Arbitration and Nonsignatories: Bound or Not Bound?

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Arbitration “dates back to the earliest days of which we have historical knowledge”¹ and has been widely used to resolve construction disputes.² While arbitration has lost some of its luster as too many participants try to convert the process into something more akin to litigation,³ it nevertheless remains as an efficient, expeditious and relatively inexpensive process when properly utilized. Arbitration may include those who have consented, by signature, to an agreement to arbitrate or, as this article examines, nonsignatories to that agreement.

A. Common Themes.

Nonsignatory issues in arbitration have three common themes. First, private commercial arbitration is, by its nature, a creature of contract. Parties are “generally free to structure their arbitration agreements as they see fit.”⁴

Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their

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disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.\footnote{Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709, 9 I.E.R. Cas. (BNA) 1127, 128 Lab. Cas. (CCH) P 11127 (7th Cir. 1994). Arguing the case on behalf of the appellee was Chicago attorney Barack H. Obama. Referencing Judge Posner’s “eye-catching rhetoric,” another court states the obvious by indicating it cannot be applied literally to all situations. Zuver v. Airtouch Communications, Inc., 153 Wash. 2d 293, 103 P.3d 753, 767 n.17, 22 I.E.R. Cas. (BNA) 446 (2004).}

While there is broad presumption favoring enforcement of arbitration clauses,\footnote{Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24–25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).} especially where involvement of interstate commerce implicates the Federal Arbitration Act, a contractual linkage must still be found if nonsignatories are to be bound by, or able to take advantage of, arbitration clauses.

Second, the manner in which contracts are written and claims pled, whether in litigation or arbitration, can have a profound impact on nonsignatory issues. Courts resist the notion that a party who insists on enforcement of some provisions may refuse enforcement of others (e.g. the arbitration provisions).\footnote{See Matson, Inc. v. Lamb & Associates Packaging, Inc., 328 Ark. 705, 947 S.W.2d 324 (1997) (incorporation by reference), Lovret v. Seyfarth, 22 Cal. App. 3d 841, 101 Cal. Rptr. 143 (2d Dist. 1972) (estoppel); Hughes Masonry Co., Inc. v. Greater Clark County School Bldg. Corp., 659 F.2d 836 (7th Cir. 1981) (estoppel).} When a contract providing for arbitration refers to the role to be played by nonsignatories, or when a pleading in a dispute between signatories refers to conduct of nonsignatories, or when nonsignatories are joined in litigation between signatories, there is an increased likelihood that nonsignatories can be bound by, or claim rights pursuant to, an arbitration clause.

Third, for the longest time, these issues have almost universally been for courts to decide. More recently, due to a series of cases and a rule change by the American Arbitration Association (AAA), at least some of these issues may now be for the arbitrators.

In First Options of Chicago, Inc. v. Kaplan,\footnote{First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985, Fed. Sec. L. Rep. (CCH) P 98728 (1995).} a corporation had signed a document providing for arbitration, but nonsignatory individuals denied their dispute was arbitrable despite an alter ego claim. As the Supreme Court explained, just as arbitrability of the merits depends on “whether” parties intended to arbitrate, the question of “who” has jurisdiction to decide arbitrability turns
on the intent of the parties. In other words, “arbitration is simply a matter of contract between the parties.”\(^9\) A court must defer to an arbitrator’s arbitrability decision if the parties agreed to submit to arbitration but, when deciding “whether” they agreed to arbitrate an issue (including arbitrability), courts should apply state law principles that govern formation of contracts with the imposed qualification that there be no assumption that parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence. In this respect the law treats silence or ambiguity about “who” should decide arbitrability differently from the way it treats silence or ambiguity about “whether” a dispute is arbitrable. This is because parties probably gave some thought to the scope of arbitration, but not to who would decide arbitrability.

It applies with even more force when the question relates to third parties who signed nothing expressly providing for arbitration. The parties’ contract or rules of a provider organization may give an arbitrator the authority to decide issues of arbitrability of a claim and jurisdiction of the arbitrator as to the parties, but this cannot generally be applied to nonsignatories.

Contec Corporation v. Remote Solution Co., Ltd.\(^{10}\) opened the door to change. When Remote filed suit, Contec Corporation (nonsignatory) demanded arbitration pursuant to a contract Remote had signed with Contec L.P. The contract provided for arbitration pursuant to the AAA Commercial Arbitration Rules. Commercial Rule R-7 reads: “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”\(^{11}\) The court recognized that a signatory cannot be forced to arbitrate with any nonsignatory. Instead, a court must first determine if the parties have a “sufficient relationship” with each other and with rights created by the contract. Three factors led to the court’s conclusion that “arbitration of the issue of arbitrability” was appropriate: (1) there was an undisputed relationship between Contec L.P. and Contec Corporation; (2) Remote was signatory to the contract that designated AAA rules; and (3) the parties had conducted themselves as being subject to the

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\(^{10}\) Contec Corp. v. Remote Solution, Co., Ltd., 398 F.3d 205 (2d Cir. 2005).

\(^{11}\) American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Rule R-7 (effective June 1, 2009). This rule was not introduced until after First Options and many other cases were decided. Also see Construction Industry Arbitration Rules and Procedures (effective October 1, 2009), Rule R-9.
contract. Perhaps most critical in this analysis was that the party opposing arbitration was signatory to the contract and had, in essence, already agreed, through adoption of the AAA rules, that the arbitrator had jurisdiction to decide the issue.\footnote{It remains to be seen to what extent state courts and other federal circuits will follow Contec's Second Circuit analysis and whether it will be applied to all theories under which a nonsignatory may be bound. See Sarhank Group v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005); Republic of Ecuador v. Chevron Corp., 638 F.3d 384 (2d Cir. 2011); Masefield AG v. Colonial Oil Industries, Inc., 2005 WL 911770 (S.D. N.Y. 2005).}

DK Joint Venture I v. Weyland\footnote{DK Joint Venture I v. Weyand, 649 F.3d 310 (5th Cir. 2011).} also dealt with Rule R-7, but there it was nonsignatory individuals who contested applicability of the arbitration clause and the court agreed. The fact that their corporations had agreed to arbitrate pursuant to the AAA rules, did not mean the individuals (a CEO and CFO) had also agreed.

B. Issues.

Nonsignatory issues come in many shapes and sizes. Some arise prior to arbitration, others during arbitration, and some in post-award contexts. Signatories to arbitration agreements ask that nonsignatories be compelled to arbitrate and nonsignatories ask that signatories be ordered to arbitrate. Sometimes these requests are submitted to courts, and other times to arbitrators. Post-award, a party may seek to have a nonsignatory added as a joint debtor, or a nonsignatory facing an adverse award may request vacatur.

Nowhere do these issues arise more often than in the construction industry, where a typical commercial project involves one or more owners, design professionals, lenders, prime contractors, subcontractors, material suppliers, insurance carriers, sureties, and others. Many participants sign contracts during early planning stages while others may not become involved for several years, long after construction has begun and disputes have arisen. Considering a hospital project, one court said,

except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present fact and future occurrences as in a huge construction project such as the building of this 100 million dollar hospital. Even the most painstaking planning frequently turns out to be mere conjecture and accommodation
to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield.\textsuperscript{14}

As a result, said the court, it is difficult to examine testimony and evidence in the quiet of a courtroom several years later concerning such confusion and then extract from them a determination of precisely when the disorder and constant readjustment, which is to be expected . . . on a job site, became so extreme, so debilitating and so unreasonable as to constitute a breach of contract between a contractor and subcontractor.\textsuperscript{15}

Especially on large projects, disputes can be complex, involving multiple contracts and many combinations of players. The problem becomes more complicated when some of the written contracts provide for arbitration (too often with non-parallel provisions), some do not, and too many are merely verbal. Parties’ interests also vary. An owner alleging construction defects may prefer a one-on-one arbitration with the prime contractor. The prime contractor may prefer to bring specialty subcontractors into the proceeding. Some subcontractors may not object to inclusion while those performing small portions of the work may oppose inclusion.

There are at least five theories recognized by federal courts—agency, assumption, estoppel, alter ego and incorporation—pursuant to which an arbitration clause may be enforced by or against a nonsignatory.\textsuperscript{16} Commentators have identified “seven theories which can be used to bind nonsignatories to arbitration agreements.”\textsuperscript{17} Subsets of these, as well as other theories—some successful, some not, and some differing only semantically—have

\textsuperscript{16} See, e.g., Boucher v. Alliance Title Company, Inc., 127 Cal. App. 4th 262, 25 Cal. Rptr. 3d 440, 444, 22 I.E.R. Cas. (BNA) 900 (2d Dist. 2005); Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc., 293 F.3d 1023, 1029 (7th Cir. 2002).
\textsuperscript{17} Anthony M. DiLeo, The Enforceability of Arbitration Agreements by and Against Nonsignatories, J. Am. Arbitration, Tulane Arbitration Inst. (Vol. 1, Issue 1, 2003); see also Richard Chernick, Ties That Bind. Arbitration Contracts Enforced Against Third Parties, Los Angeles Daily Journal (August 11, 1999); Richard Chernick, Third Parties Sometimes Can Be Compelled to Arbitrate, Los Angeles Daily Journal (August 8, 2001); Charles Lee Eisen, Compelling Non-Signatories to Arbitrate, American Arbitration Ass'n, Dispute Resolution J. (May-June 2001); John M. Townsend, Nonsignatories and Arbitration, American Arbitration Ass'n, Currents (September 1998); Bruce E. Myerson, But I Didn’t Sign an Arbitration Agreement! (http://www.bruceymerson.com/articles/arbitration-nonsignatories.html); Zarlenga and Smith, Can a Nonsignatory or

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also been used. Some occur most often in limited circumstances unrelated to construction. Others, especially incorporation-by-reference and flow-down clauses, are commonly found in construction and other commercial contexts. They are discussed below.

I. Incorporation by Reference

A. Construction

Incorporation is common in the construction industry where subcontracts often incorporate prime contracts by reference and surety bonds incorporate contracts of bond principals in an effort to create uniformity of rights and obligations among the numerous participants in a typical project. A related approach is the flow-down clause that attempts to contractually impose on lower tier participants the same obligations and responsibilities higher tier participants have assumed in their contracts.

1. Subcontracts.

Subcontracts were involved in Slaught v. Bencomo Roofing Co.,18 Saturn Construction, Inc. v. Landis & Gyr Powers, Inc.,19 and In re Wonder Works Construction Corp. v. R.C. Dolner, Inc.20

In Slaught, the prime contract provided for arbitration in accordance with AAA rules while subcontracts provided for arbitration using two-party arbitrators and a neutral third—an unfortunate example of non-parallel wording that too often results in needless appeals and attendant expense. The Prime Contractor commenced an arbitration to collect amounts allegedly still due and the Owner filed a counterclaim alleging defective work. When the nonsignatory Subcontractors refused to join the arbitration, the Prime sought an order compelling their participation. Under the heading “Assumption of Principal Contract,” the subcontracts provided that all rights and remedies reserved to the Owner in the prime contract applied to the Prime Nonparty Be Bound by an Arbitration Award? A Warning for the Unwary, American Bar Assoc., 24 No. 3 Construction Law. (Summer 2004).


20Wonder Works Const. Corp. v. R.C. Dolner, Inc., 73 A.D.3d 511, 901 N.Y.S.2d 30 (1st Dep’t 2010). For other incorporation cases, see Bartley, Inc. v. Jefferson Parish School Bd., 302 So. 2d 280 (La. 1974) (holding that subcontractor was required to arbitrate disputes arising as to its performance under subcontract, which incorporated by reference the prime contract); Ventura Maritime Co., Ltd. v. ADM Export Co., 44 F. Supp. 2d 804, 1999 A.M.C. 1676 (E.D. La. 1999) (a non-construction case).
in its dealings with the Subcontractors. Since the Owner was involved, the court interpreted the documents to mean Subcontractors were obligated to arbitrate under the prime contract’s procedure. The subcontract procedure was viewed as applicable only when disputes were solely between the Prime and one or more Subcontractors.\(^{21}\)

In Saturn Construction, the prime contract provided for arbitration. The subcontract had a flow-down clause stating that the Subcontractor agreed to be bound to the Prime by the terms of the principal contract and to assume toward the Prime all the obligations and responsibilities that the Prime assumed to the Owner. Here, unlike Slaught, the Subcontractor wanted to take advantage of the arbitration clause in the prime contract. The Prime contractor preferred litigation. The court ruled for the Prime. It found no waiver by the Prime since, despite the flow-down clause, there was no express agreement to arbitrate with its Subcontractor. Obligations and responsibilities of the Prime to the Owner flowed to the Subcontractor. Rights of the Prime to demand arbitration with the Owner did not.

Wonder Works is another New York case. There, the prime contract provided for arbitration. A subcontract provided that the Subcontractor agreed to be bound by all terms of the prime contract, required the Subcontractor to assume toward the Prime all duties the Prime had assumed toward the Owner, and said the Prime had every right and remedy against the Subcontractor that the Owner had against the Prime. Another provision provided that no arbitration was to include parties other than the Owner and Prime, but the Prime could permit the Subcontractor to participate. Incorporation clauses under New York law bind a Subcontractor only as to scope, quality, character and manner of the work absent an expression of a clear, explicit, and

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unequivocal intent to the contrary. No such intent was demonstrated here.

2. Surety Bonds.

Surety bonds were involved in Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co., Dunn Construction Co., Inc. v. Sugar Beach Condo. Association, Inc., and Matson v. Lamb.

In Boys Club, the prime contract provided for arbitration. The Prime secured a performance bond and the bond referenced the prime contract and made it part of the bond. With the Owner and Prime already engaged in arbitration relating to the Prime’s request for final payment and the Owner’s complaints of defects, the Owner filed an amended demand adding the Surety (nonsignatory). The Surety objected and argued it was not a party to the contract providing for arbitration. The court interpreted the bond as indicating the Surety intended, and agreed, to be bound by the arbitration provision. The court said it was logical to assume the parties, including the Surety, intended not merely that the Surety would be bound by the arbitration result, but that the Surety would join in the arbitration.

The prime contract in Dunn provided for arbitration of disputes relating to a condominium project. The Prime’s performance bond incorporated the contract and named the Owner and Lender as obligees. After initial litigation skirmishing in which the Lender (nonsignatory) and a Homeowners Association (nonsignatory) claimed unsuccessfully to be third party beneficiaries of the

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25 It might equally be argued that a Surety providing a performance bond would only intend to be bound as to issues of scope and quality of work. The court described this as an issue of first impression for California, but said several federal cases had ruled similarly. Boys Club, 8 Cal. Rptr. 2d at 590 (citing U.S. Fidelity and Guar. Co. v. West Point Const. Co., Inc., 837 F.2d 1507 (11th Cir. 1988); Exchange Mut. Ins. Co. v. Haskell Co., 742 F.2d 274 (6th Cir. 1984); Transamerica Premier Ins. Co. v. Collins & Co., General Contractors, Inc., 735 F. Supp. 1050 (N.D. Ga. 1990); Hoffman v. Fidelity and Deposit Co. of Maryland, 734 F. Supp. 192 (D.N.J. 1990); Cianbro Corp. v. Empresa Nacional de Ingeniería y Tecnología, S.A., 697 F. Supp. 15 (D. Me. 1988)).
contract, the Prime (signatory) and Surety (nonsignatory) made an arbitration demand on the Lender and Association, both of whom now said, as nonsignatories, that they were not bound to arbitrate. The court felt their claims were intimately founded in and intertwined with the underlying contract obligations. It also considered the fact that they had claimed to be third party beneficiaries (albeit without success), the Lender occupied an intimate position with respect to the Owner/Prime relationship, the Lender was a named obligee on the bond, and the bond incorporated the prime contract. Due to these multiple factors, the court said the Lender and Association were required to arbitrate. As in many cases, several familiar buzzwords found their way into the court’s decisional lexicon: incorporation by reference; intimately founded; intimate position; intertwining and estoppel.

An Arkansas court examined the issue in Matson where, as in Boys Club and Dunn, the prime contract provided for arbitration and the Prime’s performance bond incorporated the contract by reference. When the Owner (signatory) sued the Surety (nonsignatory) directly regarding alleged construction defects, the Prime sought to intervene to protect its interests, including enforcement of its right to arbitrate. The trial court allowed the intervention but only to let the Prime (signatory) protect its rights if judgment were entered against its Surety (nonsignatory) which might then pursue a claim against the Prime as its bond principal. The court felt incorporation was only for the purpose of defining the terms of the Surety’s obligations under the bond, but the appellate court disagreed. A party’s interest in enforcing arbitration rights has been held to be a significant factor in determining whether to allow intervention. Numerous other jurisdictions had faced similar issues and enforced arbitration agreements incorporated by reference. The Owner was “relying on the construction contract to prove its breach of contract claim [against the Contractor] but seeking to avoid the arbitration provision contained in that same contract.” Intervention should have been allowed without the limitation imposed by the trial court.

Note that this Surety voluntarily participated in arbitration, while the Surety in Boys Club objected to its inclusion.

Commercial Union Ins. Co. v. Gilbane Bldg. Co.\textsuperscript{27} and Kvaerner ASA v. Bank of Tokyo-Mitsubishi Ltd. N.Y. Branch\textsuperscript{28} involved more complex scenarios.

Commercial Union considered both a subcontract and a bond. Thirteen different projects used the same Prime, Subcontractor and Subcontractor Surety. When the Subcontractor stopped performing on one of those projects, the Surety (nonsignatory) sued the Prime (signatory). The Prime counterclaimed against the Surety. The Surety added another cause of action to its complaint and brought two Sub-subcontractors into the action on third-party complaints for indemnity. The Surety then sought to stay the Prime's counterclaim pending arbitration. The prime contract provided for AAA arbitration, the subcontract said the Prime had the benefit of all rights, remedies and redress against the Subcontractor that the Owner (signatory) had against the Prime, and the bond incorporated the subcontract. Based on what it saw as a “chain of incorporation” and analogizing the facts to those in Exchange Mutual Insurance Company v. The Haskell Company,\textsuperscript{29} the court said the Prime and its Subcontractor's Surety were bound to arbitrate the Prime's counterclaim. While the Surety had taken actions inconsistent with arbitration, the court found no prejudice to the Prime, and hence no waiver by the Surety.

A similar result with different participants was reached in Kvaerner. An Owner and a Joint Venture entered into a contract for construction of a waste-to-energy plant. Their contract included a broad arbitration clause relating to disputes arising out of or relating to the project. On completion, the Owner took possession, began an arbitration with the Joint Venture, and shut down the facility. The project had been financed pursuant to written guarantees signed by a Bank on behalf of a Syndicate providing financing and by the corporate Joint Venturers. With the Owner no longer making payments, the Bank (nonsignatory) filed an involuntary bankruptcy against the Owner, thereby staying the arbitration, and sued the Joint Venturers. The Joint Venturers sought arbitration pursuant to the guarantees that, while not mentioning arbitration, gave the Joint Venturers the

\textsuperscript{27}Commercial Union Ins. Co. v. Gilbane Bldg. Co., 992 F.2d 386 (1st Cir. 1993).

\textsuperscript{28}Kvaerner ASA v. Bank of Tokyo-Mitsubishi, Ltd., New York Branch, 210 F.3d 262 (4th Cir. 2000).

same rights and remedies as their Joint Venture had under the construction contract. This, said the court, operates to incorporate those rights and remedies into the guarantees and one of those rights was the right to arbitrate, especially since the dispute arose out of and related to the project. The Bank unsuccessfully argued that arbitration is neither a right nor a remedy, but a process.

4. **Literal Interpretation.**

A Maryland court took an interesting literal approach in Hartford Accident & Indemnity Co. v. Scarlett Harbor Associates Limited Partnership to reach a different result.

An Owner contracted with a Prime for construction of a Baltimore condominium utilizing a contract that provided for AAA arbitration. A performance bond recognized that the Prime, as principal, had a contract with the Owner and the contract was made a part of the bond by reference. In a subsequent suit by the project’s Homeowners' Association (nonsignatory) against the Owner (signatory), the Owner brought the Prime (signatory) and Surety (nonsignatory) into the suit and they moved to compel the Owner to arbitrate while staying the litigation against them. The court ordered arbitration as to the signatory Owner and Prime, but not as to the nonsignatory Surety. Although an independent-minded appeals court acknowledged that a majority of decisions from other jurisdictions had reached different results, it was not persuaded by the rationale of those decisions. Those decisions, including Commercial Union, simply could not be reached by a contract analysis since the Surety had not contracted to arbitrate anything with anyone. By incorporating the contract into the bond, the Surety, literally, had merely incorporated the Owner's agreement to arbitrate with the Prime. Nothing enlarged that commitment. Incorporation simply established the primary obligation on which the Surety’s secondary obligation would depend.

As Hartford recognized, its literal interpretation was out of step with the majority of decisions with similar facts, and Developers Surety & Indemnity Company v. Resurrection Baptist Church, 759 F. Supp. 2d 665 (D. Md. 2010)). Hartford reviewed, but disagreed with, Commercial Union Ins. Co.
Church agreed. There, a prime contract provided for arbitration and a performance bond incorporated the contract. When a claim was made against the bond, the Surety (nonsignatory) filed a declaratory relief action contending its bond obligations had been discharged by conduct of the obligees, the Owner and its Bank. A motion to compel by the obligees was granted with the court saying, the First, Second, Fifth and Eleventh Circuits and several district courts have held that a surety must arbitrate disputes related to a performance bond where the bond specifically incorporated by reference a contract containing an arbitration clause. The court relied on Commercial Union, distinguished an 8th Circuit case, and expressly rejected Hartford.

Drafters wishing to avoid a result similar to Hartford may want to consider not only incorporating the prior contract, but also expressly stating that the intent of the parties is that obligations imposed in the first contract be passed on in the second contract.

II. Agency

A. Construction.

Where there are no incorporation or flow down provisions, an agency theory may have similar effect. As the court stated in Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co., Inc.,

[a] nonsignatory to an agreement to arbitrate may be required to arbitrate, and may invoke arbitration against a party, if a preexisting confidential relationship, such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate upon the nonsignatory.

An agency relationship was alleged in American Builder’s Assn. v. Au-Yang, but the Arbitrator erred by asserting jurisdiction to decide the issue. A dispute arose between certain Buyers and their Contractor relating to a residential remodel and the Buyers commenced arbitration as provided in their contract. During the evidentiary hearing, evidence demonstrated that the Buyers were signatories to the contract, but a third party named Bonita Ace was not. Buyers had paid the down-payment and taken possession, but Bonita Ace made all subsequent payments and held title. The Arbitrator determined the Buyers had signed the contract as agents for Bonita Ace and ordered Buyers to join it as a co-claimant. Buyers and Bonita Ace did as ordered, but the Contractor (signatory) filed suit seeking an injunction against the involvement of Bonita Ace. The trial court denied the injunction, but the appellate court reversed. An undisclosed principal may prosecute an action in its own name, but the status of Bonita Ace was an issue for the court, not the Arbitrator. If it were otherwise, the Arbitrator would be making a factual determination regarding a nonsignatory who would have little recourse since factual findings by Arbitrators are subject to only limited review.

Izzi v. Mesquite Country Club also demonstrated agency and a lesson in litigation pleading. Buyers bought a condominium unit from the project’s Developer. Signatories to the contract were the Buyers, the Developer (with its President signing on its behalf), and a woman designated as a Sales Representative. Claiming the Developer failed to disclose that it had agreed with the city to create a special assessment district, Buyers filed suit, on their own behalf and on behalf of approximately 140 other similarly situated owners. The trial court agreed with Buyers that the arbitration clause was not applicable, but Defendants appealed. The appellate court reversed and quickly disposed of the argument by one Buyer that he could not be compelled to arbitrate since he had never read what he signed and, therefore, had not given informed consent to arbitral jurisdiction.

Buyers next argued that defendants in the litigation included not only the Developer and Sales Representative who were agreeable to arbitration, but also numerous nonsignatory “Doe defendants.” The court pointed to Buyers’ boilerplate allegation that “at all times herein mentioned, each Defendant was the

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agent and employee of the remaining Defendants.”

Based on Buyers’ own pleading, the “Doe defendants presumably would be subject to the agreement.”

A related, and unique, argument was considered in Landis Construction Co., Inc. v. Health Education Authority, considering the construction of a parking garage and a Louisiana statute that required “express authority” to “refer a matter to arbitration.” A public Owner admitted it was signatory to the contract, but claimed it was nonsignatory to an arbitration provision contained in that contract since a resolution authorizing the contract did not specifically mention arbitration. The state’s Supreme Court disagreed.

B. Non-Construction.

While American Builder’s and Izzi are related to construction, agency is perhaps better illustrated in Berman v. Dean Witter & Co., Inc. and Nguyen v. Tran, two non-construction cases.

In Berman, a Wife signed a contract with an investment Broker that included a broad arbitration provision. Subsequently, her Husband made investments through her account. When the Husband (nonsignatory) and Wife (signatory) sued the Broker (signatory) and Agent (nonsignatory), defendants’ motion to compel arbitration was denied. The appellate court reversed since the two nonsignatories, the Husband and Agent, “were both acting as agents for the signatories.” The Agent was clearly entitled to the benefit of arbitration as was his principal (the Broker), the Husband stood in the same position as his Wife, and the dispute fell within the terms of the broad arbitration clause.

After close of escrow in Nguyen, Buyers sued Sellers, two Buy-

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39 In McCarthy v. Azure, 22 F.3d 351 (1st Cir. 1994), the result was different despite a litigation allegation. Plaintiff was party to an arbitration agreement with a corporation, but filed suit against the corporation and a nonsignatory individual who was a 50% shareholder and the principal operating officer of the corporation. Arbitration was compelled as to the corporation. Based on an alter ego allegation in the complaint, the individual tried to bootstrap his way into the arbitration. He did not succeed.
ers’ Brokers and two Sellers’ Brokers for non-disclosure that a guest house had been built without a permit. In response, Buyers’ Brokers filed a petition to compel arbitration. The contract said, “Buyer and Seller agree . . . to arbitrate disputes or claims involving either or both Brokers . . . provided either or both Brokers shall have agreed to . . . arbitration prior to, or within a reasonable time, after the dispute or claim is presented to Brokers.”43 Though neither the Buyers’ Brokers nor Sellers’ Brokers signed the agreement, a nonsignatory may be required to arbitrate if its agency relationship with a signatory makes it equitable to do so. Buyers (signatories) had sued and, since Buyers’ Brokers (nonsignatories) were clearly their agents, the Buyers’ Brokers could compel arbitration, especially since the clause required it if the demand were timely. The Sellers’ Brokers, however, had not agreed to arbitrate and the court “found no case in which a nonsignatory was able to compel arbitration against another nonsignatory,” so Buyers’ Brokers could not invoke arbitration as to Sellers’ Brokers.

III. Estoppel

A. Construction.

Another option relating to nonsignatories is estoppel, which was discussed in Lovret v. Seyfarth,44 Hughes Masonry Company, Inc. v. Greater Clark County School Building Corp.,45 and Grinham v. Fielder.46

In Lovret, a construction contract signed only by a Husband named both the Husband and his Wife (nonsignatory) as contracting parties. It provided for a Contractor to build a residence on two adjacent lots, one vested in the name of Husband and Wife and the other only in Wife’s name. The court had to consider whether Wife was bound by a subsequent arbitration award. Factors considered in holding her bound included the fact that her name was on the contract that said both Husband and Wife were parties, she had taken no action to prevent the Arbitrator from joining her as a party, her Husband said he was acting as his Wife’s “agent,” the Contractor’s petition to confirm the award al-

43Nguyen v. Tran, 157 Cal. App. 4th 1032, 68 Cal. Rptr. 3d at 908.
leged the Husband and Wife entered into the contract and the response prepared by their counsel did not deny the allegation, the response said Husband and Wife were willing to pay amounts awarded if the Contractor complied with his obligations, they said “petitioners” entered into the contract, they had filed a counterclaim in the arbitration, the Wife had an interest in the arbitration since her lot was subject to potential mechanic’s liens, and, through post-award proceedings, the Wife obtained releases or waivers of liens or tenders to keep them from encumbering her property. Taking these multiple factors into consideration, “as well as the general principle that one cannot blow hot and cold at various stages of a given proceeding,” the court said the Wife was estopped from claiming she was not bound.

The result in Hughes was the same, but the facts were less compelling. A school company signed one contract with an Architect to provide architectural and construction management services and the Architect subcontracted the construction management to a Construction Manager (CM). The school company signed a separate contract with a Masonry Contractor that incorporated AIA General Conditions, including arbitration, from the first contract, identified the Architect and CM, set forth their project duties, and gave the CM authority to approve the Masonry Contractor’s schedules and materials. The Masonry Contractor argued it shouldn’t be compelled to arbitrate with the nonsignatory CM since they were not signatory to the same contract. The court felt otherwise. The Masonry Contractor was estopped from denying the CM “the benefits of the arbitration clause” because the “very basis” of the Masonry Contractor’s claim was that the CM had breached duties attributed to it in the contract the Masonry Contractor had with the school company. The claims were “intimately founded in and intertwined with” the underling contract obligations. Echoing Lovret, the court said the Masonry Contractor “cannot have it both ways.” It cannot claim breaches by the CM while, at the same time, denying the CM the right to take advantage of the arbitration clause.47

Estoppel was raised as a defense in Grinham.48 An Owner sued a Contractor (Grinham dba Hydrex-San Jose) pursuant to a

47 Under very similar facts, Hughes was cited and relied upon in McBoro Planning and Development Co. v. Triangle Elec. Const. Co., Inc., 741 F.2d 342 (11th Cir. 1984) (“As the Seventh Circuit stated in this situation, the contractor’s claims are ‘intimately founded in and intertwined with the underlying contract obligations.’”).

contract it had with Hydrex-San Jose. In fact, Hydrex-San Jose did not exist and the Contractor was apparently moon-lighting from his real job as an employee of Hydrex-Santa Clara. When Owner learned this, it added Hydrex-Santa Clara to the litigation. The Contractor cross-complained against Hydrex-Santa Clara and, pursuant to the contract, the case was moved to arbitration where Hydrex-Santa Clara (nonsignatory) argued it was not obligated to arbitrate and then presented evidence in its defense. The award said Contractor was liable to the Owner, but Hydrex-Santa Clara was not (i.e. Contractor had no actual authority to do what he did and the Owner could not argue ostensible authority since it was not even aware Hydrex-Santa Clara existed).

The award was confirmed and Hydrex-Santa Clara, claiming res judicata and collateral estoppel, filed a motion for summary judgment on the cross-complaint. The motion was granted and affirmed despite an argument that Hydrex-Santa Clara could not rely on the Arbitrator’s findings since it was not a party to the contract. The court disagreed since, party or not, Hydrex-Santa Clara had presented evidence and the Arbitrator made a decision. It is true Hydrex-Santa Clara had objected to the arbitration, but it had participated fully and prevailed (and thereby realized the error of its original objection) and was entitled to raise the estoppel defense.

Hartford Fire Insurance Company v. Henry Bros. Construction Management Services, LLC, involved multiple contracts (including a modified AIA B801 construction management agreement that “arguably incorporates another document”) and supplemental conditions. Due to the interplay among the various documents, the court held that to permit a nonsignatory construction manager “to invoke this equitable doctrine [of estoppel] despite the express disavowal in its own contract of any intent to arbitrate” would create “the proverbial ‘tail wagging the dog’ scenario.”

B. Non-Construction.

Estoppel was the basis of the court’s holding in a reinsurance case, International Insurance Agency Services., LLC v. Revios Reinsurance U.S., Inc. Reinsurer #1 reinsured certain employee benefits and retroceded part of its risk to Reinsurer #2. An Un-

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derwriter oversaw the program pursuant to a series of separate agreements, but was a nonsignatory to both the reinsurance and the retrocession agreements. When Reinsurer #1 terminated the reinsurance agreements, the Underwriter (non-signatory) sued saying the conduct of Reinsurer #1 caused it to lose business. Reinsurer #1 filed a motion to compel arbitration as provided in the reinsurance agreements and the court said, by accepting direct benefits of the reinsurance and retrocession agreements, the nonsignatory Underwriter was estopped and could be compelled to arbitrate tort claims related to those agreements. As another court said, if a party "knowingly accepted the benefits" of an agreement, it may be bound by the agreement's arbitration clause.\(^{51}\)

Equitable estoppel was discussed in a nonsignatory arbitration context in JSM Tuscany, LLC v. The Superior Court of Los Angeles County\(^ {52}\) (although the court had an insufficient record upon which to make a definitive ruling) and "concerted-misconduct" estoppel relating to nonsignatories was an issue in In re Merrill Lynch Trust Co.\(^ {53}\)

IV. Implied

A. Construction.

A surety's duty to arbitrate was found by implication in International Fidelity Insurance Company v. Saratoga Springs Public Library.\(^ {54}\) When the Prime defaulted, its Surety signed a takeover agreement to finish the project in accordance with the original contract's terms and conditions, one of which was arbitration. The Owner later demanded arbitration, but the Surety said the dispute was not arbitrable since it involved adequacy of its performance under the bond and/or takeover agreement, neither of which included arbitration. The court felt that,

\(^{51}\) MAG Portfolio Consultant, GMBH v. Merlin Biomed Group LLC, 268 F.3d 58, 61 (2d Cir. 2001).

\(^{52}\) JSM Tuscany, LLC v. Superior Court, 193 Cal. App. 4th 1222, 123 Cal. Rptr. 3d 429 (2d Dist. 2011).

\(^{53}\) In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185 (Tex. 2007). The court noted that "the federal courts of appeal are currently publishing more than one hundred cases per year substantially dealing with arbitration." In re Merrill Lynch Trust Co. FSB, 235 S.W.3d at 193 n.29 (citing LaForge, Note: In Equitable Estoppel: Arbitrating with Nonsignatory Defendants Under Grigson v. Creative Artists, 84 Tex. L. Rev. 225 (2005)). See discussion under "Intertwining" below.

by agreeing to do the work in accordance with “all” terms of the
contract, the Surety had, by implication, agreed to arbitrate.

V. Membership

A. Construction.

Nonsignatories have also been bound by virtue of their
memberships in organizations. One of the clearest examples in a
construction context relates to collective bargaining agreements.
In Carpenters 46 Northern California Counties Conference Board
v. Zcon Builders,\(^55\) a prime contractor “by virtue of its member-
ship” in the Associated General Contractors was deemed a signa-
tory to a master labor agreement that provided for arbitration.

A similar result was reached in Herbert v. Superior Court\(^56\)
where Teamsters had negotiated a health care plan with Kaiser
and a Member enrolled his wife and five minor children in the
plan. One provision of the plan required arbitration of any claim
asserted by the Member, the Member’s heirs or his personal
representative. When the Member died following surgery, his
wife, their two minor children and three adult children filed a
wrongful death action against numerous defendants who argued
that plaintiffs, all of whom were nonsignatories, were required to
arbitrate. The court agreed.

B. Non-Construction.

In Greenfield v. Mosley,\(^57\) arbitration before a panel from the
Screen Actors Guild was required due to membership.

VI. Alter Ego

A. Construction.

Alter ego issues are not uncommon with arbitration non-
signatories but, absent a submission to the jurisdiction of an
Arbitrator, they also are for the courts. In Hall, Goodhue, Haisley
and Barker, Inc. v. Marconi Conf. Ctr. Bd.,\(^58\) an architect
demanded arbitration under an agreement providing for arbitra-
tion between the parties but permitting inclusion of non-parties

\(^{55}\)Carpenters 46 Northern California Counties Conference Bd. v. Zcon
Builders, 96 F.3d 410, 153 L.R.R.M. (BNA) 2321, 132 Lab. Cas. (CCH) P 11656
(9th Cir. 1996).

\(^{56}\)Herbert v. Superior Court, 169 Cal. App. 3d 718, 215 Cal. Rptr. 477 (2d
Dist. 1985).

\(^{57}\)Greenfield v. Mosley, 201 Cal. App. 3d 735, 247 Cal. Rptr. 314, 115 Lab.
Cas. (CCH) P 56295 (2d Dist. 1988).

\(^{58}\)Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd., 41
only with mutual written consent. An award favoring the architect was confirmed, judgment was entered and the architect then sought to add a third party as a joint debtor. The trial court ruled that it had no jurisdiction to consider the request. The appellate court reversed and remanded. While the architect could not go back to the Arbitrator to add the alleged alter ego, a statute provided that judgments confirming arbitration awards have the same effect as judgments obtained in civil actions and can be enforced like all other judgments.

B. Non-Construction.

Rowe v. Exline\textsuperscript{59} approached alter ego from a different direction. There, three individuals founded a corporation and, when Founder #1 left the company, he and the corporation entered into an agreement providing for the corporation to pay him an agreed amount in installments. The remaining individuals (Founders #2 and #3) allegedly then dissolved the corporation, distributed its assets to themselves, and failed to make remaining payments to Founder #1. An irritated Founder #1 sued the corporation and Founders #2 and #3 and alleged four causes of action. The first, for breach of contract, claimed the corporation was the alter ego of Founders #2 and #3, the second was based on a statute, and the last two were derivative claims. When the defendants sought to enforce an arbitration clause in the agreement, the trial court said only the signatory corporation could do so. Since Founders #2 and #3 would have to litigate and that might result in inconsistent verdicts, the entire case had to be litigated.

The appellate court reasoned “no reported California case has decided whether a nonsignatory sued as the alter ego of a signatory can enforce an arbitration provision,”\textsuperscript{60} but an agent of a signatory may enforce an arbitration agreement and may also be compelled to arbitrate claims made against him. While Plaintiff could not deny that he had alleged alter ego on his breach of contract claim, he argued that the trial court’s ruling was correct because the other three causes of action were not arbitrable. Based on his own allegations, he lost. He had alleged the derivative actions were “pursuant to” the written agreement, the relief sought was the same in all causes of action and all were intertwined. Founder #1 had subjected himself to arbitration based on the manner in which he crafted his claims.

A New York court took a different, and manifestly logical, ap-

\textsuperscript{59}Rowe v. Exline, 153 Cal. App. 4th 1276, 63 Cal. Rptr. 3d 787 (1st Dist. 2007).
\textsuperscript{60}Rowe v. Exline, 153 Cal. App. 4th 1276, 63 Cal. Rptr. 3d at 793.
Arbitration and Nonsignatories: Bound or Not Bound?

The court thought it was simply more logical that the signatories to the agreement arbitrate their disputes and resolve liability issues, before litigating alter ego liability of nonsignatories. “It does not make sense to litigate the alter ego liability of some eighty-two individuals and entities before resolving the question of primary liability first.” The court acknowledged First Options, but apparently didn’t want to address the issue of whether any of 82 nonsignatories had clearly and expressly agreed to arbitrate arbitrability. Instead, it took a “common sense” approach.62

VII. Assumption

A. Non-Construction.

If no new contract is signed, the party taking over the obligation of another party remains a nonsignatory to the original agreement and, depending on the facts, may or may not be bound by an arbitration provision.

No assumption was found in Kelly v. Tri-Cities Broadcasting Inc.63 There, a Lessor leased premises to Lessee for use in Lessee’s business. Several years later, the Lessee sold the business to a Buyer (nonsignatory) who continued running the business on-site for a year or so before abandoning it. Lessor demanded arbitration with the Buyer who said he had never assumed the lease, had not signed it and did not feel like arbitrating. The trial court ordered arbitration, found the lease was assumed by Buyer and refused to vacate a subsequent award.

The appellate court reversed, reasoning that “[i]f the trial court has found an agreement to arbitrate when one does not exist, the finding is an abuse of discretion because an essential jurisdictional fact is missing.”64 While recognizing contracts can be assumed, the court said that, “in every case examined where there has been an express assumption, the assignee has stated specifically either orally or in writing that he agrees to be bound by the


terms of the lease." That was not present here and the court found there had been no assumption. Absent an agreement, there is no privity of contract between Lessor and Buyer. There also was no privity of estate since Buyer had abandoned the premises. The Arbitrator’s award was deemed “contrary to law” and confirmation was denied.

There was privity of estate in Melchor v. Rolm, a factually complex case. A nonsignatory Sub-Lessee demanded arbitration with a signatory Lessor who refused to arbitrate, even after the Lessee joined in the demand. Lessor argued it had no privity of contract with the Sub-Lessee, but privity of estate was dispositive. The Sub-Lessee was still occupying the premises and the Lessor was bound to arbitrate even if the Sub-Lessee had not expressly assumed that obligation.

Kelly included a review of numerous other California cases dealing with assumption, although none involved construction or arbitration. In two of those cases, Lutton v. Rau and Chase v. Oehlke, the court found nothing that would have bound the nonsignatory to anything other than normal obligations imposed on anyone taking possession of leased premises. In the other three, Bank of America National Trust & Savings Association v. Moore, Timm v. Brown, and Flynn v. Mikelian, the court found there was an express assumption of terms and conditions of the underlying lease. An assumption was also found in Gvozdenovic v. United Airlines, Inc.

In a construction context, one could envision a specialty contractor taking over for a defaulting specialty contractor, submitting pay requests on forms provided by the prime contractor, acknowledging project schedules, attending site meetings, and otherwise performing pursuant to and acknowledging terms

of a subcontract signed by the prior specialty contractor that provided for arbitration.

VIII. Partnership

A. Construction.

In Keller Construction Co., Inc. v. Kashani, signatories sought to enforce arbitration provisions against nonsignatories with different results.

In Keller, the Owner, a limited partnership, contracted with a Contractor for construction of a hotel. Signing on behalf of the Owner was its General Partner. The Contractor led a demand for arbitration under AAA rules against the Limited Partnership and its General Partner. The Limited Partnership led bankruptcy but its General Partner attended the evidentiary hearing, objected that he was a nonsignatory to the contract, and left. Following an adverse $1,417,456 award, he contested judicial confirmation. While this was an issue of first impression for California, the court noted that another court had found general partners obligated to arbitrate and felt that was a proper result. It is noteworthy that both California in Keller and Maine in Hartford had statutes making general partners liable for partnership debts.

A different result was reached in Roe, where an Owner signed a contract with a Contractor, a limited liability partnership. Owner’s demand for arbitration under AAA rules named both the Contractor and an individual Partner as respondents. The court recognized that an AAA rule provided “the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the

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76In a different scenario, Lee Brown, owner of a defunct limited liability company that installed a gutter system, elected not to appear for a Tennessee arbitration and was more fortunate. An adverse award was set aside since Mr. Brown was a nonsignatory, and whether he had to arbitrate was, by statute, a decision that the court should have made. Brown v. Styles, 2011 WL 3655158 (Tenn. Ct. App. 2011).
arbitration agreement, but the General Partner was a nonsignatory. It could not be said that the General Partner had "clearly and unmistakably" agreed to arbitrate.

**B. Non-Construction.**

In Blaustein v. Huete, with two individuals signing on its behalf, an LLC entered into an agreement with a Law Firm. Two suits were consolidated in federal court, the court said the scope of the agreement was broad enough to cover claims being made by one of the individuals, but the mere fact the individual had signed on behalf of the LLC wasn't enough to make him arbitrate. The district court would have to determine whether other grounds existed.

On remand, the District Court said the doctrine of direct benefits estoppel required the individual to arbitrate. This time its ruling was affirmed.

In Wagner v. Stratton Oakmont, Inc, an Individual opened an account with his Broker and signed an agreement as to how the Clearing Broker would handle the account, providing for arbitration and saying Broker and its employees were third-party beneficiaries. A Partnership then signed a letter giving permission for a deposit payable to the Partnership to be deposited in the Individual's account. Subsequently, the Partnership opened its own account with the Broker, that account did poorly, the Partnership sued and the Broker sought arbitration, but the court saw no basis to apply the clause regarding the Individual's account to the nonsignatory Partnership's dispute.

**IX. Subrogation**

**A. Construction.**

In Valley Casework, Inc. v. Comfort Construction, Inc., another case of first impression in California, a Prime contractor on a project for construction of an apartment complex hired a cabinetry Subcontractor pursuant to a subcontract providing for

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77 Roe presumably involved Rule R-8 of the Construction Industry Arbitration Rules and Mediation Procedures, effective September 15, 2005. The rule was formerly R-9, effective October 1, 2001. The corresponding commercial rule, R-7, was discussed in Fallo v. High-Tech Institute, 559 F.3d 874, 242 Ed. Law Rep. 647 (8th Cir. 2009).
78 Blaustein v. Huete, 2010 WL 7097472 (5th Cir. 2010).
80 Wagner v. Stratton Oakmont, Inc., 83 F.3d 1046 (9th Cir. 1996).
arbitration of issues “regarding the work . . . the rights and obligations of contractor and subcontractor . . . or the plans or specifications.” 82 When the Prime’s G.L. insurer settled a claim against its insured, the Prime (signatory) and Carrier (nonsignatory) demanded arbitration with the Subcontractor (signatory). The Subcontractor, who wanted to make a claim against its Suppliers, filed suit and argued (1) the Prime (signatory) had paid nothing and therefore had no damages (i.e. standing but no damages), (2) the Carrier paid but was a nonsignatory (i.e. damages but no standing), and (3) even if Prime and Carrier could arbitrate, the scope of the clause did not include tort damages.

“The determination of standing to arbitrate as a party to the contractual arbitration agreement is a question of law for the trial court in the first instance.” 83 The trial court’s confirmation of an arbitration award against the Subcontractor was reversed. The appellate court felt the clause was broad enough to include tort damages, but the more difficult question was whether the Carrier (nonsignatory) had standing. The Arbitrator determined the Carrier, as subrogee to the rights of the Prime (signatory), was entitled, with Prime’s consent, to enforce the arbitration clause. But the court cautioned, “judicial enthusiasm for alternative methods of dispute resolution ‘must not in all contexts override the rules governing the interpretation of contracts’ as the policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate.” 84 The scope of arbitration is defined primarily by the agreement of the parties and, since this agreement related only to defective work and not to issues relating to equitable subrogation, the “trial court went beyond the scope of the contractual issues presented, into the equitable arena of subrogation law.” 85 The court did not seem to rule out the possibility of such claims being arbitrated, but apparently felt the clause in this case was too narrow to permit such an interpretation.

X. Assignment

A. Construction.

Nonsignatory assignees tried to compel arbitration in two matters. Only one succeeded.

In Smith v. Cumberland Group Ltd., the Assignee was able to compel arbitration. An Owner and Prime signed a contract for renovation of a restaurant. One month after the specified completion date, the Prime assigned its contract to the Assignee which completed the project four months later. When the Assignee filed an arbitration demand with the AAA, the Owner, alleging delay, sued the Prime and Assignee and obtained a court order staying the arbitration from which the Prime and Assignee successfully appealed.

The contract was a type that could be assigned and there were no prohibitions against assignment. The Assignee, therefore, stood in the shoes of the Prime and was entitled to enforce the agreement. The assignment had also been ratified by the Owner who attended site meetings, corresponded with the Assignee and made progress payments directly to the Assignee. Owner's argument that the contract had already been breached when it was assigned was unavailing.

Assignment was raised in a different context in Board of Governors for High Education v. Infinity Construction Services, Inc. A Subcontractor (nonsignatory), claiming site conditions required it to perform substantially more excavation than it had anticipated, entered into a pass-through agreement with the Prime that would permit it to pursue claims directly against the Owner “as if made by” the Prime. The Subcontractor then sought to compel arbitration with the Owner pursuant to an arbitration provision in the prime contract. The trial court recognized the validity of the pass-through doctrine as something that “might almost be taken as black letter law,” but felt it was not applicable to exclusive remedies contained in a prime contract. In effect, the court said “the right to settle disputes by arbitration is not an assignable right,” especially since the prime contract prohibited assignment.

XI. Derivative

A. Construction.

In Satomi Owners Association v. Satomi, L.L.C., when a nonsignatory Homeowners Association made claims against the project's Developer, the Developer claimed a right to arbitrate the claims since each of the individual Unit Owners had signed agreements to arbitrate and to bind their successor owners. The Association argued it was legally distinct from the Unit Owners and had never agreed to arbitrate anything, but the court felt the Association's rights were derivative from those of the Unit Owners, although certain statutory warranty claims were not arbitrable.

B. Non-Construction.

Claims similarly viewed as derivative include those that might be brought by a nonsignatory corporate Shareholder.

XII. Parent / Subsidiary

A mere parent/subsidiary relationship is usually insufficient to commit one to arbitration pursuant to a contract executed by the other, but facts may alter theoretical constructs and other means may be found to unite parents with their subsidiaries in the same proceeding.

The general rule was reflected in Thomson-CSF, S.A. v. American Arbitration Association. A Parent corporation acquired a Subsidiary corporation that had already signed a contract with a Supplier that provided for arbitration, but the court felt the mere existence of the parent/subsidiary relationship, with nothing more, was not sufficient to require the nonsignatory Parent to arbitrate. After examining recognized theories for binding a nonsignatory, as well as claims “intimately founded in and intertwined with the underlying contract obligations,” the court found no basis to bind the Parent.

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90 Frederick v. First Union Securities, Inc., 100 Cal. App. 4th 694, 122 Cal. Rptr. 2d 774 (2d Dist. 2002); see also EFund Capital Partners v. Pless, 150 Cal. App. 4th 1311, 59 Cal. Rptr. 3d 340 (2d Dist. 2007) (plaintiff sued on its behalf and, derivatively, on behalf of other investors).

A. Construction.

In re Farkar Co. v. R. A. Hanson DISC, Ltd.\(^{92}\) involved a Parent corporation that manufactured construction equipment and a corporate Subsidiary created to take advantage of tax laws relating to the export of machinery. A Purchaser, unaware of the relationship, signed a contract with the Subsidiary and later filed a demand for arbitration naming both the Parent (nonsignatory) and Subsidiary (signatory). The Parent objected, but arbitration was compelled with the court saying the Subsidiary was nothing more than a “paper” company and the “corporate veil was so diaphanous that it did not even require piercing.” While the Parent was compelled to arbitrate after an alter ego determination, factors considered in making that determination included that it wholly owned the Subsidiary, the officers and directors were identical, the Subsidiary had no employees, personnel of the Parent performed all the Subsidiary’s functions, and the Subsidiary had neither an office nor inventory.

B. Non-Construction.

Again showing the significance of drafting, nonsignatories were bound based on pleadings in Sam Reisfeld & Son Import Co. v. S. A. Eteco\(^{93}\) and J. J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.\(^{94}\) In Reisfeld, a Parent and successor corporations were required to arbitrate, even though they were not “formally” parties to the contract. “The charges against these two defendants,” the court said, “were based on the same operative facts and were inherently inseparable from the claims against” the Subsidiary. No more was needed. If the Parent had to litigate while the Subsidiary arbitrated, the court felt the federal policy in favor of arbitration would be thwarted.

J. J. Ryan was similar and referenced Reisfeld in saying, “when the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable,” a court may refer claims against the parent to arbitration even though it

\(^{92}\) In re Farkar Co. v. R. A. Hanson DISC, Ltd., 583 F.2d 68 (2d Cir. 1978), on reh'g, 604 F.2d 1, 26 U.C.C. Rep. Serv. 1104 (2d Cir. 1979).

\(^{93}\) Sam Reisfeld & Son Import Co. v. S. A. Eteco, 530 F.2d 679, 1976-1 Trade Cas. (CCH) ¶ 60851 (5th Cir. 1976).

\(^{94}\) J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988); see also E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187 (3d Cir. 2001) (contract was between two subsidiaries; one Parent sued the other Parent and its Subsidiary, and defendants tried unsuccessfully to compel arbitration based on third party beneficiary, agency, and estoppel arguments).
was not a party to the arbitration agreement. “The same result has been reached under a theory of equitable estoppel.”

A recent opinion considering the parent/subsidiary issue in a broader context is Hird v. iMergent, Inc. Hird’s contract with a Subsidiary of a nonsignatory Parent corporation included a broad arbitration clause, but Hird sued the Subsidiary, Parent and various Officers and Directors of the Parent. Hird agreed to arbitrate with the Subsidiary and arbitration was compelled as to the remaining defendants. Referencing estoppel and intertwining, the court noted that the arbitration clause was broad, all claims against all defendants arose out of Hird’s relationship with the Subsidiary and Hird had included an alter ego allegation based on the close relationship of the Subsidiary and other defendants.

XIII. Intertwining

Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc. is a case that did not invent, but seems to have made famous, the phrase “intimately founded in and intertwined with,” perhaps because its flexibility makes it inherently useful. A nonsignatory Parent corporation (Del Monte) acquired a Subsidiary (Sunkist Soft Drinks) and filed a motion to compel arbitration under a license agreement previously entered into by the Subsidiary with a Licensor. The motion was opposed on the ground the Parent (nonsignatory) had no standing. The court felt otherwise, said the nonsignatory was “estopped” to avoid arbitration and referenced two cases discussed above:

Although the nonsignatories were expressly mentioned in the contracts at issue in McBro and Hughes Masonry, and each court took this into account, the reference to a third party was neither a crucial nor dispositive factor in either case. Instead, these decisions rest on the foundation that ultimately, each party must rely on the terms of the written agreement in asserting their claims.

A. Construction.

Board of Managers of the Courtyards at the Woodlands Condo-

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95 J.J. Ryan, 863 F.2d at 321 (citing McBro Planning and Development Co. v. Triangle Elec. Const. Co., Inc., 741 F.2d 342 (11th Cir. 1984)).
Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.\textsuperscript{98} considered the effect of an arbitration provision in a contract between a Designer and a Developer. In litigation, when the Designer (signatory) moved to compel arbitration of indemnification and contribution claims against it by the Developer (signatory), the motion was opposed by the Developer and numerous nonsignatories who argued the issues were “intertwined, intermingled and dependent” on issues in the litigation—the reverse of using the intertwined nature of claims to support arbitration. If nothing else, they said, it made little sense for two signatories to arbitrate indemnification and contribution when the basic defect issues had not been determined. The court was asked to consider conflicting policies, one favoring enforcement of arbitration agreements and the other supporting resolution of multiparty conflicts in a single forum. It based its holding on the right of parties to freely contract.\textsuperscript{99} Intertwining or not, the court felt it was compelled to enforce the arbitration agreement even where the principle litigation relating to existence or non-existence of defects involved numerous others and had not yet been concluded.\textsuperscript{100} “Judicial economy,” it said, “is an insufficient basis for denying arbitration” but, with a tip of its hat to economy, suggested the litigation could proceed first with arbitration following only if liability were found.

B. Non-Construction.

In Molecular Analytical Systems v. Ciphergen Biosystems, Inc.,\textsuperscript{101} an agreement between a Licensor and Licensee provided for arbitration. When the Licensor sued the Licensee and an Assignee (nonsignatory) to whom the Licensee had assigned its rights under the agreement, a court refused to compel arbitration. This was reversed in an opinion saying, if claims against a nonsignatory are “intimately founded in” and “intertwined with” claims against a signatory, the nonsignatory may compel arbitration.


\textsuperscript{100}But see Cal. Civ. Proc. Code § 1281.2(c) (permitting a court to refuse to compel arbitration if “a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact”).

In Grigson v. Creative Artists Agency, Producers and a Distributor had a contract providing for distribution of an “obscure” Actor’s film and arbitration of disputes. The Actor had a contract with an Agent. When the Distributor allegedly delayed distribution of the film, the Producers (signatory) and the Trustee (nonsignatory) for the film’s owners sued the Actor and Agent (nonsignatories) for allegedly interfering with the distribution contract. Arbitration was compelled. The Trustee was seeking payment under the distribution contract and admitted he was a third-party beneficiary of the contract. The Producers and Distributor argued they did not have to arbitrate but, in a case of first impression for the circuit, the court found Sunkist persuasive. Sunkist had “taken the lead in applying equitable estoppel under the intertwined claims basis” and “we agree with the intertwined-claims test.” The majority decision was criticized in a lengthy dissent saying, “nearly anything can be called estoppel. When a lawyer or judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel.”

Grigson v. Creative Artists Agency L.L.C., 210 F.3d 524 (5th Cir. 2000); see also Johnson v. Polaris Sales, Inc., 257 F. Supp. 2d 300 (D. Me. 2003) (stating a court will “‘estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement the signatory has signed,’ and the signatory and nonsignatory parties share a close relationship”); Goldman v. KPMG LLP, 173 Cal. App. 4th 209, 92 Cal. Rptr. 3d 534 (2d Dist. 2009) (although finding a fraud claim separate from the contract, the court said equitable estoppel can be invoked by a nonsignatory if the claims are “dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations”); Turtle Ridge Media Group, Inc. v. Pacific Bell Directory, 140 Cal. App. 4th 828, 44 Cal. Rptr. 3d 317 (2d Dist. 2006), as modified, (July 20, 2006) (“Under federal law, a non-signatory may compel a signatory to arbitrate its claims when the signatory’s claims are based upon and intertwined with a contract containing an arbitration agreement.”); Metalclad Corp. v. Ventana Environmental Organizational Partnership, 109 Cal. App. 4th 1705, 1 Cal. Rptr. 3d 328 (4th Dist. 2003) (relying heavily on Sunkist and a broad arbitration clause, the court ordered that litigation be stayed pending arbitration).

The “obscure” actor was Matthew McConaughey. His obscure co-star was Renee Zellweger. The film was the Texas Chainsaw Massacre: The Next Generation (1994), a 2.7-star epic in which teenagers find themselves alone with “Leatherface and his insane family of cannibalistic psychopaths.” http://www.imdb.com.

Grigson, 210 F.3d at 532 (referencing Samuel Williston, 4 ALI Proceedings 61, 89–90 (1926)). With promissory estoppel, detrimental reliance estoppel, intertwined claims estoppel, equitable estoppel, collateral estoppel, concerted-Metalclad Corp. v. Ventana Environmental Organizational Partnership, 109 Cal. App. 4th 1705, 1 Cal. Rptr. 3d 328 (4th Dist. 2003) (relying heavily on Sunkist and a broad arbitration clause, the court ordered that litigation be stayed pending arbitration).

102 Grigson v. Creative Artists Agency L.L.C., 210 F.3d 524 (5th Cir. 2000); see also Johnson v. Polaris Sales, Inc., 257 F. Supp. 2d 300 (D. Me. 2003) (stating a court will “‘estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement the signatory has signed,’ and the signatory and nonsignatory parties share a close relationship”); Goldman v. KPMG LLP, 173 Cal. App. 4th 209, 92 Cal. Rptr. 3d 534 (2d Dist. 2009) (although finding a fraud claim separate from the contract, the court said equitable estoppel can be invoked by a nonsignatory if the claims are “dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations”); Turtle Ridge Media Group, Inc. v. Pacific Bell Directory, 140 Cal. App. 4th 828, 44 Cal. Rptr. 3d 317 (2d Dist. 2006), as modified, (July 20, 2006) (“Under federal law, a non-signatory may compel a signatory to arbitrate its claims when the signatory’s claims are based upon and intertwined with a contract containing an arbitration agreement.”); Metalclad Corp. v. Ventana Environmental Organizational Partnership, 109 Cal. App. 4th 1705, 1 Cal. Rptr. 3d 328 (4th Dist. 2003) (relying heavily on Sunkist and a broad arbitration clause, the court ordered that litigation be stayed pending arbitration).

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Grigson was criticized in In re Merrill Lynch Trust Co. Plaintiffs had arbitration agreements with Merrill Lynch, but not with Employees and Affiliates of Merrill Lynch that they named as defendants when they filed suit. Even though Merrill Lynch was not named, the court compelled arbitration of the Employee claims but not the Affiliate claims, saying, “under both Texas and federal law, arbitrability turns on the substance of a claim, not artful pleading.” It then reviewed numerous cases and stated “while the Fifth Circuit has recognized concerted-misconduct estoppel, the theory is far from well-settled in the federal courts.” It referenced Grigson and MS Dealer Service Corp. v. Franklin as the two leading cases holding “that both direct-benefits and concerted-misconduct estoppel were present, so it is unclear what the latter theory added to the result.” In eight other opinions, the court ruled the theory was inapplicable in four, not reached in two, and led to different results in the remaining two.

XIV. Third Party Beneficiary

To bind a nonsignatory on a third party beneficiary basis, courts must find a clear “intent” to benefit a third party and the relationship must be part of the “consideration” for the contract, not merely incidental to it.

In Stadtlander, a divided Louisiana court ruled that an Employer was a third party beneficiary of an arbitration agreement. As a condition of employment, it required prospective Employees to first sign arbitration agreements with a designated arbitration Provider. Not only did that agreement benefit the Employer, but it specifically said Employer was a third party beneficiary.

misconduct estoppel, direct-benefits estoppel, judicial estoppel and probably a few more having found their way into the legal lexicon, Williston may have been clairvoyant.

105 In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185 (Tex. 2007).
106 MS Dealer Service Corp. v. Franklin, 177 F.3d 942, 43 Fed. R. Serv. 3d 1204 (11th Cir. 1999).
107 Fleetwood Enterprises, Inc. v. Gaskamp, 280 F.3d 1069, 1075 (5th Cir. 2002), opinion supplemented on denial of reh’g, 303 F.3d 570 (5th Cir. 2002).
Arbitration and Nonsignatories: Bound or Not Bound?

In Washington Square Securities, Inc. v. Aune, nonsignatory Investors were deemed third party beneficiaries of an agreement between a Securities Firm and the NASD that required members to arbitrate with “customers” and “associated persons” even though the investments were made through an alleged Independent Contractor.

In Southwest Health Plan, Inc. v. Sparkman, the court found that an arbitration provision in a contract between an Employer and a Health Care Provider, required a nonsignatory Employee to arbitrate as a third party beneficiary, a theory discussed in numerous other cases.

XV. Miscellaneous Claims and Issues

A. Other Theories.

Other theories or variations, usually unrelated to construction, with significant over-lapping of terminology and often boiling down to little more than an estoppel, include an acceptance of benefits, parent-child, ratification, res judicata, wrongful

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109 Washington Square Securities, Inc. v. Aune, 385 F.3d 432 (4th Cir. 2004); see also John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48 (2d Cir. 2001).


111 Smith v. Microskills San Diego L.P., 153 Cal. App. 4th 892, 63 Cal. Rptr. 3d 608, 221 Ed. Law Rep. 799 (4th Dist. 2007) (a student, who borrowed tuition money from Sallie Mae pursuant to a note with an arbitration provision, later sued the nonsignatory school for alleged misrepresentations); Matthau v. Superior Court, 151 Cal. App. 4th 593, 60 Cal. Rptr. 3d 93 (2d Dist. 2007) (an actor and an agency signed a contract providing for payment of commissions to the agency and arbitration of disputes; after the actor's death, his son stopped paying and the agency's attempt to compel arbitration was unsuccessful since the son was not an intended third-party beneficiary of the contract); City of Hope v. Cave, 102 Cal. App. 4th 1356, 126 Cal. Rptr. 2d 283 (2d Dist. 2002), as modified, (Nov. 13, 2002) (an attorney and law firm could not demonstrate they were third-party beneficiaries and could not “finesse” their way into arbitration); Benasra v. Marciano, 92 Cal. App. 4th 987, 112 Cal. Rptr. 2d 358 (2d Dist. 2001) (an individual's claim that he was a third-party beneficiary of a license agreement he signed on behalf of a corporation was unavailing); Harris v. Superior Court, 188 Cal. App. 3d 475, 233 Cal. Rptr. 186 (2d Dist. 1986) (a doctor was the beneficiary of a clause contained in a medical program’s form).

112 See, e.g., Johnson v. Polaris Sales, Inc., 257 F. Supp. 2d 300 (D. Me. 2003) (“Courts will enforce arbitration against a nonsignatory... on behalf of a signatory, provided the nonsignatory knowingly accepted benefits flowing directly from the agreement.”); RN Solution, Inc. v. Catholic Healthcare West, 165 Cal. App. 4th 1511, 81 Cal. Rptr. 3d 892 (1st Dist. 2008); NORCAL Mutual Ins. Co. v. Newton, 84 Cal. App. 4th 64, 100 Cal. Rptr. 2d 683 (1st Dist. 2000) (a
death, insurance policy relationships and medical care agreements.

wife who accepted the benefit of her husband’s insurance policy by having it provide a litigation defense was also bound by its arbitration clause).

112 Doyle v. Giuliucci, 62 Cal. 2d 606, 43 Cal. Rptr. 697, 401 P.2d 1 (1965) (a father, whose contract with a Medical Group included an arbitration clause and provided for services to his dependents, filed a malpractice claim on behalf of his nonsignatory minor child; arbitration was compelled since the court felt a parent had a right and duty to provide for the care of a child); see also Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392 (Fla. 2005); Cross v. Carnes, 132 Ohio App. 3d 157, 724 N.E.2d 828, 27 Media L. Rep. (BNA) 1366 (11th Dist. Trumbull County 1998); Wilson v. Kaiser Foundation Hospitals, 141 Cal. App. 3d 691, 190 Cal. Rptr. 649 (3d Dist. 1983); but see Weeks v. Crow, 113 Cal. App. 3d 145, 167 Cal. Rptr. 201 (1981); Wilson v. Kaiser Foundation Hospitals, 141 Cal. App. 3d 890 (4th Dist. 1980) (the court viewed a medical services contract as covering services for an expectant mother, not a newborn child and was considered inapplicable in a wrongful death action).

114 Caro v. Smith, 59 Cal. App. 4th 725, 69 Cal. Rptr. 2d 306 (4th Dist. 1997), as modified, (Dec. 24, 1997) (insurance defense counsel signed a stipulation agreeing to submit a litigated matter to arbitration, a hearing was held, parties agreed the award would be binding and, when Plaintiff prevailed, Defendant argued she was a nonsignatory to the stipulation so the award could not be binding; the court, after making comments about “welshing lawyers,” felt Defendant, through her conduct, had ratified the agreement).

115 Vandenberg v. Superior Court, 21 Cal. 4th 815, 88 Cal. Rptr. 2d 366, 982 P.2d 229 (1999) (After an arbitration award in a landlord and tenant dispute in which the arbitrator ruled for landlord and indicated a belief that the primary discharge of contaminants from underground tanks was not “sudden and accidental,” the tenant paid the award and then sued its nonsignatory CGL carriers who, fond of the language indicating the arbitrator’s belief, argued they had no duty to defend or indemnify their insured Tenant; in a lengthy opinion discussing “claim preclusion” and “issue preclusion,” the court, cautioning that its holding should be “narrowly circumscribed,” held “a private arbitration award, even if judicially confirmed, may not have nonmutual collateral estoppel effect under California law unless there was an agreement to that effect in the particular case.”); see also Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 36 Media L. Rep. (BNA) 1801 (2008) (five-factor analysis in the federal arena on issue preclusion).

116 See, e.g., Graves v. BP America, Inc., 568 F.3d 221, 28 I.E.R. Cas. (BNA) 30, 157 Lab. Cas. (CCH) P 60803 (5th Cir. 2009) (referencing a Texas statute, the court said heirs of a deceased employee were bound by the employment contract to arbitrate); Ruiz v. Podolsky, 50 Cal. 4th 838, 114 Cal. Rptr. 3d 263, 237 P.3d 584 (2010) (Based on a California statute, the court said heirs filing a medical malpractice action were required to arbitrate “at least when, as here, the language of the agreement manifests an intent to bind these claimants.” The holding expressly “does not extend to third parties who are strangers to the decedent and who file cross-claims in a medical malpractice case.”). Ruiz was discussed in Emma Gallegos, Malpractice Arbitration Agreements Handcuff Heirs, L.A. Daily J. (Aug. 24, 2010).
B. Nonsignatory Motion to Stay or Compel.

In One World Networks Integrated Technologies, Inc. v. Duitch, the court considered the ability of a nonsignatory to stay an arbitration between two signatories. An Employee and former Employer agreed to arbitrate whether the Employee had breached a confidentiality agreement. While that was pending, the Employer sued the Employee’s current Employer for unfair competition. When the current Employer (nonsignatory) sought to stay the arbitration, the appellate court relied on a statute in saying a stay could only be sought by a party to the agreement.

[Refer to footnotes for detailed legal references and cases]

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The current Employer wasn’t a party to the agreement, the Employee was a party but wasn’t involved in the litigation and the outcome of the arbitration wouldn’t affect the litigation since an award favorable to the former Employer couldn’t be used against the current Employer.

In One World Networks, a nonsignatory had tried to stay an arbitration between signatories, while in In re Rubiola, nonsignatories wanted to compel arbitration. Buyers and Sellers of a residence signed a contract that did not provide for arbitration, but the Buyers’ separate financing agreement with a Mortgage Company provided for arbitration between “the parties.” The broad clause defined “parties” to include “individual partners, affiliates, officers, directors, employees, agents, and/or representatives” of the signatories. When the Buyers sued Sellers and numerous others, the nonsignatory defendants’ moved to compel arbitration. The court held that signatory parties who agree to arbitrate may grant nonsignatories the right to enforce the agreement and the wording of this clause indicated they intended to do so.

C. Provider Not Liable.

International Medical Group, Inc. v. American Arbitration Association, Inc. considered the liability, if any, of arbitration providers. In a well-worded opening, the court stated, “International Medical Group, Inc., (“IMG”) and Sirius International Insurance Corporation (“Sirius”) were so displeased at being drawn into an arbitration proceeding that they sued not only the claimant who drew them in but his lawyers, their law firm, the American Arbitration Association (“AAA”) and a few hapless employees of the AAA.” IMG, a nonsignatory to the arbitration agreement, asked the court to create a “bad-faith arbitration” cause of action against providers. The appellate court ruled against IMG and said providers play a role similar to a court clerk who receives and files pleadings. Under IMG’s analysis, “the AAA would have been deciding arbitrability of the case no matter what it did after the demand was filed.” Providers are within their rights to begin processing a case with parties who challenge jurisdiction before arbitrability has been determined.

D. Advocates.

For arbitration advocates who think they made it through this
article “scot free,” we suggest reading Bak v. MCL Financial Group. During discovery in a FINRA arbitration, Plaintiffs inadvertently produced privileged documents and counsel sent a letter to Defendants’ counsel claiming the privilege and demanding a return of the documents.

Appropriately, Defendants’ counsel returned the documents. Not so appropriately, he first “made a cursory review” of them, copied them, sent copies to the Arbitrators and created a spreadsheet outlining information contained in the documents, conduct for which the Arbitrators imposed a $7,500 sanction and required the counsel to sign an affidavit stating that neither he nor anyone in his office retained copies, copies had been given to no one else and no other copies existed. Counsel produced the affidavit, but said he was a nonsignatory to the arbitration agreement so the Arbitrators had no authority to sanction him. The court felt otherwise. By voluntarily appearing on behalf of Defendants, conducting discovery and responding to a claim of privilege, the attorney had subjected himself to jurisdiction of the Arbitrators.

XVI. Conclusion

It is difficult to draw a bright line definitive list of what theories work in specific circumstances and what theories don’t since fact situations differ significantly. The one thread that pervades most opinions is that (1) private commercial arbitration is contractually based, (2) the manner in which contracts, litigation pleadings, demands in arbitration and other documents are drafted may play a major role in the ultimate result, and (3) subject to the evolution of the Contec analysis, these are almost always issues to be decided by courts, not arbitrators.

Particularly for those in the construction industry, a clear and express incorporation by reference of one agreement into another is usually effective, but drafters should maintain parallel wording and processes and may want to keep Hartford in mind and augment the incorporation language to avoid a too literal interpretation. Flow down clauses also seem to be effective, but

122 Most on-line resources trace the phrase to “scot,” a Scandinavian word for tax or payment. It emigrated to the UK as a method of taxation levied to provide a form of municipal relief for the poor. The term was said to be a contraction of “scot” (the tax) and “lot” (the share given to the poor). As a term for tax, “scot” has been used subsequently in a more generic sense. Being “scot free” referred to not paying one’s taxes, something that evolved to its current meaning.

require more care by drafters to make clear what is, and what is not, intended to flow from one document to another.