is on ascertaining the true intent of the parties. While bills of lading continue to represent a challenge, general formal validity requirements of the "agreement in writing" have been relaxed. This overview has not addressed some of the more complex issues that arise as to the scope of the arbitration agreement incorporated and circumstances where the arbitration agreement incorporated is in some way inconsistent with the contract to which it allegedly applies. In most such cases these issues are part and parcel of the general question of ascertaining the parties' intent to arbitrate.

349. United Nations Convention on Contracts for the International Sale of Goods, adopted Apr. 11, 1980, entered into force Jan. 1, 1988, 17 INT'L. LEGAL MAT'L. 668 (1980).

350. Filanto, SpA v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992), *appeal dismissed* 984 F.2d 58 (2d Cir. 1993).

351. For a more detailed discussion see Ronald A. Brand & Harry M. Flechtner, *CISG: Arbitration and Contract Formation in International Trade: First Interpretations of the UN Sales Convention,* 12 J.L. & COMM. 239 (1993).

IV. COMPARATIVE ANALYSIS: OTHER FACTORS AFFECTING THIRD PARTY NON-SIGNATORIES IN INTERNATIONAL COMMERCIAL ARBITRATION

A. Procedural Mechanisms

As well as contractual solutions to the third party problem, several "procedural" tools have been developed to lessen potential injustices caused by the limitations of the contractual approach to arbitration law. While by no means comprehensive, this section will outline some of these tools with special emphasis on provisions within arbitration legislation empowering tribunals or courts to deal with third parties, civil procedure rules which enable courts to address third party issues and common law rules governing the effect of an arbitral award on a non-party.[352]

1. Procedural Mechanisms: England

Joinder of Arbitral Proceedings

A defendant has the ability to join a third party to court proceedings.[353] There is no equivalent power enabling the court or arbitrators to join a third party non-signatory. This is so even though there may be a series of contracts arising out of the same transaction, each of which is governed by an identical arbitration clause. All parties must consent. This was authoritatively decided under the Arbitration Act 1950 in *The Eastern Sag,*[354] in which the Court held there was no power within the Arbitration Act 1950, nor any implied power in the arbitration agreement, that empowers the arbitrator to order joinder in the absence of consent.[355] The Court justified the rule on the basis that it preserves the confidentiality of evidence tendered to the tribunal, protects parties from unnecessarily providing evidence and eliminates the possibility that the duration and cost of the arbitration will be extended by adding further parties.[356] While these rationales are debatable, the drafters of the Arbitration Act 1996 decided

352. In this respect this is not so much "procedural" as a substantive limitation on the effect of an award.

353. Fed. R. Civ. P. 19.

354. Oxford Shipping Co. v. Nippon Yusen Kaisha, "The Eastern Saga," [1984] 3 All E.R. 835. *See also* Interbulk Ltd. v. Aiden Shipping Co. Ltd., "The Vimeira," [1984] 2 Lloyd's Rep. 66, 75 (per Robert Goff L.J.).

355. Presumably it is still open to parties to include such a power expressly within the arbitration agreement.

356. Cited in MERKIN, *supra* note 84, at § 15.4.

not to extend a statutory power to arbitrators to order joinder as to do so would undermine the concept of "party autonomy."[357] Thus, section 35 of the Arbitration Act 1996 codifies the common law in that it states that the parties are free to agree on consolidation or concurrent proceedings (subsection 1) and may confer such power on the tribunal but, in the absence of such, the tribunal has no power to make such orders (subsection 2).

Yet a blurring of this straightforward position occurred in *The SMARO*,[358] which concerned a sale agreement for the sale of a vessel from Willie to Roussos or "company to be nominated." The sale agreement contained an arbitration clause. Subsequently, Willie nominated Ocean Laser as the purchaser and the purchase duly proceeded. A dispute arose and the parties commenced an arbitration, but there was no agreement on whether Ocean Laser (as nominee) was a party thereto.[359] The parties sought clarification from the court as to whether the arbitration had been properly commenced and "how, if at all, can a party to an arbitration agreement join an existing arbitration between the parties to the same arbitration agreement?" The Court's decision rests ultimately on other grounds but Justice Rix made lengthy obiter comments that he would have been willing to hold that Ocean Laser had properly joined the Roussos/Willie arbitration:

> I would be loathe to think that where a claim by party A to a contract with party B has been submitted to arbitration under that contract's arbitration clause, another claim based on identical facts brought by a third party to the same contract, party C, could not (without the agreement of B) be referred to the same arbitration but would have to be referred under an entirely new arbitral submission. No authority has been cited to me which compels me to determine that that would have to be done. *I know of course that arbitration is a consensual process, but where the relevant parties are bound to arbitrate, I do not see why the respondent's refusal to recognize party C's submission* of its claim to the same arbitrators *can force parties A and C to arbitrate in separate arbitrations* . . . The vice of that (apart from time and resources) is the danger of inconsistent decisions in separate arbitrations . . . .[360]

Thus, if the "third party" can somehow be brought within the contract containing the arbitration agreement (and here his Honor takes a fairly wide view of "within")[361] then arbitration may be compelled absent a party's consent.

"Under or Through"

An important, although strangely underused, provision exists which may offer some avenue of recourse for a non-signatory claiming to be a party and wish-

357. *See* DAC REPORT, *supra* note 329, at §§ 177-182.

358. *Ocean Laser Shipping*, [1999] 1 Lloyd's Rep. at 225.

359. Note that under the new Arbitration Act 1996 combined with the new C(RTP) Act 1999, *Ocean Laser Shipping* would probably have been entitled to rely on the arbitration agreement in the sale and purchase form to compel arbitration.

360. *Ocean Laser Shipping*, [1999] 1 Lloyd's Rep. at 228 (emphasis added).

361. The present case appears to have been decided on the basis that Ocean Laser had effected a novation of the sales agreement (the doctrinal argument for this is questionable).

ing to avail itself of the statutory powers granted to the courts to stay litigation or otherwise to aid the arbitration process. Section 82(2) of the Arbitration Act 1996 states that "references in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement." Thus, in as much as a non-signatory is able to come within the "under or through" definition, it will be a "party" for the purposes of the entire Act. Based on the similar but narrower provision in the Arbitration Act of 1950, Merkin suggests that the provision will not be available where the third party is an insurer,[362] a mortgagee[363] or a guarantor.[364] However it may apply to a contractual assignee[365] or to an assignee by operation of law including by death, bankruptcy or liquidation.[366]

The potentially broad application of the "through or under" formula is best evidenced in *Roussel-Uclaf*.[367] In that case, the non-signatory UK subsidiary of a US pharmaceutical company which was a signatory to a licensing agreement including an arbitration clause, was granted a stay of litigation pursuant to section 1, Arbitration Act 1975. The Court was willing to pierce the corporate veil as it considered that the two companies (both defendants in the action) were "so closely related on the facts in this case" that the UK subsidiary was "within the purview of the arbitration clause" and on this basis it was making the application for a stay "through or under" the signatory parent.[368]

Thus, the availability of the "through or under" mechanism has ameliorated the potential unjustness of the common law position[369] that a third party has no *locus standi* to ask the court to discontinue legal proceedings in the face of an arbitration agreement to which it is not a party.[370] Building on the *Roussel*

362. MERKIN, *supra* note 84, at § 1.37 (citing Frotanort, [1995] 2 Lloyd's Rep. 254.

363. MERKIN, *id.* (citing Bonnin v. Neame [1910] 1 Ch. 732).

364. MERKIN, *id.* (citing Alfred McAlpine Constr. v. Unex Corp., [1994] N.P.C 16).

365. MERKIN, *id.* (citing Rumput (Panama) S.A. v. The Islamic Republic of Iran Shipping Lines, "The Leak" [1994] 2 Lloyd's Rep. 259).

366. *Id. See also* MERKIN, *id.* at §§ 2.18ff.

367. Roussel-Uclaf v. G. D. Searle & Co. Ltd., [1978] 1 Lloyd's Rep. 225 (Ch.D.).

368. *See also* Etri Fans v. M.M.B. (UK) Ltd. [1987] 2 All E.R. 763 (Eng. C.A.). *Roussel-Uclaf* was criticized and distinguished in Grupo Torras S.A. v. L. Sabah [1995] 1 Lloyd's Rep. 374, 451. In that case the non-signatory sought to rely upon an arbitration agreement contained in a contract between its subsidiary and the parent company of the plaintiff. Mr. Justice Mance considered that the nature of the claim sought to be stayed (a tort action dependent on the defendant's personal conduct not that of its subsidiary) and the lack of relationship between the defendant's subsidiary and the plaintiff's parent, precluded the claim from being considered "through or under".

369. Pennell v. Walker, [1856] 18 C.V. 651; Bannin v. Neame [1910] 1 Ch. 732.

370. The phrase also appears as "through or under" in earlier U.K. legislation and in other Commonwealth legislation. There are a number of important decisions from other Commonwealth jurisdictions which have adopted this provision to mitigate problems with third parties; *see* espe-

precedent and the *prima facie* broader provision in section 82(2)of the Arbitration Act 1996, English courts may be empowered to grant to non-signatory parties claiming "through or under" a party to an arbitration agreement not only a stay of litigation but possibly even *de facto* joinder other remedies that have the effect of this offers the potential to allow court-ordered de facto "joinder" of such non-party to the arbitration. Support for this may be drawn from the obiter comments in *The SMARO*[371] referred to above, although it remains to be seen whether this approach will be adopted.[372]

Other Mechanisms

Other mechanisms to overcome the potential injustice to a third party unable to bring itself within the arbitration agreement include:

Stay of proceedings pending arbitration: Under the former Arbitration Acts, it was possible for a court to exercise its discretion not to order a stay of proceedings pending arbitration. However since the Arbitration Act 1975 this option has not applied to "international arbitrations" as defined in the Act. Under the Arbitration Act 1996, section 9 removes the power to refuse a stay in all cases.[373]

Anti-suit injunction to prevent litigation: Similar to the stay provisions, a signatory or non-signatory may achieve the same result by seeking an anti-suit injunction in the appropriate court or jurisdiction.[374]

Appointment of common arbitrator: The courts have developed a very limited solution whereby a common arbitrator is appointed for multiple arbitrations under the power to appoint a tribunal where the parties have failed to do so.[375]

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cially Mt. Cook (Northland) v. Swedish Motors [1986] 1 N.Z.L.R. 720 (New Zealand) and Tanning Research Laboratories, Inc. (US) v. O'Brien (Liq. of Hawaiian Tropic Ltd.) (Australia) 64 A.L.J.R. (1990) 211 (H.C. Australia).

371. *Ocean Laser Shipping*, [1999] 1 Lloyd's Rep. at 225. *See also supra* note 356 and accompanying text.

372. *See Kavrit Steel & Crane Ltd. v. Kone Group*, 87 D.L.R. (4th) 129, 132 (Alb. Ct. App) (supporting a broad interpretation of the English section 82(2) and expressing disappointment that the same power is not available in the Alberta statute).

373. The section of the Act which makes separate provisions for domestic arbitrations has not been enacted and is apparently intended to be repealed. Section 9 was applied in Wealands v. C.L.C. Contractors Ltd. & Scaffolding Ltd. & Another, [1999] 2 Lloyd's Rep. 739, 745 (citing the decision at first instance, "I appreciate that the conclusion I have reached is in many ways an unsatisfactory one but I remind myself again that the Act now gives priority to party autonomy. It entitles the third party as of right, to the stay which it asks for").

374. *British & Foreign & TMM Transcap*, [1998] I.L.Pr. at 838.

375. Arbitration Act 1996, section 18 (Arbitration Act 1950, section 10). *See* Abudabi Liquefaction Col. v. Eastern Bechtel Corp. & Chiyoda Chem. Engineering & Const. Co. Ltd., [1982] 2 Lloyd's Rep. 425, (appointing the same arbitrators for two different hearings, one involving disputes under the head contract and the other the sub-contract. Thus the procedure sought to lessen the likelihood of different arbitrators reaching different factual conclusions).

2. Procedural Mechanisms: United States

Federal Arbitration Act § 4

Of the several procedures available,[376] the most likely recourse for a non-signatory is to petition the court for a motion to compel arbitration. The relevant part of § 4 provides:

> A party aggrieved by the alleged failure, neglect or refusal by another to arbitrate under a written agreement for arbitration may petition an United States District Court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . . the court shall hear the parties and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . If the making of the arbitration agreement or failure, neglect or refusal to perform the same be in issue the court shall proceed summarily to the trial thereof . . .

To succeed, the non-signatory must prove that it is a party to a "written agreement for arbitration" and the court may proceed to a trial thereon if that is in issue. In this respect, the reference to "an agreement in writing," while on its face restrictive, has been interpreted not to preclude the invocation of § 4 by a non-signatory.[377] Note also that, unlike in other jurisdictions, an attack on the arbitration clause itself is a question for the court to determine not the arbitral tribunal.[378]

While § 4 may appear straightforward, the need to establish the facts relevant to jurisdiction to make the orders can give rise to complications. For example, in *Limonium Maritime*[379] the Court of Appeals for the Second Circuit upheld a District Court decision denying petitioners' motion to compel arbitration. The lower court had declined to decide whether the approximately 117 non-signatory appellees were parties to a charter agreement until after the completion of arbitration proceedings between the charter signatory and its guarantor. The appellants argued that the court had no such discretion but rather was bound by § 4 to determine the non-signatories' status under the charter agreement before the pending arbitration proceedings could ensue. The Court of Appeals rejected this proposition essentially on grounds of convenience, stating:

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376. For a general discussion see MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 74, at § 23; COE, *supra* note 268, at §§ 3.8.1, 5.3-5.5; Healey, *An Introduction to the Federal Arbitration Act*, 30 J. MAR. L. & COM. 223 (1989).

377. *See also Keystone Shipping Co.*, 782 F. Supp. at 31.

378. *Prima Paint Corp.*, 388 U.S. at 395; *see* discussion infra at note 101.

379. Limonium Maritime SA v. Mizushima Marinera S.A., 201 F.3d 431 (2d Cir. 1999); 1999 U.S. App. LEXIS 30447 (2d Cir. 1999).

> Nor do we see any abuse of discretion by that Court. The District Court deferred consideration of whether the non-signatories were parties until after the arbitration was completed ... for sound reasons of judicial economy ... as a general rule 'we are very reluctant to interfere with district judges' management of their very busy dockets' . . . to adjudicate the non-signatories [sic] status first . . . would not expedite final resolution of the case but might actually delay it.[380]

Thus the Court was willing to defer its obligation to "hear the parties" and if satisfied "proceed summarily to trial" until after the arbitration against the signatory and its guarantor was completed, despite the possibility that this may result in a split arbitration.[381]

Federal Arbitration Act, Chapters Two and Three

A dispute relating to an international agreement may also arise for determination under FAA, Chapter Two (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) or Chapter Three (implementing the Inter-American Convention on International Commercial Arbitration). Analogous provisions to 9 U.S.C. § 4 exist in § 206 and § 303, providing for orders to compel arbitration in reliance on the New York Convention or Panama Convention, respectively.

By way of example, in *Anderra Energy Corp.*,[382] disputes arose between members of a joint venture (Petro Anderra and AEC) and SAPET concerning the existence of projects in Peru. The joint venture initiated court proceedings against SAPET as well as two other defendants. The defendants successfully removed to federal court relying on the arbitration agreement provided in the letter of intent between the joint venture participants and SAPET. The procedural battle was then fought over FAA, § 205 which provided the basis for removal to federal court and the plaintiff's motion to remand back to state court. The District Court upheld the removal to federal court and granted the motion to compel arbitration despite the fact that AEC was not a signatory to the arbitration agreement, because the nature of the joint venture with Petro Anderra bound it to the arbitration agreement. Influential in the Court's decision was the

380. *Id.* at 431, *id.* at *3-4.

381. The power in 9 U.S.C. § 4 to compel arbitration is supplemented by 9 U.S.C. § 3, which empowers the court to stay litigation pending arbitration. As a matter of practice, a request for relief pursuant to §4 is often accompanied by a request for a stay of litigation pursuant to §3. In the non-signatory context, *see Keystone Shipping Co.*, 782 F. Supp. at 29. *See also* Minera Alumbrera Ltd. v. Fluor Daniels, Inc., No. 98CIV5673, 1999 WL 269915, *5 (S.D.N.Y. May 4, 1999) (also considering the court's inherent power to stay a case but rejecting this as well as § 3).

382. Anderra Energy Corp. v. SAPET Dev. Corp., No. 3:94-CV-2683-P (N.D. Tex. Sept. 29, 1995), in 10 INT'L ARB. REP. E-1 (1995).

extra deference given to international arbitration agreements and the "strong public policy to channel this type of case into federal court."[383]

Stay of Litigation Pending Arbitration

Anderra Energy Corp. is also interesting in that the Court granted a request on behalf of the non-signatory defendants that all litigation be stayed pending the conclusion of the arbitration between plaintiff joint venturers and defendant SAPET.[384] This is a matter of discretion for the District Court.[385] In considering this request, the Court rejected an argument that § 3 of the FAA mandates the stay of litigation for issues within the scope of the arbitration agreement but which relate to non-signatories (who are also not claiming to be parties to the arbitration agreement).[386] In exercising its discretion, the Court held that the "identity of the issues in this case and the possibility of duplicative action counsels in favor of a discretionary stay as to the entire litigation pending the outcome of arbitration between the plaintiffs and SAPET."[387] The Court placed a one year limit on the stay.

Other Mechanisms

Courts have occasionally executed their general powers under the state civil codes of procedure, to consolidate arbitrations arising out of the same dispute, so as to lessen the likelihood of conflicting determinations.[388] They have also stayed arbitrations to permit the completion of related litigation involving third parties where such was the efficient result.[389]

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383. *Id.* at § 7 (citing McDermott Int'l Inc. v Lloyd's Underwriters of London, 944 F.2d 1199 (5th Cir. 1991)).

384. *Anderra Energy Corp.*, 10 INT'L ARB. REP. E-1 at § 19.

385. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 21 ("In some cases it may be advisable to stay litigation among the main arbitrating parties pending the outcome of the arbitration. That decision is one left to the District Court as a matter of its discretion to control its docket").

386. *Anderra Energy Corp.* at § 19 (citing Talbott Bigfoot Inc. v. Boudreaux, 874 F.2d 611 (5th Cir. 1989)).

387. *Id.* at § 20.

388. *See e.g.* Mercury Ins. Group v. Super. Ct., 965 P.2d 1178 (1998). *See generally* Debra S. Neveu, *An Informative Note on Aggregation Devices in Arbitration*, 10 WORLD ARB. & MED. REP. 224 (1999).

389. *See Volt Info. Scis., Inc.*, 489 U.S. at 468 (relying on CAL. CODE CIV. PROC. 1281.2(c)).

Unlike in some jurisdictions,[390] there is no provision permitting a third party not a party to the arbitration, to intervene as an interested person in the confirmation/enforcement hearing. Moreover, the Court's task is limited only to determining "whether the arbitrator's award falls within the four corners of the dispute as submitted to him."[391] Thus, the Court in that case refused to consider whether the parties bound by the award included the signatory's alleged alter ego.[392]

3. Procedural Mechanisms: France

The French procedural position is similar to that of the United States or England with respect to uncontroversial matters such as a stay of litigation, but three unique characteristics are worth noting.

First, French courts generally are precluded from interpreting the arbitration agreement on a preliminary application, leaving this instead to the arbitral tribunal.[393] Second, in those circumstances where a French court is required to review the validity of an arbitration agreement it will do so on the basis of French law rather than considering any applicable law arguments.[394] Thus, in any action before a French court the more permissive rules on third parties will apply, even in the face of a mandatory rule of another state which would otherwise preclude a third party from enforcing the agreement.[395] Third, unlike in domestic arbitration, French law in an international arbitration does not permit third party intervention on a recognition/enforcement action. Fouchard & Gaillard suggest, "the privity of the arbitration agreement and of the res judicata effect of the arbitrator's decision suffices to protect third parties from any negative impact . . . ."[396]

390. Intervention is permitted for example in Polish arbitration law. *See* Mauro Rubino-Sammartano, INTERNATIONAL ARBITRATION LAW 184 (3d ed.1989).

391. Align Shipping & Trading Co. v. Eastern States Petroleum Corp., 312 F.2d 299 (2d Cir. 1963).

392. *Id.* at 301.

393. FOUCHARD, *supra* note 11, at § 474, at 255.

394. Goutal, *supra* note 73, at 439.

395. *See* FOUCHARD, *supra* note 11, at § 628, at 382 (stating that French law would uphold the arbitration agreement even in the face of a law such as the 1989 Colombian law invalidating any arbitration agreement that concerns a dispute "affecting a nonparty" (Decree No. 2279, Oct. 7, 1989, amended by Law No. 23, Mar. 2 (1991))).

396. FOUCHARD, *supra* note 11, at § 1598, at 918.

4. Procedural Mechanisms: International Law/Institutional Rules

Several international institutions provide in their arbitration rules for procedural mechanisms that may be relevant to the non-signatory. For example, the London Maritime Arbitrators Association Terms empower the arbitral tribunal to make orders as to concurrent hearings to the extent that such procedures are in the "interests of economy and expedition."[397]

Importantly, the Rules of the London Court of International Arbitration (1998) empower the tribunal, unless the parties otherwise agree, to:

> allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.[398]

This provision is of potentially wide application in that one can envisage a number of situations where, for example, a subsidiary company may want to join its parent company or vice versa. The "consensual" theory of arbitration is still protected in as much as the parties must already have chosen to adopt the LCIA Rules and are permitted to opt out of the rule if they wish.[399]

An interesting variation on this model in a specialized arbitration tribunal is the Court of Arbitration for Sport created by the International Olympic Committee in 1983.[400] The rules provide for both compelled joinder of a party[401] and a broad "intervention" rule.[402] Such non-consensual provisions are perhaps only

397. London Maritime Arbitrators Assoc. Terms (2002), Article 14(b).

398. LCIA Arbitration Rules (1998), Article 22.1(h).

399. The same "opt in/opt out" approach is taken in many domestic enactments of the UNCITRAL Model Law. For example, New Zealand Arbitration Act 1996, Second Schedule, Clause 2 empowers the tribunal to order consolidation of proceedings (but not joinder of parties) upon the application of at least one party to the proceedings. This power is excluded from "international arbitrations" unless the parties specifically opt in to the additional rule or rules.

400. *See generally* Jose M. Marxuach, *The Court of Arbitration for Sport*, 10 WORLD ARB. & MED. REP. 71 (1999). Awards rendered are enforceable under domestic international arbitration legislation, such as in Switzerland. *See* Grundel v. Int'l Equestrian Fed., Tribunal Federal Suisse, Mar. 15, 1993, 8 INT'L ARB. REP. F-1 (1983).

401. Rule 41.2: "If a respondent intends to cause a third party to participate in the arbitration, it shall so state in its answer, together with the reasons therefore, and file an additional copy of its answer. The Court Office shall communicate this copy to the person the participation of which is requested and set such person a time-limit to state its position on its participation and to submit a response pursuant to Article R39. It shall also set a time-limit for a claimant to express its position on the participation of a third party."

402. Rule 41.3: "If a third party intends to participate as a party in the arbitration, it shall file with the CAS an application to this effect, together with the reasons therefore within the time-limit set for the respondent's answer to the request for arbitration. To the extent applicable, such applica-

feasible in a small membership-based organization such as the International Olympic Committee.

5. Procedural Mechanisms: Commentary

Five brief conclusions can be drawn from the above analysis. First, it is striking that England, with its traditionally strict limitations on the ability of a third party to participate in international arbitration, has indirectly remedied some of the "injustices"[403] this creates by implementing legislative procedural mechanisms. Thus, as seen in *Rousell*, by applying the seemingly innocuous "through or under" provision, a third party has been able to obtain a stay of litigation pending arbitration without relying on broader concepts such as the French "group of companies" doctrine or the United States third party beneficiary principle. It will be interesting to see whether the wider "through or under" provision in section 82(2) of the Arbitration Act 1996 becomes more broadly applied to situations other than a mere stay of litigation.

Second, there has been an increasing tendency for courts to favor either increased third party participation or, as an alternative remedy, an increased use of the court's discretionary powers to grant a stay of litigation pending the arbitration, so as to protect a third party's position.

Third, at least in the United States and France, there is particular deference given to international arbitration agreements in terms of protecting third party interests and in applying domestic procedural rules consistent with policies favoring arbitration amongst international parties (e.g. *Anderra Energy Corp.*).

Fourth, there is ongoing tension between judicial efficiency concerns (e.g. wanting to ensure an efficient use of court and parties' resources) and a contractarian desire to limit the arbitration to only those parties bound by the agreement thereby leaving the other parties to pursue litigation. It is suggested that the displeasure expressed by the English court in *Wealands* in forcing a split between the arbitrable and non-arbitratable claims and parties, could be resolved by a more creative application of the broad discretion the court enjoys in ordering stays (as applied by the United States courts, e.g. *Anderra Energy Corp.*).

Finally, a related issue not directly discussed above, is the effect of the award on third parties. The basic position in all these jurisdictions is that the *res judicata* and collateral estoppel effects of the award are limited only to the parties to the arbitration.[404] However this principle has been somewhat undermined

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tion shall have the same contents as a request for arbitration. The Court Office shall communicate a copy of this application to the parties and set a time-limit for them to express their position on the participation of the third party and to file, to the extent applicable, an answer pursuant to Article R39."

403. The term "injustice" is used to refer to Dr. Blessing's quote in the heading to this article. *See supra* note 4.

404. *See* COE, *supra* note 266, at 299.

by contemporary case law. The issue is too complex to discuss here, but by way of example, the Court of Appeals for the Second Circuit has enforced an arbitral award against a parent nonparty on the basis that it is the *alter ego* of the signatory subsidiary.[405] More remarkably, failure by a non-signatory to challenge the tribunal's jurisdiction in a timely fashion or to participate in the proceedings may result in the third party being deemed to have waived its right of objection on any subsequent challenge to the award.[406] These cases emphasize the importance of developing clear substantive law on the rights and duties of non-signatories to participate in arbitration.

B. Choice Of Law/Applicable Law Issues

While already addressed within each of the individual legal theories discussed, it remains to comment on the overall degree of predictability and uniformity of choice of law rules and how that impacts on third party issues. It will be recalled that, as previously discussed,[407] some commentators have suggested that third party issues can be decided simply by applying clear choice of law rules and then relying on the applicable national contract norms. It is suggested that this is not feasible.

Fundamentally, there is potentially a multiplicity of different applicable laws at issue. The law applicable to the validity of the arbitration agreement may well be different to the law applicable to the substantive dispute, which may in turn be different to the law applicable to the contract giving rise to the third party's claim for compelling arbitration. To give a concrete example, an insurance company subrogated to the rights of its insured vessel owner with respect to a dispute over a cargo contract may have to deal with United States law as the law governing the validity of the arbitration agreement vis a vis its position as subrogee (perhaps because the cargo owner has brought suit in the United States); English law may apply to the dispute over the cargo; and French law may apply as the governing law of the insurance policy. When one adds to

405. *See* Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc., 2 F.3d 24, 29 (2d Cir. 1993) (successful claimant's award had already been reduced to a judgment but was then enforced against the insolvent respondent's parent company). *See also* Nauru Phosphate Royalties Inc. v. Drago Daic Interests, Inc., 138 F.3d 160 (5th Cir. 1998) (creditor non-party to the arbitration bound by factual finding of liability in award where its interests were in privity to those of the party that participated in the arbitration).

406. *See* Owen-Williams v. Merrill Lynch, 907 F. Supp. 134, 137 (D. Md. 1995).

407. *See supra* note 12 and accompanying text (discussing the "traditional approach").

this, further complications like state law variations within the United States, the potential for confusion abounds.

Even if one concentrates only on the validity of the arbitration agreement vis a vis the non-signatory's claim to be entitled to enforce it, there are different ways of rationalizing what the applicable laws should be. In the assignment context, Girsberger & Hausmaninger have examined this problem extensively.[408] The authors state:

> Because the issue of transfer [by assignment] may be characterized in different ways, there are several conflict-of-law approaches to the issue. If a court or arbitral tribunal characterizes the question of arbitrability or of the scope and effects of an arbitration agreement or its interpretation as a procedural matter, it may apply the *lex fori*, based on the general conflict-of-law principles that the forum applies only foreign substantive law, but uses its own procedural law. If it characterizes those questions as a substantive matter, it may apply the conflict of law rules applicable to contractual matters. In this case, the chosen conflict-of-law approach may still differ, depending on whether the issue is considered to be one of assignability or scope and effects of the assignment, or one of arbitrability or scope and effects of the arbitration agreement. Finally, as a combination of the procedural and the substantive approaches applied, a competent jurisdiction may use either one of these conflict-of-law approaches, or a combination thereof.[409]

Nevertheless, in terms of selecting the applicable law, there is at least some uniformity across all three jurisdictions reviewed in this article in as much as they appear to give at least considerable weight to the expectations of the parties.[410]

However, as a final complication, some tribunals have also sought to resolve non-signatory issues by referring to not only the parties' intent but also anational or transnational principles of law. Such a "cumulative" approach to applying the conflict of laws rules has been identified as being the "principal method" in ICC arbitrations.[411] In *Isover*[412] the respondent challenged the ICC's jurisdiction with respect to subsidiary non-signatory companies on the basis that it had never entered into an arbitration agreement with either. The arbitral tribu-

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408. Girsberger & Hausmaninger, *supra* note 73, at 149-61.

409. *Id.* at 150.

410. For an English example see Arbitration Act 1996, section 4; *compare* Union of India v. McDonnell Douglas Corp., [1993] 2 Lloyd's Rep. 48. For a United States example see comments in Chelsea Square Textiles Inc. v. Bombay Dyeing & Mfg. Co., 189 F.3d 289 (2d Cir. 1999). For a French example see FOUCHARD, *supra* note 11, at § 437, at 230 (citing Cass. 1e civ., December 20 1993, Comité populaire de la municipalité de Khoms El Mergeb v. Dalico Contractors ("[t]he existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intentions")).

411. *See* William Lane Craig, *International Ambition and National Restraint in the ICC*, ARB. INT'L 49, 65 (1985).

412. Dow Chem. v. Isover Saint Gobain, I.C.C. Case No. 4131 (September 23, 1982), REVUE DE L'ARBITRAGE 137 (1984), in IX YEARBK. COM. ARB. 131 (1984).

nal rejected this challenge and reached its conclusion based not just on the French law (the chosen substantive law) but rather stated:

> [T]he sources of law applicable to determine the scope and effects of an arbitration clause providing for international arbitration do not necessarily coincide with the law applicable to the merits of the dispute submitted to such arbitration . . . [t]he tribunal shall accordingly determine the scope and effects of the arbitration clauses in question . . . by reference to the common intent of the parties . . . and also by taking into account, following a particular French case law relating to international arbitration, usages conforming to the needs of international commerce . . .[413]

The Paris Court of Appeals rejected the subsequent challenge to the award.[414] The Paris Court confirmed that the law applicable to determine the scope and effect of an arbitration clause need not necessarily be the substantive law chosen by the parties to govern the merits of the dispute and that in any event the ICC Rules were sufficiently broad to permit the consideration of contract terms and trade usage. Thus, the decision stands for the proposition that an ICC arbitrator can make choice of law decisions independent of the national choice of law rules and indeed can apply an anational set of rules, although once again based on the intentions of the parties.

C. Enforcement Issues/Form Requirements

Briefly, while a non-signatory third party may be able successfully to compel arbitration and obtain an award applying one of the legal theories discussed above, it may still encounter difficulties in enforcing the resulting award or in a subsequent application to have the award set aside. This issue is inextricably linked to the minimum "form" requirements for an international arbitration agreement.

As already discussed, the New York Convention on Recognition and Enforcement of Arbitral Awards (1958) is the primary international mechanism for recognition and enforcement of awards.[415] Article II of the Convention provides that it applies only to an award arising from an "agreement in writing" that has

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413. *Id.* § 3; reproduced in Craig, *supra* note 411, at 66.

414. Isover Saint Gobain v. Dow Chemical, 21 Oct. 1983, in IX YEARBK. COM. ARB. 132 (1984)

415. Note also that some international arbitral institutions may have specific procedures for challenging an award and also specific form requirements that might be relevant to a challenge premised on non-signatory issues. Most important of these is the annulment procedure provided for in the ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and Chapter VII of the Arbitration Rules promulgated thereunder. *See* Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REV. FOREIGN INV. LAW J. 321 (1991).

been "signed by the parties or contained in an exchange of letters or telegrams." There is a vast body of commentary on this provision.[416] For present purposes, it suffices to say, first, that the form requirements generally have been liberally applied. For example, in the United States a valid agreement has been found in the absence of a signature, but on the basis of a long-standing business relationship.[417] Another agreement was upheld because "the clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes."[418] However, the caselaw is unsettled, particularly in the United States, and there is always some danger that a strict approach will be taken.[419] Second, all three of the legal systems in this study have to some extent adopted more lenient requirements, i.e. the Convention sets only the minimum standards.[420] Third, arguably, there is a distinction between fulfilling Article II(2) in the context of a motion to compel as opposed to enforcement of an award.[421]

As to the actual grounds for challenge to an award, in the non-signatory context this is most likely to arise in one of two ways. First, Article V(1)(a) provides that an award may be refused recognition where "[t]he said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

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416. *See e.g.* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 217 (1981); F.A. Mann, *An "Agreement in Writing" to Arbitrate*, 3 ARB. INT'L 171 (1987); Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 ARB. INT'L 27 (1996). For a recent and illuminating discussion *see* Toby Landau, "The Requirement of a Written Form for an Arbitration Agreement," 16TH ICCA CONGRESS, London (May 2002).

417. Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987).

418. Republic of Nicaragua v. Std. Fruit Co., 937 F.2d 469, 478 (9th Cir. 1990).

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

420. *See supra* note 332 and accompanying text discussing the English Arbitration Act 1996. However, note that it is an unresolved issue, at least in the United States, as to whether these more lenient standards apply to any application premised on the New York Convention. *See* Chloe Z Fishing Co., Inc. v. Odyssey Re (London) Ltd., 109 F. Supp. 2d 1236, 1246 (S.D. Cal. 2000) ("Article II of the [New York] Convention exhaustively defines what constitutes an 'agreement in writing' under Chapter 2 of the FAA" but on the facts accepting that the parties' conduct in negotiating and purchasing the insurance policies constituted "an exchange of letters or telegrams" for the purposes of Article II(2)).

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

Second, and probably more likely, there may be a challenge under Article V(1)(c) where the "[a]ward deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . ."

As to procedure, parties may bring a challenge either in the court at the seat of the arbitration or upon enforcement action being taken in that or another state. A well known example of the first scenario is the *Pyramids* case[422] in which the Paris Court of Appeals set aside an arbitral award with respect to respondent Egypt on the basis that there was no valid arbitration agreement. Similarly, in *Westland Helicopters,*[423] the Swiss Federal Tribunal confirmed the setting aside of an interim award on the basis that the arbitration agreement could not be extended to the Arab states which controlled the signatory trading entity.[424] As to the second scenario, a New York federal court recently enforced an award rendered by an Egyptian arbitral tribunal that had found a U.S. parent non-signatory bound by the arbitration agreement and therefore jointly and severally liable with its subsidiary for damages.[425] The court refused to revisit the tribunal's finding that the parent was bound by the agreement and held that none of the parent company's arguments constituted grounds on which enforcement could be denied under New York Convention, Article V.[426] In particular, it found that the proposition that non-signatories could be bound to an arbitration agreement did not contravene U.S. public policy for the purpose of Article V(1)(e).[427]

V. COMPARATIVE ANALYSIS: CONCLUSIONS

The commentary sections following each of the "legal theory" discussions above have already provided specific conclusions on each of the addressed legal doctrines. The following section offers five broader conclusions addressing the

422. *Pyramids* case, *supra* at note 40, at 752.

423. *Westland Helicopters, supra* note 23, at 688.

424. *Id.* (the award was only set aside in respect to Egypt absent any challenge by the other state non-signatories).

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

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

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

questions posed in the Introduction. These conclusions will then serve as the basis for the remaining sections, which focus on options for reform.

A. The "Third Party Problem" Does Exist

The comparative project in Section III identifies certain problems that arise within each of the jurisdictions and also problems that arise across all three legal systems. These problems are manifested in five key ways.

First, there is inconsistency within each jurisdiction's application of specific legal theories. Even on such a common issue as whether an arbitration clause is incorporated by reference, the position in England remains unclear. While the Arbitration Act 1996 sought to resolve the inconsistent opinions expressed in *Aughton*,[428] the statutory reform itself leaves unanswered several questions about how to apply the doctrine. So too in the United States with respect to the split between those circuits which apply the "direct benefit" test[429] to establishing that a party is estopped from refusing to arbitrate and those which rely on the "two-prong" test.[430] These distinctions could well produce different outcomes.

Second, there is inconsistency of approach between the three jurisdictions in this study. Thus, the third party beneficiary hypothetical above[431] reveals the potential for different results in each of England, the United States and France. Likewise, in the case of the application of the doctrine of "incorporation by reference," as evidenced in some different approaches to charter parties and bills of lading.[432] Different overarching jurisprudential notions, such as the French position affected by a less formalistic notion of the "party" to a contract,[433] the application of the "principle of validity,"[434] and the automatic transmission of the arbitration clause along with the transfer of the main contract by assignment or succession exacerbate these differences.[435] Similarly, what might appear to be only minor differences in the details of applying the doctrine can in fact have major potential consequences. For instance, the "nexus" limb of the equitable estoppel test applied in the Eleventh Circuit in the United States has frequently been applied to extend the arbitration agreement to a third party beyond the much more limited approach in England.[436]

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428. *Aughton*, 57 BUILDING LAW REP. 1.

429. *See Deloitte Noraudit A/S*, 9 F.3d at 1060 and *see supra* note 281 and accompanying text.

430. *See Sunkist Soft Drinks*, 10 F.3d at 753 and *see supra* note 291 and accompanying text.

431. *See supra* note 261 and accompanying text.

432. *See supra* note 327 and accompanying text, compare *supra* note 346 and accompanying text.

433. *See supra* note 310 and accompanying text.

434. *See* FOUCHARD, *supra* note 11, at § 418, at 214-217.

435. *Id.* at § 712, at 427. *See also* comments of Messrs. Fouchard, Oppetit & Delvolve, in Arbitrage, *supra* note 30, at 469-470 (despite the "separability" principle).

436. Compare *Sunkist Soft Drinks Inc.*, 10 F.3d at 753 and *Roussel-Uclaf*, [1978] 1 Lloyd's Rep. at 225 (dealt with as a "through or under" case).

Third, the comparative project has revealed doctrinal overlaps and confusion as to how to characterize the third party scenario. Thus, in *Detlev von Appen,*[437] the court speaks almost in one breath of the transactions involving all of assignment, subrogation and succession.[438] In the United States, the third party beneficiary principle has been inconsistently applied so as sometimes to permit a signatory claimant to enforce the "burden" of an arbitration agreement against a non-signatory.[439] Meanwhile, courts have routinely employed the estoppel principle where the third party beneficiary principle would provide a more doctrinally sound basis for extension of the agreement.[440]

Fourth, transnational differences are exacerbated by conflicting choice of law rules[441] and uncertain division of responsibility between courts and arbitral tribunals.[442] The former encourages forum shopping, may create difficulties in enforcement, makes it difficult to contract with certainty and, even if the parties have addressed the issue, may ultimately lead to a court imposing a different law on the parties than that intended (e.g. by applying anational principles). As to the latter, the United States position of having such "arbitrability" issues determined by the courts is in stark contrast to the standard position in France in which the issue is left to the arbitrators. Such differences create in applicable law and jurisdiction creates uncertainty in dealing with third party issues.[443]

Fifth, many of the aforementioned inconsistencies and uncertainties also result in the marginalization of the concept of consent to the arbitration agreement. This has already been identified and discussed above, however it is a striking characteristic of many of the cases examined. To take just one example, a case such as *Enron* reveals a doctrinal confusion that results in non-parties being bound to arbitrate where this does not appear to have been the intention of any of the parties or nonparties at the time of entering in to the contract. This issue will be the focus of the final section.

In conclusion, more than just an academic abstraction, the third party problem is of real significance. Not only does it create uncertainty in conducting international transactions but it also has serious implications for international dispute resolution. This is seen most graphically in the third party who, although not having participated in the arbitration, finds itself constrained by the

437. *Schiffahrtsgesellschaft Detlev von Appen*, [1997] 2 Lloyd's Rep. 291.
438. *Id.* at 293.
439. *See e.g. Ex Parte Dyess*, 709 So. 2d at 450 discussed *supra* note 233.
440. *See supra* notes 293 and 299 and accompanying text.
441. *See supra* Section IV.B.
442. *See* generally *supra* note 101.
443. See e.g. *Bell Ray Co.*, 181 F.3d at 445.

factual or legal findings in the resulting award[444] and is equally evident in the infamous decade-long battle to obtain an enforceable award due to third party complications in the *Westland Helicopters* case.[445]

B. Common Concerns Expressed In Third Party Situations

Despite the inconsistencies identified above, the three jurisdictions do share certain common policy concerns in trying to deal with the third party problem, even if methods for resolving them may differ.

First, there is a concern for the position of the original promisor whose consent to the arbitration agreement may have been conditioned on the prospects of an arbitration with the original promisee (not the third party). Such concerns come to light where it is the third party claiming against the promisor, either by way of arbitration (in which case the court is concerned that the promisor did not bargain on arbitrating with the particular third party) or by litigation (in which case the court is concerned that the promisor bargained on resolving disputes by arbitration). These concerns are all the more pressing where the third party may be more (or less) financially able to meet the costs of international commercial arbitration and honor any award, e.g. where the promisee international corporation assigns its interest to a nominee shelf company or, conversely, where the rights of a small time operator are subrogated to a well-financed internationally savvy and litigious insurance company.[446] Another concern identified by Girsberger and Hausmaninger is that the third party may be more advantageously placed in the arbitration, e.g. where he is a national of the pre-chosen arbitral seat, is more conversant in the applicable law originally chosen for its neutrality, or has some kind of relationship with a preselected arbitrator.[447]

Second, there is a concern for the position of the third party who has been "dragged into" an arbitration, either as respondent in an arbitral claim by the promisor or as a plaintiff in litigation that she is subsequently compelled to arbi-

444. *See supra* note 406 and accompanying text.

445. *See Westland Helicopters*, *supra* at note 23, at 1071. *See* WORLD ARB. & MED. REP. 258 (1994) (noting settlement of case).

446. English courts seem particularly concerned with the cost implications of introducing a new or substituted party to the arbitration. *See Ocean Laser Shipping*, [1997] 1 Lloyd's Rep. 225 (where the promisee remains a party to the arbitration, cost implications can be resolved by the arbitrators in their discretion). *See London Steamship Owners*, [1990] 2 Lloyd's Rep. 21 (where the promisee drops out of the pending arbitration the new third party should be held liable for any costs incurred by the claimant for which the promisee is not responsible).

447. Girsberger & Hausmaninger, *supra* note 73, at 145-46. Certainly the last of these and possibly the other two would demand corrective measures (perhaps based on the principle of equal treatment of parties in UNCITRAL Model Law, Article 18). Alternatively, it is pointed out that such evidence would go towards an argument that the arbitration agreement was not intended to be extended to that particular third party or may even constitute a personal, and therefore non-transferable arbitration agreement *intuitu personae*.

trate. The justification here is the obvious one that the third party did not enjoy the opportunity to negotiate the original agreement, may not have enjoyed the collateral benefits of other terms in the main contact which justified including the arbitration provision, or may not even have been aware of the arbitration agreement.

In the jurisdictions included in this study, courts and arbitrators have increasingly marginalized these concerns. With respect to the promisor's concerns, especially in the United States, the logic seems to be that "you reap what you sow," i.e. having chosen to arbitrate all disputes arising out of a contract these extend also to disputes with the third party (as seen most dramatically in the equitable estoppel cases). Often this is justified by focussing on the broad scope of the subject matter anticipated by the arbitration agreement rather than probing the parties' intention to extend the agreement to the particular third party.[448]

As to concern for the third party, in the United States and France the analysis of claims by signatories centers on the relationship between the third party and the promisee, i.e. is it reasonable for the third party to fulfill the promisor's expectation it would arbitrate with the promisee? Where it is the third party who has sought to sue and is being compelled to arbitrate, the courts have looked at the subject matter of the third party's claim and whether it falls within the scope of the arbitration agreement, the third party's relationship to the promisee, and whether the third party has received any benefit from the main contract which contains the arbitration agreement. Such analysis proceeds under various labels: estoppel; third party beneficiary; group of companies doctrine; or is simply applied without relying on any stand alone doctrine (e.g. the *V2000* test).

Addressing these concerns ultimately is a matter of establishing what were the intentions of the parties. As will be discussed shortly, all three jurisdictions use this as the yardstick for measuring the appropriateness of extending the arbitration agreement. However, this analysis has been compromised by frequent reliance on a blanket "policy" to uphold arbitration agreements.[449]

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448. This is tellingly seen in the confused use of the term "arbitrability" in dealing with the issue of who is a valid party to the agreement. *See e.g., First Options*, 514 U.S. at 938.

449. Before leaving the topic of "common concerns", note that two concerns one might have thought to be prevalent are mentioned only rarely. First, there is little reference to the position of the promisee who transfers her rights and thereby may or may not remain bound to arbitrate disputes to the extent still legally interested in such. *See e.g.* Bank v. Bank, I.C.C Award No. 6733 (1992), 121 JOURNAL DU DROIT INT'L 1038 (1994) (in the subrogation context); Samuel, *supra* note 6, at 102 ("[w]hat little material exists in this area suggests that after an assignment, the assignor remains a party to the arbitral agreement"). Second, there is only passing discussion of the practical effect of adding the non-signatory to the arbitration as an extra party in terms of interfering with such issues

C. *The Policy Of Promoting International Commercial Arbitration*

Recent court decisions from all three jurisdictions have ultimately held that extension of the agreement to a third party has been at least partially influenced by a policy to uphold arbitration agreements: "the federal policy [that] strongly favors arbitration;"[450] a direction that "courts should if the circumstances allow lean in favor of giving effect to the arbitration clause;"[451] and the French "principle of validity" which exempts an arbitration agreement from all but French mandatory rules and international public policy.[452] While United States courts emphasize that the policy should not impinge on the principle that "[a] party cannot be required to submit to arbitration any dispute which he has not agreed to submit,"[453] one has to question why it is so frequently cited in the first place.

This pro-arbitration policy applies even more strongly to international disputes, expressed in the United States in the language of "considerations of international comity" or that enforcement is "an almost indispensable pre-condition to achievement of the orderliness and predictability essential to any international business transaction."[454] The same is seen in France, to the extent that international arbitration is accorded special treatment in terms of substantive rules applied to the conduct of the arbitral tribunal[455] and subsequent enforcement of foreign awards,[456] and to some extent in England.[457]

Notably, Fouchard & Gaillard support the *cour de cassation*'s rejection of special interpretation based on the principle of *in favorem validitas*:

> Where the disputed issue is whether a party agreed to be bound by an arbitration agreement, it is unhelpful to refer to the "validity" and "effectiveness" of an agreement that may not even have been concluded in the first place. Here, the debate is unconnected with both the principle of autonomy and that of the effectiveness of the arbitration agreement. The only relevant

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as appointment of the tribunal and sharing of arbitration costs. Some institutional rules have attempted to deal with this scenario. *See* ICC Rules (1998), Article 10; LCIA Rules (1998), Article 8.1. *See* also Dominique T. Hascher, *Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial* Arbitration?, 1 J. INT'L ARB. 127 (1983) (discussing the difficulties of third party rights).

450. *Collins*, 2 F. Supp. 2d at 1465 (citing United Steelworkers of Am. v. Warrior & Gulf Nav. Co. 363 U.S. 574, 582-83 (1960)).

451. Astro-Vencedor Compania Naveira S.A. v. Mabanaft G.M.B.H. [1970] 2 Lloyd's Rep. 267, 271 (per Mocatta J).

452. C.A. Paris, June 19, 1970, Hecht v. Buisman's JCP. This is the basis for the intention test in V2000, discussed *supra* at note 252 and accompanying text.

453. *United Steelworkers*, 363 U.S. at 582.

454. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (This applies not in the extension of the arbitration agreement context but in the arbitrability of securities law claims).

455. N.C.P.C. Title V, Arts. 1492-97.

456. *Id.*

457. *See* Arbitration Act 1996, Part II (applying only to domestic arbitration provisions, although never actually entered into force).

> issue in such cases is the proof of the existence and the extent of the parties' consent to the arbitration agreement, which is an entirely different question.[458]

This must be correct as any general "presumption of validity" or "policy favoring arbitration" cannot be a substitute for consent to arbitration. The application of such policy arguments is at best unjustified and, at worst, counterproductive to finding a reasoned solution to the third party problem.[459]

D. Parties' Intention As A Common Touchstone

All three jurisdictions have as their *Grundnorm* for extending the arbitration agreement a test based on whether this would be in accordance with the intentions of the parties. The importance of "intention" differs across the jurisdictions. At one end of the spectrum, is the French position that intention is enough in and of itself to extend the arbitration agreement to a third party.[460] In the United States, intention to include a third party is but one (albeit necessary) element in various of the legal theories employed to extend the arbitration agreement.[461] In England, intention is also important but is more likely to be associated with other legal requirements (e.g. the sufficient designation test in the new C(RTP) Act 1999)[462] or constrained by formality requirements (e.g. section 126 of the Law of Property Act 1925).[463]

A similar spectrum exists with respect to the fundamental issue of the scope of the inquiry permitted to ascertain intention. France, as seen in the *V2000* case, enjoys the most "liberal" policy, in that even mere "direct involvement" with the performance of the contract "can raise the presumption that the contracting parties' true intention was that the non-signatory party would be bound by the agreement."[464] The French approach also judges the third party's intent

458. FOUCHARD, *supra* note 11, § 440 (citing Cass. 1e Civ. June 11 1991, Orii v. Societé des Lubrifiants Elf Aquitaine, REVUE DE L'ARBITRAGE 95 (1992) (emphasis added)).

459. An example of such counterproductivity is the proposition that automatic transmission of arbitration clauses may actually weaken the attractiveness of arbitration. *See* Girsberger & Hausmaninger, *supra* note 73, at 141 (citing for the converse proposition Werner, *supra* note 73, at 17). These "institutional issues" will be returned to in the final section.

460. *See e.g. V2000*, *supra* at note 250 and accompanying text.

461. *See e.g. In re Prudential Ins. of Am. Sales Practice Litig.*, 133 F.3d at 225 (applying third party beneficiary doctrine).

462. *See supra* note 267 and accompanying text.

463. *See* KNAPP, CRYSTAL & PRINCE, *supra* note 79 and accompanying text.

464. FOUCHARD, *supra* note 11, at § 499.

on his or her "involvement" with the main contract as a whole, rather than requiring some separate indication of consent to the arbitration agreement.[465]

In the United States, the court in *Thomson* emphasized that the arbitration agreement "[c]ould not be so broadly construed as to encompass claims and parties that were not intended by the original contract."[466] Yet courts have been willing to venture into the "close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contractual obligations."[467] Indeed, much of the United States courts' expansive use of the estoppel doctrine in this context is really a backhanded way of inferring intent from the parties' representations (particularly in the case where a non-signatory seeks to establish that the signatory held itself out as willing to arbitrate).[468] United States courts are also willing to undertake some economic analysis, e.g. in probing the "close relationship" between the promisee and third party.[469] However this is usually justified on some other legal doctrine (e.g. "piercing the corporate veil") rather than being part of an intention inquiry for its own sake. Compare the position in France As in France, courts and tribunals are willing to gauge intent based on the parties' intention to be bound to the main contract rather than focusing on the arbitration agreement itself. Finally, critics also contend that the "pro-arbitration policy" operates sometimes as a substitute for contractual intent.[470]

In England the position is less clear. In applying the "through or under" mechanism for obtaining a stay in the earlier Arbitration Act, courts were willing to undertake relatively broad inquiries into, for example, corporate structure and proximity to the dispute.[471] A similar analysis may be undertaken in finding that an ad hoc arbitration agreement had arisen between the original promisor

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465. *V2000, supra* note 251, as translated in FOUCHARD, *supra* note 11, at § 499.

466. *Thomson*, 64 F.3d at 776.

467. *Sunkist Soft Drinks, Inc.*, 10 F.3d at 757 *cert denied* 513 U.S. 869 (1994) (quoting *McBro Planning & Dev. Co.*, 741 F.2d at 344).

468. In this case, the representations could meaningfully be relied on as an indication of intent to extend the agreement to that particular non-signatory (as manifested by the representations made) however the court often satisfies itself with the less precise inquiry of whether the signatory represented that it intended to arbitrate the claims (ignoring the issue of the third party's identity). This approach also obfuscates the important issue of when such intention should be measured, i.e. at the time of entering into the arbitration agreement, when transfer of the rights to the third party occurs, or once the dispute arises.

469. J. J. Ryan & Sons Inc. v. Rhone Poulenc Textile S.A., 863 F.2d 315, 320-21 (4th Cir. 1988).

470. *See e.g.*, Steve Walt, *Decision by Division: The Contractarian Structure of Commercial Arbitration*, 51 RUTGERS L. REV. 369, 398 (1999).

471. *Roussel-Uclaf*, [1978] 1 Lloyd's Rep. at 225.

and/or promisee and the third party.[472] However, these cases are few and of limited application. Rather, the more common approach is that seen in the "incorporation by reference" cases, in which analysis of the parties' intentions takes place only within the "four corners" of the documents at issue.[473] A similar desire to restrain the scope of inquiry into the parties' intent was evidenced in the drafting of the C(RTP) Act 1996, although this has yet to be judicially discussed.[474] Perhaps consistent with this, with some exceptions,[475] in considering the parties' intentions to expand the arbitration agreement to a third party English law still appears to focus separately on intention to be bound by the arbitration agreement itself.

However, the "spectrum" identified above should not detract from the observation that there is a discernible convergence of sorts in the treatment of third party situations in arbitration law.[476] Similarly, the rise of the broader intention test has been accompanied by a decline in the importance of formal validity requirements in all three jurisdictions.[477] This convergence will be further discussed in the next section in the context of options for reform.

Finally, the touchstone of "intent" is also a feature of the principles of international law and the institutional rules analyzed as part of the comparative law project. Certainly a theory based on the intention of the parties falls squarely within such important transnational concepts as "good faith" and "*pacta sunt servanda*". Moreover, arbitral tribunals applying international law concepts have been more willing on the whole than those applying national substantive law to extend third party agreements.[478]

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472. *See* Almare Societàddi Navigazione S.P.A. v. Derby & Co. Ltd., The Almare Prima, [1989] 2 Lloyd's Rep. 376 (no agreement found); Hoesch Export AG v. Hansa Projekt Transport, The World Umpire [1990] 1 Lloyd's Rep. 374.

473. *See e.g. Aughton*, 57 BUILDING L. REP. at 87.

474. *See* LAW COMMISSION REPORT 242, *supra* note 175, at § 4.17 (commenting that the more expansive "intention to benefit" test "has, in practice, failed to achieve consistent results").

475. *See e.g. Northern Reg. Health Auth.*, [1994] 2 All E.R. 175 (CA); see also section 8 of the C(RTP) Act 1999.

476. *See* W. Lorenz, *Contracts and Third Party Rights in German and English Law*, in THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES, AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY 65 et. seq. (Basil S. Markesinis ed., 1994) (discussing convergence in the general contract law context of English and German third party rights).

477. *See supra* Section IV.C.

478. *See e.g. International Chamber of Commerce Court of Arbitration: Interim Award Regarding Jurisdiction in the Arbitration Between Westland Helicopters Ltd. and The Organization for Industrialization, United Arab Emirates, Saudi Arabia, Qatar, Egypt, Arab British Helicopter Company*, 23 INT'L LEGAL MAT'L 1071, 1071 (1984) ("Everything in this case depends on the intention expressed by the parties in the arbitration clause. It is necessary and therefore sufficient in principle that they wish to bind themselves for the arbitrators to have jurisdiction at the same time against all

E. Reliance On Contract Law Principles

Finally, a comment in answer to the introductory question: to what degree does the arbitral law applied to the third party problem mirror the general contract law position on third parties? Courts in all three jurisdictions have clearly stated that contract law determines whether a person is bound to a valid arbitration agreement. In the United States, the Supreme Court has directed that courts "apply ordinary state-law principles that govern the formation of contracts."[479] In France, "the principles of interpretation that apply to arbitration agreements are the same as the general principles frequently adopted with regard to all contracts."[480] In England, "English law respects the parties' freedom to enter into arbitration agreements in the same way it respects the freedom to enter into other contracts."[481] Yet one could argue that the third party context is different: the question is not whether a person is necessarily a "party" to the arbitration agreement but rather whether the person is bound thereto despite not having signed the agreement. This is a distinction courts and commentators have not been willing to make. Rather, the comparative analysis untertaken in Section III evidences a clear decision to apply third party contract principles on the basis that the problem involves the same application of substantive contract law as is required for determining the parties to the agreement. The final section discusses the correctness of this approach.

Before doing so, however, note that despite the courts' frequent declaration that an arbitration agreement will be treated like any other contract, this is not always so. Sometimes the arbitration clause may be subject to a more restrictive interpretation than would otherwise apply.[482] In other cases, the court is more willing to extend the arbitration clause a more liberal interpretation.[483] On occasion, the courts have even applied a specially tailored test based on the commercial nature of arbitration provisions.[484] Thus, there is some truth to the observation that the arbitration agreement is "governed by special rules."[485] The final section of this article will return to the relationship between arbitration, contract

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of them and for one of them to be able to initiate proceedings against all of the other parties within one set of arbitral proceedings").

479. *First Options*, 514 U.S. at 944.

480. FOUCHARD, *supra* note 11, at § 476.

481. RUSSELL ON ARBITRATION, *supra* note 64, at § 2-003, at 28.

482. See e.g. *Aughton*, *supra* note 267, at 326, at 87 (there must be "very clear language to oust the jurisdiction of the Court").

483. *See e.g. Northern Reg. Health Auth.*, [1994] 2 All E.R. at 183 (extending the arbitration agreement to a subcontractor because of the "unique contractual relations developed").

484. *See e.g.* The Annefield [1970] 2 Lloyd's Rep. 252, 263 (1970) (interpreting an arbitration clause on the test of "what an ordinary businessman . . . would think with regard to the application" of such a clause).

485. SAMUEL, *supra* note 6, at 41. *Also cited* in A. BERNARD, L'ARBITRAGE VOLONTAIRE EN DROITE PRIVÉ 28 (1937).

law, the "intention test," and the notion of the arbitration agreement as a "special" contract.

VI. POSSIBLE SOLUTIONS TO THE THIRD PARTY PROBLEM

Having accepted the existence of a "third party problem" and concluded that this impedes the efficiency and certainty of international commercial arbitration as a tool of international commerce, this section compiles alternative solutions to the problem.

A. Relying On Individual Contract Drafters

In the absence of a uniform identical rule, some standard form contracts provide their own contractual term delineating the boundaries of third party involvement in any arbitration.[486] Ultimately, of course, the ideal outcome is exactly that: parties should turn their minds to the problem and create a clear allocation of responsibility in the event of a dispute arising. Indeed, in complex networks of contracts this may be the norm.[487] However, in most instances this is unlikely simply because, as a "matter of psychology," it is difficult in negotiating an agreement to "contemplat[e] in detailed terms the problems" that may attend the breakdown of a successfully completed relationship.[488]

Furthermore, parties may well be unable to predict legal variables that may ultimately impact on the issue such as the applicable law of a subsequent third party claim or factual variables like the later insolvency of a party. Indeed, the third party problem arises in part due to the unpredictability of international transactions and, in particular, long term contracts. This business uncertainty combined with the legal uncertainty already identified has prompted some

486. For example: the FIDIC Sub-contract form for use in international contracting with the main FIDIC contract form, sub-clause 19.2; the "blue form contractual provisions for multi-party arbitration," subclause 18(10); so-called "name-borrowing" whereby a sub-contractor is contractually entitled to bring a claim against the employer in the name of the main contractor. The latter is often used in conjunction with the JCT standard form but was disparaged as being "doctrinally unsound" in *Northern Reg. Health Auth.*, [1994] 2 All E.R. at 23-24 (per Dunn LJ).

487. Böckstiegel, *supra* note 21, at 197 ("Finally, almost all contracts in this field [international construction and infrastructure projects] are tailor-made for one specific project even if certain model contracts such as those of FIDIC are used. Therefore, the usual guidance by national contract law or international principles such as the Unidroit principles are either not applicable or do not suit the specific contractual relationship.").

488. A.T. von Mehren, *To what extent is international commercial arbitration autonomous?* in LE DROIT DES RELATIONS ÉCONOMIQUE INTERNATIONALES: ÉTUDES OFFERTES À BERTHOLD GOLDMAN 217, 226 (1982).

commentators to suggest that the "safest answer" to the third party arbitration problem is simply to insert a clause explicitly negating any possible extension to third parties.[489] This "safe option" may have not only unintended circumstances (e.g. in a subsequent insolvency) but may also represent a missed opportunity to include some explicit mechanism for dealing with third party issues, e.g. explicitly incorporating a subcontract. Acknowledging the practical restrictions on contract drafters, reliance on individual action to resolve third party issues is unwise.[490]

B. Piecemeal Reform

Certain statutory and common law exceptions have been developed to clarify whether third parties are entitled to rely on an arbitration agreement despite a lack of privity, e.g. case law arising out of the Third Party (Rights Against Insurers) Act 1930 in England;[491] and the autonomy of a bank guarantee from any arbitration agreement in France.[492] While these examples reflect domestic law, there is no reason why international treaties could not undertake a similar role to effect universal piecemeal reform.[493]

While something is better than nothing, such piecemeal efforts may in fact be counter-productive as they may usurp the urgency of obtaining a comprehensive solution.[494] Furthermore, piecemeal reform may create injustices where the underlying business transaction does not fit entirely within the recognized subject matter for third party arbitration rights. For example, a trustee in bankruptcy may be able to compel arbitration of a dispute arising out of the bankrupt's contract but the dispute may also involve another third party unable to avail itself of such procedures (e.g., a guarantor of a loan). Further complica-

489. Blessing, *Extension of the Arbitration Clause to Non-Signatories*, in AAMCA, *supra* note 54, at 163-164; *see also* Wright, *supra* note 198, at 138.

490. Of course even if a clear international solution to the third party problem was developed, the principle of party autonomy should still dictate that a clear contractual prohibition on the extension of the arbitration agreement would trump all other arguments.

491. *British & Foreign & TMM Transcap*, [1998] I.L.PR. at 838, at § 38, *citing* Firma C-Trade S.A. v. Newcastle Prot. & Indem., [1990] 2 Lloyd's Rep. 191 (H.L.). *See supra* note 142 and accompanying text. *See also London Steamship Owners*, [1990] 2 Lloyd's Rep. at 21 (discussing position where arbitration proceedings have already commenced).

492. *See* Bernard Hanotiau, *Arbitration and Bank Guarantees*, 16(2) J. INT'L ARB'N 15 (1999).

493. This could be in a discrete subject-specific area in which arbitration is common (e.g., software distribution) or in a broader substantive convention such as the Convention for the International Sale of Goods.

494. An analogy exists to the decline in England of the rule against a contractual beneficiary enforcing the contract to which she is not a party. Piecemeal legislative reform (e.g. the Third Parties Rights Against Insurers Act 1930) and common law reform (e.g. the device of "Trust of a Promise) are believed to have slowed the pace of implementing the reforms eventually initiated in the C(RTP) Act 1999. *See* Atlas Shipping v. Suisse Atlantique [1995] 2 Lloyd's Rep. 188.

tions could arise where there are questions of the applicable law, such that a trustee in bankruptcy in one jurisdiction may not have the same rights as in another. In short, piecemeal reform is an unattractive option for establishing a long term workable rule of general application.

C. Procedural Protections/Powers

The complexity and uncertainty of "protections" for third parties contained in arbitration legislation, civil procedure rules, and arbitral institution rules have already been outlined.[495] Importantly, these "procedural protections" are usually nothing more than mechanisms to ameliorate the procedural complications that arise specifically because non-signatories are not permitted to participate in arbitration. Therefore, this seems an inappropriate basis for addressing the third party problem.

A variation on this would be to empower arbitrators or the courts to make orders analogous to civil litigation joinder or consolidation to address some of the circumstances where third parties seek involvement in a hearing. However, applying such reforms could undermine the consensual basis for arbitration and call into question the legitimacy of the arbitrator's jurisdiction. For the reasons developed in this Section, it seems preferable to have a jurisdiction-creating rule premised on an inquiry into consent rather than some more unrestrained discretion enjoyed by the arbitrators or courts. This allows parties to conduct themselves, including their initial contracting, with more certainty. It also maintains the appropriate distinction between arbitration (based on consent) and litigation (based on compulsion).

D. Strengthening The Choice Of Law/Applicable Law Rules

A less radical option for reform is to accept Professor Sandrock's contention that the resolution of the third party problem lies in the application of the "respective rules of national proper laws of contract."[496] However, the inconsistency of proper law makes it difficult to meet the needs of international commerce on this issue.[497] Thus, one option is to clarify and harmonize choice of law rules so that parties can contract with a level of predictability in knowledge of what rules will apply to decide (a) the validity of an agreement vis-à-vis the

495. *See supra* Section IV.A.
496. Sandrock, *supra* note 12, at 168.
497. *See supra* Section IV.B.

third party, (b) the validity of the contract creating the right in the third party (e.g. an assignment agreement); and (c) who will decide (a) and (b), i.e. the arbitral tribunal or the courts.

Of course, pursuing such an option would require international coordination, e.g. a treaty promulgating conflict of laws rules or a model law (or amendment to the existing UNCITRAL Model Law or the New York Convention) providing a blueprint for national legislation. This is an attractive option in as much as it uses the existing "traditional" tool of private international law to resolve the problem. Indeed, there have been advocates of developing a specific "conflict of laws" set of rules for international arbitration.[498] However, there are four qualifications to the feasibility and desirability of approaching the problem this way.

First, this theory represents only a "partial solution" in that it would not achieve harmony of outcome, i.e. an enforceable agreement in one state might still be unenforceable in another. Rather, it simply clarifies whose law should determine the issue and by whom that law should be applied. Second, the enormity of the task cannot be underestimated. Other attempts at developing uniform rules for the law applicable to arbitration agreements have been unsuccessful[499] Although this does not apply to all such attempts,[500] third party issues can arise in legal fields as diverse as corporate law (group of companies doctrine) and the law governing assignment. As such, is it even feasible to fashion one rule for all? Third, and related to the above, if this option were to be pursued, it could better be made part of a broader project of harmonization by international agreement (e.g. the Rome Convention) or by *lex mercatoria*. Fourth, to the extent that any clarified or harmonized conflicts rules were to be based on other more traditional doctrines (e.g. supremacy of *lex fori*), this has the potential to undermine the parties' intentions and to encourage forum shopping. Both are results inimical to the attractiveness of international commercial arbitration.

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498. Von Mehren, *supra* note 488, at 277. ("Indeed, scholars have noted that there is a 'strong argument' to be made for the development of a 'lex mercatoria of conflictual rules . . . in response to the special opportunities and challenges that conflicts questions present for the arbitral process.'").

499. *See e.g.* Convention on the Law Applicable to Contractual Obligations (Rome, Jun. 19 1980), Art. 1(2)(d) (specifically excluding its application to arbitration agreements). Failure to achieve a consensus view also stymied efforts to clarify the position of judgments concerning arbitration in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968). *See* Dominique Hascher, *Recognition and Enforcement of Judgments on the Existence and Validity of an Arbitration Clause under the Brussels Convention*, 13 ARB'N INT'L 33 (1997) (discussing the failure to issue a joint declaration or amend the Convention).

500. *See e.g.* Art. V(1)(a) of the New York Convention or Art. IX(1) of the European Convention on International Commercial Arbitration (Geneva, April 21 1961).

E. Creating A Formal Test For Third Party Arbitration

This option could take many different forms. One possibility is a test that has as its foundation the principle that an arbitration agreement will bind a third party non-signatory if this is consistent with the intention of all parties.[501] The justification for this test stems from the use of intention as a touchstone in various forms in all three jurisdictions examined and applied (albeit inconsistently) under all of the legal theories analyzed. Arguably, it is the rule that already applies generally in French law.

Pursuing this option requires formalizing it into a substantive rule of arbitration law. Ideally, this would be achieved in an international agreement (e.g. an amendment to the New York Convention) or a model law that provides a basis for harmonization at domestic law (e.g. an amendment to the UNCITRAL Model Law). The desirability of this approach depends greatly on the exact wording of the mooted law. Ideally, the rule should address all the concerns identified in the conclusion to the comparative project above.[502] In some respects, the rule must also achieve a compromise between these concerns, e.g. the English courts' hesitancy to apply an intention test as widely as that accepted in France. The drafter of such a rule also faces the daunting task of overcoming the differences between dissimilar factual situations identified as giving rise to disparate legal theories, e.g. the range of legal theories applied to the charter party/bill of lading situation.[503]

However, the fundamental objection to such an approach is that present conventions do not seek to lay down substantive laws for determining who is a party, so why should they seek to create rules for third parties? Moreover, the formulation of such a rule raises a host of ancillary questions. Must the dispute still arise out of "a defined legal relationship, whether contractual or not?" Should the parties ignore the requirement of "an agreement in writing" or does it act as a useful constraint on the extension to third parties? Must the parties manifest their intent in writing? Should one set some bounds on the extent to which one is entitled to refer to documents outside the four corners of the con-

501. And the non-signatory will also be permitted to compel arbitration of a dispute within the scope of the agreement.

502. *See supra* Section V.

503. Girsberger & Hausmaninger, *supra* note 73, at 164. This argument would support adopting an international rule for each of the legal theories analyzed. Indeed, models have already been offered in the assignment field. *Id.* However, this author's concern is that such piecemeal harmonization will simply encourage recharacterization of a particular scenario to suit the outcome desired. If piecemeal reform is pursued it would be better done in discrete factual areas (e.g., insurance), but for the reasons discussed *supra* at Section IV.B, this too is unsatisfactory.

tract containing the arbitration agreement? What consequential amendments are necessary to address appointment of the arbitral tribunal etc? Must there be a prohibition on amending the arbitration agreement after its formation, i.e. does the third party have rights to prevent the arbitration agreement from being altered?

While these ancillary questions are complex, it is possible that such a rule could develop over time. However, it would seem incongruous for a principle to be established applying only to the narrow issue of third parties in arbitration. It would be more conceivable for this task to be undertaken as part of a broader project of harmonization of substantive arbitral law, possibly in conjunction with a more ambitious effort to harmonize general contract law in transnational commerce.[504]

F. Relying Upon (And Developing) Anational/Transnational Rules

In the conclusions section to the comparative analysis,[505] it was already noted that the rise of a test premised on "the intention of the parties" is consistent with that the "good faith" principle found in the *lex mercatoria* and other anational or transnational legal regimes. Therefore, a further option for resolving the third party problem would be to encourage arbitrators and courts to deal with non-signatory issues by reference to such a principle. This differs from the previous reform option in that it does not depend on international agreements or domestic legislation but rather operates as part of a transnational or anational body of rules "[d]erive[d] from the convergence of the main legal systems from which they are drawn."[506]

There would be two ways to invoke the rule. First, where the parties explicitly have chosen to have their dispute governed by transnational rules and the arbitral tribunal or court extends those rules to the determination of the validity of the agreement as it concerns a third party. Second, and more controversially, an arbitral tribunal could exercise its powers to apply the law determined by the conflict of laws rules it considers applicable[507] in order to determine the validity of the agreement as it concerns a third party on the basis of transnational rules

504. Of course this presupposes that developments in international commercial arbitration are constrained by contract law. The non-contractual development approach premised on transnational norms is discussed in the next section.

505. *See supra* Section V.D.

506. FOUCHARD, *supra* note 11, at § 1447, at 806. This could be characterized as transnational rules, "general principles of law", "*lex mercatoria*" or any of the other terms used to refer to legal rules derived from outside of national domestic law.

507. UNCITRAL Model Law, Article 28(2).

(regardless of the law applicable to the substance of the dispute).[508] The validity of such "transnational" approaches has been the subject of much debate.[509]

For present purposes, it suffices to say that there is some appeal to the idea that transnational rules regarding the role of third parties to the arbitration agreement could be crystallized from the partial convergence of the rules applied in the legal systems discussed above. Further, instead of being a "formalistic" rule of the sort envisaged in the previous section, a transnational rule could be premised on the "broader" principles of good faith and *pacta sunt servanda* as generally accepted "principles of international commercial law."[510] Indeed, arbitral tribunals have previously applied these principles to the interpretation of a contract in order to determine its validity, tied also to the touchstone of the parties' intentions:

> The requirement that contracts be interpreted in good faith is merely another way of saying that a literal interpretation should not prevail over an interpretation reflecting a party's true intentions. As observed in an earlier award, 'the fundamental principle of good faith . . . entails searching for the common intention of . . . the parties.'[511]

This formulation sounds remarkably close to the proposition put in the last of the quotes introducing this article: justice demands that a formalistic interpretation of the agreement not prevent the extension of the arbitration agreement to a third party if that is what the parties intended.[512]

However, such an approach is inherently dangerous. To pick just one of the critical commentators:

> [B]roadly speaking the problems associated with the new *lex mercatoria* may be divided into three categories. First, there is no clear consensus on its sources, although a number of sources have been identified with some consistency in the literature and elsewhere. Second,

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508. An arbitrator may rationalize such an approach on the *tronc common* method of determining a rule based on the commonalties of the applicable legal systems, although this is usually applied only where the parties have so chosen *See* FOUCHARD, *supra* note 11, at § 1457.

509. *See generally* Berthold Goldman, *La lex mercatoria dans les contrats de l'arbitrage internationaux: réalité et perspectives*, 106 J. DROIT INT'L 475 (1979); O. Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L COM. L. Q. 747 (1985); Michael J. Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, 4 ARB'N INT'L 86 (1988); von Mehren, *supra* note 489, at 217; FOUCHARD, *supra* note 11, §§ 1443 et seq.

510. FOUCHARD, *supra* note 11, at § 1460 (citing the LIAMCO Award, 12 Apr. 1977, 20 INT'L. LEGAL MAT'L. 54 (1980)).

511. FOUCHARD, *supra* note 11, at § 1470, at 825 (citing Award of Jun. 10, 1955, Gouvernement Royal Hellénique v. Gouvernement de sa Majesté Britannique, REVUE DE L'ARBITRAGE 15 (1956)).

512. *See* Blessing, *supra* note 4 (author's paraphrasing).

it is unclear where the new *lex* will be applied. Third, the new *lex mercatoria* is simply lacking in content.[513]

In this instance, the same lack of convergence in the details of the various intent-based tests plus the diversity of third party situations raise concerns about whether any rule really has crystallized as a truly anational norm. Moreover, it is doubtful whether such a transnational rule would achieve the certainty necessary for efficient risk allocation in international contract making. Finally, adoption of such a vague standard may impede developing a more precise rule as part of any general contract harmonization.

G. Relying Upon General Contract Law

As discussed in the conclusion to the comparative section, careful application of general contract law principles can solve many third party scenarios. Therefore, one option would involve strictly treating third party issues as a matter of contract law and applying the "general principles of contract and agency" to govern the extension of the arbitration agreement to a non-signatory third party.[514]

This approach differs from "creating a formal test for third party arbitration"[515] because there it was sought to fashion an "intention of the parties" test which would not directly be constrained by contract doctrine. With the instant option, the "ordinary principles of contract and agency" would constrain the ability of a third party to compel and to be compelled to arbitrate. While the intention of the parties may be a fundamental part of the principles of contract and agency, the more doctrinally sound approach is to adhere to existing general legal doctrine rather than create a special third party test for international commercial arbitration agreements.

Accordingly, such principles as assignment, third party beneficiary and subrogation should all be applied on the *same* basis as with any other contract. Thus, for example, English courts should abandon the last vestiges of the rule of strict interpretation of arbitration agreements historically linked to a fear of "ousting the jurisdiction of the courts." However, so too should United States courts forego the vague "pro-arbitration policy of the Federal Arbitration Act" and reliance on the uncertain "equitable estoppel" theory (at least in its broad hybrid sense).[516] The French position is somewhat harder to criticize in a system where the nature of the agreement (i.e. international arbitration) seems to be a

513. Phillip D. O'Neill & Nawaf Salam, *Transnational Rules and International Commercial Arbitration I.C.C. Pub. No. 480/4 (1993)*, cited in REDFERN & HUNTER, *supra* note 2, at § 2-61, at 120.

514. *Thomson*, 64 F.3d at 776.

515. *See supra* Section VI.E.

516. *See supra* note 291 and accompanying text.

fundamental part of the general law of obligations, however the applicable test should remain anchored to the touchstone of consent to be bound by the agreement, and eschew the dangers of fabricating "intention" based on economic proximity or interrelatedness of business transactions.[517]

The obvious disadvantage of such an approach would be that it foregoes the advantages of an internationally harmonized approach, leaving the parties at the mercy of the vagaries of choice of law issues. Further, one would lose the opportunity to provide a unified rule for all the different sorts of third party scenarios (if that is possible). However, the doctrinal and policy advantages to a more constrained contractual approach outweigh these disadvantages, as are discussed in the following section.

VII. THE RELATIONSHIP OF THE REMEDIES TO THE PROBLEM: GETTING BACK TO THE CONSENSUAL NATURE OF ARBITRATION

Before reaching a final conclusion, it is useful to stand back from the doctrinal detail of the comparative project and attempt to put the debate about the third party problem (and hence the solutions offered) in perspective.

A. Jurisdiction Premised On A Synthesis Of Consent/Contract

The working assumption posited at the outset of this article was that the third party problem exists within two fundamental characteristics of arbitration. In the substantive dimension, commentators accept that arbitration is "contractual by nature." In the jurisdictional dimension, the distinguishing feature of arbitration is that it is dependent on the consent of the parties. This section will discuss the possible synthesis of these two fundamental concepts by applying the "general principles of contract and agency" to determine what constitutes consent so as to permit extension of the arbitration agreement to a third party. This raises three questions.

> Is it Appropriate to Apply Substantive Contract Law to the Third Party Problem?

Courts have on occasion strained to treat arbitration agreements as a "special" kind of contract, e.g. in applying onerous form requirements so as to evi-

517. *Supra* note 250 and accompanying text.

dence intention to incorporate an arbitration clause into a bill of lading.[518] One can surmise that such special treatment is an attempt to address the concerns about extension of the arbitration agreement as identified in Section V.B. Given this uneasiness, is it desirable to be applying substantive contract law principles to the third party problem?

First, despite differences in implementation, all jurisdictions studied assess whether or not a party is bound by an arbitration agreement on the basis of general contract principles: was there an intention to be bound; was the clause sufficiently certain; was consent vitiated by duress, mistake or unconscionable conduct? These are all classic questions of contract law. Why then should "extension" of the contract to a third party, which raises the same basic issues, be different? Contract law frequently has to deal with the problem of defining the rights of parties who are not signatories to the agreement. In such situations, it may be necessary to transfer rights (e.g. assignment, subrogation, etc.) or to allow non-parties to enforce rights (e.g. incorporation by reference, third party beneficiary principle, etc.). Similarly, there may be disputes about who the parties to the contract really are so that it is necessary to rely on equitable estoppel or agency principles. Why should arbitration agreements be treated any differently?

Second, acceptance of the contractual nature of arbitration and recognition of the decreased reliance on formal requirements,[519] will inevitably involve the need for some kind of objective basis for establishing consent. Thus, courts have been able to draw on contract principles like "constructive notice" to bind third parties to an arbitration agreement based on the reasonable expectations of a person in a sophisticated third party's position where the third party was using a common standard form.[520]

Third, in as much as the arbitration agreement may be considered "procedural," is it appropriate to apply "substantive" contract law?[521] It is suggested that this is not a valid ground for treating the third party problem any differently.

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518. *See supra* note 326 and accompanying text (discussing *Aughton*, 57 BUILDING LAW REP. at 87).

519. *See* VARADY, BARCELO & VON MEHREN, *supra* note 5, at 86-87 ("During the last decades, however, the accepted notion of what constitutes a written agreement has become more and more flexible." This in turn affects the "position of parties closely connected with the transaction but not signatories of the arbitration agreement.").

520. Steel Warehouse Co., Inc. v. Abalone Shipping Ltd. of Niccosai, 141 F.3d 234, 237 (5th Cir. 1998) (holding "proper incorporation yields constructive notice" in what was really an incorporation by reference case).

521. None of the jurisdictions studied in this article treat the arbitration agreement in this manner. However, this is not the case in other legal systems. *See* Girsberger & Hausmaninger, *supra* note 73, at n.106 and n.109 (suggesting the arbitration agreement may be treated as procedural in Austria, Switzerland and Germany but noting that this conclusion has several qualifications). This author also suggests subsequent legislative reform in those countries further limits the extent to which the arbitration agreement is considered procedural.

After all, the question of whether a signatory is party to a valid arbitration agreement would trigger the same objection, yet all three jurisdictions treat this as a matter of contract law.[522] Moreover, other analogous procedural jurisdictional rights-creating agreements are also judged on "normal" contract law principles. For example, in the case of forum selection agreements, courts have held that non-parties may be bound to the agreed forum if some element of traditional substantive contract law would confer those rights and duties, e.g., courts have used third party beneficiary,[523] assignment[524] and novation[525] doctrines to bind non-parties to the forum selection agreement.[526] Similarly, contract law principles are applied to cases involving additional named insureds in insurance policies (non-signatories with rights to enforce an insurance policy)[527] and disputes concerning manufacturers' warranty exclusion clauses (being jurisdictional right-limiting agreements) included in the manufacturer-retailer contract where a consumer brings a direct action against the manufacturer on the basis of that contract.[528] Note also that the third party arbitration provision enacted in the English C(RTP) Act 1999 was based in part on what the Law Commission considered to be the analogous scenario of applying contract principles to exclusive jurisdiction clauses.[529] Finally, Girsberger & Hausmaninger suggest that even if the arbitration agreement is treated as procedural, this does not preclude the application of substantive law rules "*per analogiam* where no specific rules govern a particular issue and where sound reasons speak in favor of such an analogous application."[530]

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522. *See supra* Section V.E.

523. *See, e.g.* Process & Storage Vessels, Inc. v. Tank Serv. Inc., 541 F. Supp. 725 (1982), *aff'd*, 760 F.2d (3d Cir. 1985).

524. *See e.g.* Moretti & Perlow Law Offices v. Aleet Ass'n, 668 F. Supp. 103 (D.R.I. 1987).

525. *See e.g.* Richardson Eng'g. Co. v. I.B.M. Corp., 554 F. Supp. 467 (D. Vt. 1981), *aff'd* 697 F.2d 296 (2d Cir. 1982).

526. *See generally* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 85 n.253 (1992).

527. *See* Mark Pomerantz, *Recognizing the Unique Status of Additional Named Insureds*, 53 FORDHAM L. REV. 11 (1984) (arguing that general contract law doctrine should be applied and that this provides sufficient flexibility to recognize the special nature of the insurance contract).

528. *See* Dean. W. Russell, *Enforcing Warranty Exclusions Against Non-Privity Commercial Purchasers: The Need for Uniform Guidelines*, 20 GA. L. REV. 461, 462 (1986).

529. LAW COMMISSION REPORT 242, *supra* note 175, at §14.18, n.25 (referring to the Privy Council decision in *The Mahkutai* [1996] 3 W.L.R. 1 in which an exclusive jurisdiction clause was distinguished from exception and limitation clauses (jurisdiction rights-limiting provisions) on the basis that the former creates mutual rights and obligations as to jurisdiction rather than just benefiting one party).

530. Girsberger & Hausmaninger, *supra* note 73, at 141.

Fourth, there is the simple fact that courts have unambiguously and repeatedly upheld the applicability of general contract principles to the third party problem.[531] Indeed, the United States Supreme Court, in the context of whether there is a binding agreement, has recently repeatedly reaffirmed its contractualist approach to arbitration.[532] While there have been objections to United States courts' contractualist approach, these have been largely limited to issues of questionable consent in the labor and consumer contexts,[533] which are of limited relevance to international commercial arbitration.

What Do "General Principles of Contract and Agency" Have to Do With Consent?

One could imagine the courts and tribunals applying a test which asks only whether the parties consented to the arbitration agreement being extended to the third party in question; a position similar to the "intentions" aspect of the tests identified in Section V.D. This would be unsatisfactory for the following reasons. First, to do so would be to apply a looser standard than applies to deciding who is a party to the agreement in the first place. Second, it would deprive the decision-maker of the use of the standards contract law doctrine has developed for dealing with third parties whose consent is not manifested in the agreement itself. Thus, for example, substantive contract assignment doctrine is able to balance form requirements (e.g. Law of Property Act 1925 in England) with the possibility that a contract was entered into *intuitu personae* (e.g. in France) and with the practical necessity of transferring obligations in string contracts (e.g. in marine insurance). Furthermore, assignment doctrine provides guidance as to what is binding and the proper scope of inquiry into whether the parties intended the agreement to be assignable.

In other words, "consent" by itself is not enough without some more structured framework within which to assess the extent of third party rights and obligations to arbitrate. The "general principles of contract and agency" provide that necessary framework as long as they are applied with sensitivity to the touchstone of "consent."

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531. See discussion above at Section V.E and especially at note 479 and accompanying text.

532. *See e.g.*, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("This Court has determined that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'") (citing *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

533. *See e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997).

What Does Reference to "General Principles of Contract and Agency" Mean?

This phrase is simply used to suggest that the general contract law of the domestic legal system should be applied to arbitration agreements to determine the extent of the rights and obligations of third parties. Which begs the question what is meant by the reference to "agency"? Admittedly, the "contractual" discussion above marginalizes the "agency" limb of the test espoused in *Thomson*. However, this can be explained by the fact that arbitration is contractual by nature and the only need for a reference to agency is to address those cases where the signatory to the agreement is not the real contracting party but rather signed the contract on behalf of her principal (in which case it is the principal who is the real party). Thus, the matter could really be described as one of contract law.[534]

B. Contours Of The Academic Discussion Of The Third Party Problem

The various options and conclusions drawn from the comparative project can also be analyzed through the filter of the different jurisprudential theories applied to international commercial arbitration.[535] The classic formulation recognizes four theories: the jurisdictional; the contractual; the mixed or hybrid; and the autonomous. These have been summarized in the following way:

> A contractual theorist would necessarily advocate unhindered party autonomy, whereas a jurisdictionalist would argue for substantial judicial supervision of arbitration. An adherent of the mixed or hybrid theory is likely to favor an effective mixture of autonomy and regulation, whereas an autonomist would focus on what is necessary to ensure that arbitration meets the needs and objectives of the parties.[536]

Applying these labels to the third party problem, one can appreciate the options identified in the previous sections are more or less appealing depending on one's understanding of the nature of arbitration. Most obviously, a solution based on

534. *See e.g. Bell-Ray Co.*, 181 F.3d at 435 (rejecting the wider "agency theory" in refusing to extend the arbitration agreement to the officers and directors of the defendant-claimant).

535. Volumes have been written on this topic and the following serves only the limited purpose of providing vocabulary to analyze the options and to set up the final conclusion. The discussion is drawn mainly from the following sources: A.F.M. Maniruzzaman, *State Contracts and Arbitral Choice-of-Law Process and Techniques: A Critical Appraisal* 15 J. INTL'L ARB'N. 65 (1999); SAMUEL, *supra* note 6; von Mehren, *supra* note 488, at 217.

536. Maniruzzaman, *supra* note 536, at 67 (citing OKEZIE CHUKWUMERIJE, CHOICE-OF-LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 14 (Quorum Books 1994)).

the development of a transnational rule to govern third party situations would be inimical to a strict jurisdictionalist and, possibly, most appealing to those who view international arbitration agreements as autonomous.

Understanding the range of opinions expressed in the Basel and Paris conference papers discussed throughout this article is best accomplished through a jurisdictional approach. Thus, Professor Sandrock's rejection of the "group of companies doctrine" as the product of a "poorly defined *lex mercatoria*" which is rendered unnecessary by reliance on the respective rules of the national proper laws of contract,[537] displays a classic "jurisdictional" reliance on national proper laws of contract and the substantive national rules of contract to govern extension of the arbitration agreement. For Professor Sandrock, the "solution" to the "third party problem" lies solely within the realms of national domestic law, both in terms of choice-of-law rules and contract doctrine. Contrast this with the qualified support for the development of the group of companies doctrine proposed by Charles Jarrosson[538] and the more enthusiastic support of Yves Deraines.[539] The former proposes development of the doctrine within the confines of contract law (albeit the French law of obligations);[540] the latter sees the development as a function purely of international commercial arbitration.[541] The authors are proposing in these papers something closer to, respectively, the hybrid and autonomous schools of thought.

Dr. Blessing's introduction suggests that the above dichotomy can be explained as a divide between, on the one hand, those who "favor a more formalistic approach" (i.e. those who would negate the existence of a valid arbitration clause where it is not evidenced in a written document; are less likely to consider other documentary evidence; and are skeptical of the group of companies doctrine) and, on the other hand, those who take a "less formalistic approach" (i.e. who consider an arbitration agreement to be "validly concluded when all relevant circumstances permit such a conclusion and where such a conclusion is warranted having regard to the objectively fair and subjectively reasonable expectations of the parties").[542] Applying this dichotomy to the non-signatory situation, Dr. Blessing divides the camps into "mercatorists" and "non-mercatorists." Mercatorists:

> maintain that the leading criteria are to be derived from general principles of law, i.e. from a-national or transnational law, or from a *lex mercatoria*. According to them it is neither appropriate nor necessary to search for a legal basis in the applicable *lex causae* ... to determine

537. Sandrock, *supra* note 12, at 168.

538. Charles Jarrosson, *Conventions d'Arbitrage et Groupes de Societes*, in AAMCA, *supra* note 4, at 209.

539. Yves Deraines, *L'Extension de la Clause d'Arbitrage aux Non Signatories - La Doctrine des Groupes de Societes*, in AAMCA, *supra* note 4, at 241.

540. Jarrosson, in AAMCA, *supra* note 4, at 209.

541. Yves Deraines, in AAMCA, *supra* note 4, at 241.

542. Blessing, in AAMCA, *supra* note 4, at 18.

> whether or not a third party must be deemed to have become a party to the particular contract. . . . Mercatorists will also say that it is quite unnecessary to examine particulars of the relevant national laws . . . because, . . . the extension of an arbitration clause to a non-signatory must necessarily be made as a consequence of the *bona fides* principle, in particular its requirement to act in good faith, and such principle does in fact underlie all national laws . . . Mercatorists also tend to say that it is a demand of the times that the key and fundamental principles of international trade should be judged according to the standards of internationally recognized principles consistently applied around the world, rather than to have regard to purely local niceties or perceptions which may not stand in conformity with the objectively fair and subjectively reasonable expectations [of the parties].[543]

Compare this to the "non-mercatorists" who:

> maintain a position that it is . . . not necessary to resort to any transnational notions, or to vague principles as those which are said to pertain to the *lex mercatoria*. They do say that the relevant national laws do contain all necessary legal tools and remedy [sic] to adjudicate the situation in a manner responsive to those demands of modern international business and trade, and particular reference is made to . . . rules on estoppel and the rules on acquiescence in common law, the alter ego doctrine in common law, notions pertaining to the doctrine of piercing of the corporate veil, notions pertaining to apparent and ostensible authority etc.[544]

However, the two camps are described as engaging in a "pillow fight" because both approaches will lead to the identical result. This is because:

> the provisions of national laws applicable in this context are directly grounded in the *bona fides* principle . . . and it is exactly the very same *bona fides*-principle which is the heart, the most essential center piece, of all transnational rules, of the so-called general principles of law (private or public) of the *lex mercatoria*, as well as the trade usages; and it is again the *bona fides*-principle which has directly been transcribed into . . . the UNIDROIT principles.[545]

While one cannot dispute that some notion of *bona fides* underlies the application of contract and agency law in national legal systems, Dr. Blessing's conclusion obscures the important jurisprudential divide between the two "camps" understood by applying the labels discussed. Moreover, to reduce the debate to the semantics of what constitutes "bona fides," avoids the fundamental issue of whether and how such a notion of "fairness" can co-exist with the strict requirements of the consensual nature of arbitration. Section VII.A of this article suggested a synthesis of consent and contract to achieve this function. The following section argues it is the best model for an imperfect world.

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543. *Id.* at 21.
544. *Id.*
545. *Id.* at 22.

VIII. CONCLUSION: A CONTRACTUAL SOLUTION TO THE THIRD PARTY PROBLEM

This article commenced with three quotes. Each underscored the contractual nature of arbitration and the necessity that there could only be a valid arbitration where there is a valid agreement. However, the quotes from, first, *Thomson*, and then from Dr. Blessing, introduced qualifications on this apparently straightforward principle. First, that a "non-signatory can also be bound by the arbitration agreement; second, that in certain circumstances "justice would not seem to be done" if a non-signatory third party were not considered bound by the arbitration agreement.

This article has sought to show that these qualifications are not novel when viewed as part of the larger development of contract law. Indeed, ever since Roman law rejected the notion of a third party acquiring rights and obligations under a contract, Western legal systems have grappled with how to define a third party and how to remedy those situations where it would be "unjust" to deny a non-party the ability to enforce a contractual benefit or to be bound by his conduct in relation to the contract.

While the third party problem in general contract law is nothing new, the specific context of international commercial arbitration raises some unique complications. In particular, the need to remain true to the touchstone of arbitration: consent to the jurisdiction of the tribunal. As well as the common concerns identified in Section V.B, there are such complicating factors as addressing applicable law/choice of law issues, distinguishing between intention to be bound to the underlying agreement and to the arbitration agreement, and judicial suspicion exacerbated when such "ouster of the courts' jurisdiction" is being extended to a third party. Thus, it is little wonder that courts in the jurisdictions studied have a tendency to treat arbitration agreements as a "special" kind of contract, while simultaneously and incongruously declaring their commitment to applying the "ordinary principles of contract and agency."

Sections VI.G and VII.A have put the case that application of the "general principles of law and agency" is the best model for mediation between the relevant concerns discussed, while still remaining true to the contractual and consensual nature of arbitration. That is, any solution to the third party problem should be confined within the parameters of contract doctrine. This is the fundamental lesson this article has sought to instill: it is preferable to draw on the rich (even if sometimes confused) national bodies of contract law to define the boundaries of what the circumstances are where "justice" demands the arbitration agreement be extended to a third party (to use Dr. Blessing's language). Contractual theories such as assignment, subrogation and the rule pertaining to third party beneficiaries already carry the imprimatur of law and the conceptual depth of accepted doctrines. It is they that should define what constitutes a situation where a third party will be subject to an arbitration agreement.

To restate a recurring theme of this article: too often courts and arbitral tribunals have succumbed to the "temptation . . . to reach for the real *personae dramatis*"[546] despite the limitations imposed by the contractual nature of the arbitration agreement and the primacy of consent to arbitral jurisdiction. There are six main complaints. First, bending contract doctrine to bring a third party within the purview of the arbitration agreement (e.g., imposing the burden of an arbitration agreement on a defendant non-signatory as a third party beneficiary). Second, an overly expansive application of estoppel doctrine to create consent to the arbitration agreement (e.g. where a non-signatory is bound merely by pursuing a claim the subject matter of which relates to the contract containing the arbitration agreement). Third, confusion between substantive rights to make a claim on the underlying contract, and intention to be bound by the imbedded arbitration agreement. Fourth, unreasoned amplification of the scope of the arbitration agreement (i.e. scope of subject matter) to be indicative of parties with whom the signatories intended to arbitrate. Fifth, a tendency to succumb to efficiency arguments by joining parties and consolidating arbitrations, but in so doing, undermining the consent doctrine and thus the distinction between arbitration and litigation. Sixth, an overly broad application of "pro-arbitration policies" in the absence of reasoned analysis. The danger is that these extensions, at best, significantly lower the threshold for establishing consent and, at worst, impose consent where the facts suggest it does not otherwise exist.

Furthermore, a contractual solution is also justified on the basis that many of the same results achieved by "lazy" use of estoppel and pro-arbitration policies could be achieved by applying contract doctrines. The comparative project in Section III identified a number of, especially United States and English, cases where the courts appropriately employed third party beneficiary or subrogation doctrines and further cases where they could have been employed to extend the arbitration agreement. More generally, Section V.D identified a broad overarching test based on the intentions of the parties. Such focus is appropriate to remain sensitive to "consent" concerns, however it can be accommodated within existing contract doctrine rather than unconstrained factual investigations as is presently the trend in the United States and France and appears in occasional English decisions. Contract law sets limits on the scope of the inquiry, thereby lessening the likelihood of inconsistency and uncertainty identified in Section III and summarized in Section V.

Further, contract law is able to recognize and give weight to the "special features" of arbitration law and international commerce. For example, the arbi-

546. VARADY, BARCELO, VON MEHREN, *supra* note 5, at 203.

tration agreement might be analogous to the established "trade usages" doctrine, thereby enabling an arbitral tribunal or court to take account of international arbitral practice but within the rubric of contract law. This could enable a more focused intentions test by judging the parties' conduct on the basis of "the reasonable expectations of an international business person," or noting that arbitration is a standard method of doing business in a particular industry, or considering evidence of standard usage of particular phrases in a bill of lading to establish the validity of incorporation of terms from a charter party. The point is that rather than relying on a vague pro-arbitration policy or on an unlimited inquiry into intent, general contract law provides a more doctrinally-sound tool for establishing consent.

Abandoning any attempt at international codification or acceptance of a transnational norm leaves parties having to face different approaches in different jurisdictions. However, this problem is best handled at the "macro level" by focusing efforts on international harmonization of conflict of laws rules and, ultimately, contract doctrine. This is preferable to preempting and possibly retarding such a development by seeking to address only the limited situation of third parties in international commercial arbitration.

Finally, at the policy level, the world is simply not yet ready for reliance on anational or transnational rules for a matter of such potentially far-reaching importance as third party issues. When one recalls the antipathy engendered in the developing world by the attempts to apply anational general principles of law to the series of Middle East oil concession arbitrations,[547] it becomes evident that there is much at stake in jettisoning international dispute resolution conducted in accordance with national rules of law.

Ultimately however, it is the users of arbitration - international business people - who will dictate the pace of change. It is always open to contracting parties to adopt an applicable law governing third party issues other than that of a national legal system. Similarly, it is open to parties to draft arbitration clauses specifically dealing with third party issues. It would be a shame if one commentator's advice to include a standard term excluding the extension of the arbitration agreement to third parties just "to be on the safe side"[548] became the norm. This may be a "knee jerk" reaction to the sometimes dangerously expansive approach of courts and tribunals in the jurisdictions studied. Rather, arbitration, rooted as it is in the theory of contract and the notion of consent, would do better to place its trust in the international harmonization of arbitration law and the rational development of national contract laws as they apply to interna-

547. *See e.g.* Saudi Arabia v. Arabian American Oil Co. (ARAMCO), Aug. 23, 1958, 27 INT'L L. REP. 117, 198 (1963). *See* M. Sornarajah, *Power and Justice in Foreign Investment Arbitration*, 14 J. INT'L. ARB. 103, n.60 (1997) (discussing the *ARAMCO* case and others as examples of self-interested "internationalization" to avoid domestic law).

548. Wright, *supra* note 200, at 138-139.

tional commercial arbitration. Consent is too fundamental a concept to sacrifice for the sake of the fleeting satisfaction of having done justice in the particular circumstances.