BUT I DIDN'T SIGN AN ARBITRATION AGREEMENT!

By Bruce E. Meyerson[1]

Every student of arbitration knows that arbitration is a matter of contract law. This means, ordinarily, that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs. Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986).

Despite this hornbook principle, however, there is a well-established body of law which authorizes a court to make arbitration provisions binding even on parties who never signed an arbitration agreement and also to allow these "nonsignatories" to compel arbitration with those who have signed an arbitration agreement. This body of law finds its source in two areas. First, courts have relied upon common law contract and agency principles to extend the both the obligation and the opportunity to arbitrate to noncontracting parties. Second, for the many disputes that fall under the Federal Arbitration Act (the "FAA", some courts have relied upon the strong federal policy favoring arbitration. In accordance with this policy, the parties' intentions "are generously construed as to issues of arbitrability," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 626 (1985), and any "ambiguities as to the scope of the arbitration clause itself" must be resolved in favor of arbitration. *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989). Of course, these rules are not without their limits, as the presumption of arbitrability may be overcome with "clear evidence" that the parties did not intend a claim to be arbitrable. *Harvey v. Joyce*, 199 F.3d 790, 703 (5th Cir. 2000).

Some courts, however, have properly observed that it is incorrect to cite the federal policy favoring arbitration in cases of nonsignatories. "[F]ederal policy favoring arbitration does not apply in a situation like this when a court is determining whether an agreement to arbitrate exists. Rather it applies when a court is determining whether the dispute in question falls within the scope of the arbitration agreement already found to exist." *California Fina Group, Inc. v. Herrin*, 379 F.3d 311, 316 n.6 (5th Cir. 2004); *Griswold v. Coventry First LLC*, 762 F.3d 264, 271 (6th Cir. 2014) ("The presumption in favor of arbitration does not extend, however, to non-signatories to an agreement; it applies only when both parties have consented to and are bound by the arbitration clause.").

The purpose of this article is to examine the theories that courts have relied upon to extend the obligation (or the right) to arbitrate to parties regardless of whether they have actually signed an arbitration agreement. There is a preliminary question that must be answered, however—when a dispute arises over whether a nonsignatory should be compelled to arbitrate, who decides that dispute, an arbitrator or a judge?

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Who Decides Whether a Nonsignatory is Bound to Arbitrate?

Although courts have expanded greatly the power of arbitrators to decide issues of arbitrability, the initial question of whether a party is bound by an arbitration agreement remains almost always one for a court to decide. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) the Court explained that "a gateway dispute about whether parties are bound by a given arbitration agreement clause [is] for a court to decide." *See Granite Rock Co. v. International Bd. of Teamsters*, 561 U.S. 287, 296 (2010) (whether parties have agreed to submit a particular dispute to arbitration is typically one for judicial determination). Thus, courts commonly determine whether a nonsignatory is bound to arbitrate. *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 691 (7th Cir. 2001); *Smith v. Pinnamaneni*, 254 P.3d 409, 416 (Ariz. Ct. App. 2011).

Two federal appellate courts, however, held that, based on the particular facts in each case, the issue of arbitrability involving a nonsignatory may be decided by the arbitrator. These courts relied upon the principle that when parties clearly and unmistakably demonstrate their intent that an arbitrator is to decide arbitrability, the United States Supreme Court has held that arbitrators, not courts, should determine arbitrability. *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995).

The Second Circuit Court of Appeals, citing this principle, held in *Contec Corp. v. Remote Solutions Co.*, 398 F.3d 205 (2d Cir. 2005), that an arbitrator should decide if a nonsignatory should be made subject to arbitration. Contec Corp. was a successor to Contec L.P., a party to a contract with Remote Solutions ("Remote") that contained an arbitration provision. In a dispute between Contec Corp. and Remote, Remote opposed arbitration because Contec Corp. was not a party to the original contract. The court of appeals considered whether a court or an arbitrator should decide whether the dispute between Remote and Contec Corp. was arbitrable. The original arbitration agreement incorporated the American Arbitration Association commercial rules which provide that an arbitrator is to determine "his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Rule R-7 (a). The appellate court concluded that the issue of whether Contec Corp., a nonsignatory to the arbitration agreement, could compel arbitration with Remote, was a dispute pertaining to the "existence, scope or validity" of the arbitration agreement and therefore it was to be resolved by an arbitrator, not a court.

Importantly, the court recognized that just because a signatory to an arbitration agreement has agreed to arbitrate issues of arbitrability with another party, that does not mean that it must arbitrate with any nonsignatory. The court found it must first determine whether the "parties have a sufficient relationship to each other and to the rights created under the agreement." 398 F.3d at 209. Here the court found there was a relationship between each corporate form of the original parties to the agreement and further, the

dispute arose because the parties continued to conduct themselves in accordance with the terms of that agreement. Thus, the court found that a sufficient relationship existed between the parties and it was therefore proper for the court to hold whether Remote should be required to have an arbitrator determine the question of arbitrability.[2]

In *Eckert/Wordell Archs., Inc. v. FJM Props. Of Willmar, LLC*, 756 F.3d 1098 (8th Cir. 2014), citing the American Arbitration Association commercial arbitration rules, the court held an arbitrator correctly found that a nonsignatory to the arbitration agreement was nevertheless a proper party in an arbitration. The case began as a dispute between Fischer Laser Eye Center, LLC and Eckert/Wordell which was to design and build a clinic on property owned by Fischer. The arbitration agreement was contained in the contract between these parties. The shareholders of Fischer formed a separate corporation to own the property and transferred title to the property to that entity, Family Eye Properties, LLC. Family Eye Properties changed its name to FJM Properties of Willmar which filed the demand for arbitration against Eckert/Wordell regarding the clinic's ventilation system.

The dispute on appeal was over who should decide whether FJM could enforce the arbitration agreement between Eckert/Wordell and Fischer Laser Eye Center. Because the arbitration agreement incorporated the AAA commercial rules, the court reasoned those rules "clearly and unmistakably" grant to the arbitrator the power to determine questions of arbitrability.[3] Thus, the court concluded that because the arbitrator had the power to determine the arbitrability of the dispute between FJM and Eckert/Wordell, the appellate court affirmed the judgment of the district court which vested the issue of arbitrability with the arbitrator.

I question the approach taken by the appellate court in this case. It is certainly not clear to me that a decision between parties A and B to vest issues of arbitrability in their arbitrator, grants that arbitrator the power to make determinations whether party C may or may not demand arbitration or be compelled to arbitration. There are a number of well-established doctrines used by courts that could correctly reached the same result in this case. Those are described in the following pages.

General Principles

There are a variety of theories upon which courts have relied to permit or impose arbitration on behalf of parties who have not signed an arbitration agreement. These

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[2] The court in *Contec Corp.* relied upon for support the decision of the First Circuit Court of Appeals in *Apollo Computer v. Berg*, 886 F.2d 469 (1st Cir. 1989). There, in accordance with a "broad form" arbitration agreement in a contract between Apollo and a Swedish company referred to as Dico in the opinion, the court said it was up to an arbitrator to decide whether claims between Apollo and Berg, an assignee of Dico, were arbitrable.

[3] The American Arbitration Association Commercial Arbitration Rules provide that 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 arbitration agreement or to the arbitrability of any claim or counterclaim." R-7(a). This rule has been held to "clearly and unmistakably" grant to the arbitrator the power to decide all issues of arbitrability. *E.g., Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011).

theories derive from the general rule set forth in Section 2 of the Federal Arbitration Act that arbitration agreements are enforceable and revocable on terms applicable to contracts generally. Thus, the doctrines making arbitration agreements binding upon non-signatories find their source in ordinary contract and agency principles. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006); *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995).[4]

The determination of whether a nonsignatory may be compelled to arbitrate, or whether a nonsignatory may compel a signatory to arbitrate, is resolved by applying principles of state law. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). "'[T]raditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" (citation omitted).

The Second Circuit Court of Appeals vacated the confirmation of an arbitration award concluding that the arbitrators erred in making a nonsignatory subject to arbitration and not following established contract or agency law. *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005). In that case, Sarhank entered into a contract with Oracle Systems, Inc., a wholly-owned subsidiary of Oracle Corp. The contract contained an arbitration provision. A dispute arose and Sarhank demanded arbitration against both Oracle Systems and Oracle Corp. Oracle Corp. was a not a signatory to the agreement with Sarhank, nor did it execute any written agreement to arbitrate with Sarhank. The appellate court first ruled that the district court was required to determine whether Oracle Corp. had agreed to arbitrate. The appellate court noted that the basis of the arbitrators' ruling was Egyptian law. Because the proceeding was one to enforce the award in the United States, the court found that American federal arbitration law governed. The court held that an "American nonsignatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law." *Id.* at 662.

It is not necessary to consider a contract or agency theory in the rare circumstance where the arbitration agreement itself permits arbitration with nonsignatories. For example, in *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 383 (5th Cir. 2008), the court of appeals held a party to an arbitration agreement could be compelled to arbitrate with a nonsignatory where that party had agreed to arbitrate any claim arising from the "'relationships [which] result from th[e] [a]greement.'" In that case the court held that such a relationship existed between Green Tree, a loan servicing company, and Sherer, a party who executed a loan serviced by Green Tree.

[4] Courts generally have been consistent in following these rules. For example, in *Thomson-CSF, S.A.* the appellate court reversed the trial court which found a nonsignatory subject to arbitration without regard to agency or contract rules. The court of appeals held the district court's "hybrid approach dilutes the safeguards afforded to a nonsignatory . . .and fails to adequately protect parent companies, the subsidiaries of which have entered into arbitration agreements." *Id.* at 780.

Theories on Which Nonsignatories
Have Compelled, or Have Been Held Subject to, Arbitration

Alter Ego. Although a corporate relationship or affiliation alone rarely has been held sufficient to bind a nonsignatory to an arbitration agreement, the existence of an alter ego relationship is one of the established grounds to support arbitration by a nonsignatory. *E.g., Maggi XXI, Inc. v. Stato della Citta del Vaticano,* 714 F.3d 714, 723 (2d Cir. 2013). Because of the difficulty generally in establishing the factual basis to pierce the corporate veil, it is the rare case that has applied this doctrine. *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 447 F.3d 411, 420 (5th Cir. 2006). In the converse situation—where a signatory to an arbitration agreement brings suit against a nonsignatory on ground that the nonsignatory is an alter ego to a signatory to the arbitration agreement, the nonsignatory can successfully compel arbitration. *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Properties, Inc. v. Robson,* 294 P.3d 125, 134 (Ariz. Ct. App. 2012); *Rowe v. Exline,* 63 Cal. Rptr. 3d 787 (Cal. Ct. App. 2007).

Equitable Estoppel. Equitable estoppel is the most commonly applied doctrine in the area of nonsignatories and arbitration. Equitable estoppel is a doctrine which applies where a party is seeking to preclude another party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity. *Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006). As one court stated, the "linchpin for equitable estoppel is equity—fairness." *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000). There are a number of variations on how equitable estoppels has been applied by the courts.

One application of the doctrine is where a party to an arbitration agreement has been held to be "estopped" from refusing to arbitrate with a nonsignatory where issues between the parties are "intertwined" with the agreement containing an arbitration provision. *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 97-98 (2d Cir. 1999); *see Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Properties, Inc. v. Robson*, 294 P.3d at 134-35. A common example of this situation is found in *Letizia v. Prudential Bache Securities, Inc.*, 802 F. 2d 1185 (9th Cir. 1986). After suit was filed against two brokerage account executives, they successfully moved to compel arbitration based upon an arbitration provision in the brokerage agreement. The plaintiff contended his action against the individual account executives should not be subject to arbitration because those individuals had not signed the arbitration agreement he signed with the brokerage firm. The court of appeals disagreed noting that all of the allegedly wrongful acts related to the handling of the securities account which contained the arbitration agreement.

In *Murphy v. DirecTV, Inc.,* 724 F.3d 1218 (9th Cir. 2013), the court refused to apply the doctrine of equitable estoppels in a case where a signatory to an arbitration agreement sought to compe arbitration by a nonsignatory. Although the party seeking to compel arbitration alleged that nonsignatories where in engaged in "collusion" with signatories, the court held that "[m]ere allegations of collusion are insufficient trigger the equitable estoppels," where there is no allegation that the collusion pertained to an

agreement which contained an arbitration clause. *Id.* at 1312. In that decision, the court also found no evidence to support the agency and third-party beneficiary theories that might support arbitration by nonsignatories.

Citing California law, the Ninth Circuit described the circumstances when a nonsignatory may compel arbitration with a signatory under the doctrine of equitable estoppel. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013):

> Where a nonsignatory seeks to enforce an arbitration clause, the doctrine of equitable estoppel applies in two circumstances: (1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are 'intimately founded in and intertwined with' the underlying contract, and (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and 'the allegations of interdependent misconduct [are] founded in or intimately connected with the obligations of the underlying agreement.'

(citations omitted).

One of the leading cases in the converse situation—where a signatory is seeking to compel arbitration with a nonsignatory—is *M.S. Dealer Serv. Corp. v. Franklin*, 177 F.2d 942 (11th Cir. 1999). In that case, the court recognized two circumstances when signatories would be able to compel nonsignatories to arbitrate. First, "equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claim against the nonsignatory." *Id.* at 947. Second, the doctrine should apply "when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more signatories to the contract." *Id; see generally Kingsley Capital Mgmt., LLC v. Sly*, 820 F.Supp.2d 1011, 1018-25 (D. Ariz. 2011).

In *M.S. Dealer Serv. Corp.* a consumer purchased a car under a contract which incorporated a Retail Installment Contract with MS Dealer. After the consumer brought suit against both the seller and MS Dealer, MS Dealer moved to compel arbitration. The court of appeals held that because the plaintiff alleged collusive behavior on the part of the defendants, and because the customer's obligation to pay certain charges arose from the purchase contract which contained the arbitration clause, the consumer was estopped from avoiding arbitration.

In other situations, courts have permitted a signatory to bind a nonsignatory to a contract containing an arbitration clause where the claims made by the nonsignatory arise out of and relate directly to the agreement containing an arbitration provision. *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993) (party stopped from avoiding arbitration where its claims were "intimately founded and intertwined with" a contract containing the arbitration provision); *see Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 527-28 (5th Cir. 2000). In a variation of this theme,

signatories to arbitration agreements have been able to compel nonsignatories to arbitrate where the nonsignatory, during the term of the contract, has "embraced" the contract, but then during litigation attempts to repudiate the arbitration clause in the contract. *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d 292, 295 (3d Cir. 2004); *see Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 472 (5th Cir. 2010). A nonsignatory can "embrace" a contract containing an arbitration clause "by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract." *Id.* at 473; *see also Westmoreland v. Sadoux*, 299 F.3d 462, 466 (5th Cir. 2002) (nonsignatory may compel arbitration against a signatory where the signatory must rely on a contract containing an arbitration clause in asserting claims against the nonsignatory).

Other courts have held that where a nonsignatory receives a benefit from a contract containing an arbitration provision it is estopped from refusing to comply with the arbitration clause. *R. J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160-62 (4th Cir. 2004). In *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003), the court held that a direct benefit is required for a nonsignatory to be compelled to arbitrate. For example, in *Bouriez v. Carnegie Mellon University*, 359 F.3d 292, 295 (3d Cir. 2004), a corporation was a party to an arbitration agreement. The court refused to impose arbitration on a nonsignatory minority shareholder where there was no showing that any benefit of the project in dispute would "go to him *directly*." *See Griswold v. Coventry First LLC*, 762 F.3d 264, 273-74 (3d Cir. 2014) (signatory was not permitted to compel arbitration with a nonsignatory where its claims were not "*directly*" based on the contract containing the arbitration agreement).

The Texas Supreme Court found that a direct benefit existed in *In re Weekley Homes*, 180 S.W.3d 327 (Tex. 2005). In that case, Forsting entered into a construction contract with Weekley, which contained an arbitration clause. After closing, Forsting transferred the home to his family trust, whose sole beneficiary was Von Bargen, his only child. A dispute arose regarding the construction of the home and Weekley undertook repairs. Von Bargen handled all matters relating to the house, the construction problems, the warranty work and the negotiations. When she brought suit against Weekley claiming that dust during the repairs caused her to contract asthma, Weekley moved to compel arbitration. The Texas Supreme Court found that Von Bargen was a direct beneficiary of the construction contract based upon her exercise of rights under the contract and her equitable entitlement to other contractual benefits.

The Ninth Circuit refused to compel arbitration applying the direct benefits theory of estoppel. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014). The court first rejected Barnes & Noble's argument that the consumer was bound to arbitrate a dispute because the court found unenforceable the arbitration provision in the company's browsewrap agreement found on its website. As an alternative argument the company contended that when the consumer brought his complaint in court, he relied upon the choice of law provision in the Terms of Use on the company website. The court held "we are unable to find any case law holding that reliance on a contract's choice of law provision in itself constitutes a 'direct benefit.'" *Id.* 1180.

Agency. Traditional principles of agency law may also bind a nonsignatory to an arbitration agreement and allow a nonsignatory to enforce an arbitration agreement made by the principal. In *Arnold v. The Arnold Corp.*, 920 F.2d 1269, 1282 (6th Cir. 1990), the court permitted officers and agents of the defendant corporation to invoke the arbitration agreement in a contract signed on behalf of the corporation, citing the "well-settled principle affording agents the benefits of arbitration agreements made by their principal." *See Kingsley Capital Mgmt., LLC v. Sly*, 820 F.Supp.2d at 1025-28. In *Sacks v. Dietrich*, 663 F.3d 1065 (9th Cir. 2011), Dang retained attorney Sacks to represent him in a FINRA arbitration. Dang submitted a Uniform Submission Agreement to FINRA which contained an arbitration provision. The appellate court quite summarily held that although Sacks didn't sign the arbitration agreement, under agency principles, he was bound by a ruling of the arbitration panel which disqualified him from representing Dang.

Although an agent may bind its nonsignatory principal to an arbitration agreement, the agency relationship must be relevant to the disputed issues. *InterGen N.V. v. Grina*, 344 F.3d 134, 147-48 (1st Cir. 2003). Where an agent acts on behalf of a disclosed principal, the agent is not personally obligated to arbitrate. *McCarthy v. Azure*, 22 F.3d 351, 361 (1st Cir. 1994); *Flink v. Carlson*, 856 F.2d 44, 46 (8th Cir. 1998).

Third Party Beneficiary. The "common law theories used to bind a non-signatory to an arbitration clause include third party beneficiary." *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d 292, 294 (3d Cir. 2004); *see BioD, LLC v. Amnio Tech., LLC*, 2014 WL 268575, at *4 (D. Ariz. Jan. 24, 2014); *Jeanes v. Arrow Ins. Co.*, 494 P.2d 1334, 1337 (Ariz. Ct. App. 1972) (because a third-party beneficiary accepts the benefits under a contract, that party must "accept and abide by the terms of the contract"); *see also Kong v. Allied Prof'l Ins. Co.*, 750 F.3d 1295, 1302-03 (11th Cir. 2014) (assignee of a contract containing an arbitration provision was bound to arbitrate). Most decisions, however, do not find that a third-party beneficiary relationship exists. *E.g., Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1234 (9th Cir. 2013); *GGNSC Omaha Oak Grove, LLC v. Payrich*, 708 F.3d 1024, 1026 (8th Cir. 2013). Citing Texas law, a federal appellate court held that the contract containing the arbitration provision must reflect an intent to confer a direct benefit on the third party; merely being affected by the contract or having an interest in the contract is insufficient. *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F. 3d 1069, 1075 (5th Cir. 2002); *Industrial Elecs. Corp. of Wisconsin v. iPower Dist. Group, Inc.*, 215 F.3d 677, 680-81 (7th Cir. 2000) (although a third-party beneficiary relationship existed under a franchise contract which contained an arbitration clause, the plaintiff's claims were not brought under that agreement).

Although not specifically mentioning the third-party beneficiary doctrine, the Arizona Court of Appeals distinguished between an obligation to arbitrate by a nonsignatory based on rights "derived" from a party to an arbitration agreement and rights based upon a statute. *Estate of DeCamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 316 P.3d 607 (Ariz. Ct. App. 2014). When DeCamacho was admitted to the LaSolana residential facility, her daughter, Guthrie, signed an arbitration agreement on her behalf. After DeCamacho died following a fall at the facility, Guthrie filed a

wrongful death action and a claim under Arizona's Adult Protective Services Act. The court found that the claim under the Adult Protective Services Act was derivative of DeCamacho's rights, and therefore that claim was subject to arbitration. On the other hand, Guthrie's claim under the wrongful death statute was based on Guthrie's Arizona statutory rights and was not subject to arbitration.

The Arizona Court of Appeals considered whether the third-party beneficiary doctrine and the equitable estoppel doctrine applied where the trustors and trustees of an irrevocable inter vivos trust were seeking to enforce an arbitration provision in the trust against the beneficiaries. *Schoneberger v. Oelze*, 96 P.3d 1078 (Ariz. Ct. App. 2004). The court found it unnecessary to consider these doctrines concluding that, because the trust was not a contract under Arizona law, the arbitration agreement was unenforceable. The decision in *Schoneberger* was superceded when the Arizona legislature adopted A.R.S. § 14-10205 ("A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.")

Incorporation by Reference. A nonsignatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contract with the nonsignatory which incorporates an agreement containing the arbitration clause. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995). An arbitration clause can be incorporated even if the relevant language does specifically refer to it. *World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc.*, 517 F.3d 1240, 1244 (11th Cir. 2008).

For example, in *Weatherguard Roofing, Co. v. D. R. Ward Constr. Co.*, 152 P.3d 1227 (Ariz. Ct. App. 2007), the Arizona Court of Appeals applied the doctrine of incorporation by reference in a construction dispute. After the owner made a made a claim and demanded arbitration against the general contactor, the general contractor made a demand for arbitration and sought indemnity from the roofing subcontractor. The roofing subcontractor participated in arbitration but preserved its right to subsequently argue it was not bound by the arbitration provision in the contract between the owner and the general contractor. The court of appeals disagreed citing the doctrine of incorporation by reference.

The subcontract between the general contractor and the roofing subcontractor provided that the subcontractor "shall assume and agree to perform all obligations of [the general] Contractor in the General Contract . . . and shall assume toward Contractor all of the obligations and responsibilities which Contractor assumes toward Owner under the General Contract." *Id.* at 1230. The court found this language in the subcontract was sufficient to incorporate the arbitration provision in the prime contract. Further, because the general contractor was given the same "rights and privileges" against the subcontractor the owner had against the general contractor, the court reasoned that just as the owner had the right to demand arbitration of the general contractor, the general contractor had the right to demand arbitration against the subcontractor.

Assumption by Conduct. A party may be bound by an arbitration clause if its conduct indicates it is assuming the obligation to arbitrate. *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991), *cert. denied.,* 502 U.S. 910 (1991). In finding that airline flight attendants' conduct manifested an assent to arbitrate, the court described the conduct this way:

> [A]ppellants' conduct manifested a clear intent to arbitrate the dispute. The record demonstrates their active and voluntary participation in the arbitration; for example, through the [union], they chose a committee to represent them in the arbitration, and, on their behalf, the committee withdrew funds from the bank account set up to cover its expenses, chose counsel to represent the transferring flight attendants in the arbitration and argued vigorously that they should receive full credit for their time of employment with [the airline]. Also, there is no evidence that, at any point before or during the arbitration, appellants objected to the process, refused to arbitrate or made any attempt to seek judicial relief.

See Opals on Ice Lingerie v. Bodylines, Inc., 320 F.3d 362, 368 (2d Cir. 2003) ([I]f a party participates in arbitration proceedings without making a timely objection to the submission of the dispute to arbitration, that party may be found to have waived its right to object to the arbitration.). However, to the extent a party participates in arbitration to contest the issue of arbitrability, such conduct does not to constitute a waiver of the right to object to arbitration. "[M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue . . . ." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 946 (1995).

Conclusion

It is still true that arbitration is matter of contract. But like contract and agency law in generally, parties may be bound by a contract even if they don't sign it. The same is necessarily true in arbitration.