

The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere

Pedro J. Martinez-Fraga

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Recommended Citation

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The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere?

Pedro J. Martinez-Fraga[†]

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And this, then, is the genesis and being of justice; it is a mean between what is best - doing injustice without paying the penalty - and what is worst - suffering injustice without being able to avenge oneself.

—Plato, *The Republic*, Book II, Line 359¹

Introduction

The legal standard governing the extent to which a non-signatory to an arbitration agreement may be bound by a contract that it did not negotiate, sign, or perform is based on traditional concepts of contract and agency law.² The foundation for this conceptual framework is all too familiar. The recitation of the applicable standard found in the relevant cases and scholastic sources bespeaks a boilerplate narrative more akin to a reflexive mechanical mantra than to the articulation of a legal precept. According to this standard, international commercial arbitration is a “creature of contract” and, therefore, a non-signatory to an arbitration agreement lacks standing to assert any legitimate claim to the benefits or burdens of an arbitration clause absent a contract or agency relationship, which would provide the appropriate “privity.”³ The logic and intuitive appeal that this

1. PLATO, *THE REPUBLIC* 37, *Book II, Line 359(a) (Allan Bloom trans., 2d ed. Basic Books 1991) (ca. 380 BC) (“τό ὑπό τοῦ νόμου ἐπίταγμα νόμιμόν τε καί δίκαιον, καί εἶναι δὴ ταῦτων γένεσίν τε καί οὐσίαν δικαιοσύνης, μεταξύ οὐσαν τοῦ μὲν ἀρίστου ὄντος, ἐάν ἀδίκων μὴ δίδω δίκην, τοῦ δέ κακίστου, ἐάν ἀδικούμενος τιμωρεῖσθαι ἀδύνατος ἦ, τό δέ δίκαιον ἐν μέσῳ ὄν τούτων ἀμφοτέρων ἀγαπασθαι οὐχ ὡς ἀγαθόν, ἀλλ’ ὡς ἀρρωστία τοῦ ἀδικεῖν τιμωμένον. ἐπεὶ τὸν δυνάμενον αὐτό ποιεῖν καί ὡς ἀληθῶς ἀνδρα οὐδ’ ἂν ἐνί ποτε ξυυθέθαι τό μήτε ἀδικεῖν μήτε ἀδικεῖσθαι.”) (translation by author).

2. See *Thomson-CSF, S.A. v. Am. Arb. Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995) (“This Court has recognized a number of theories under which nonsignatories may be bound to the arbitration agreements of others. Those theories arise out of common law principles of contract and agency law.”). The contractual genesis of arbitration commands qualification notwithstanding binding jurisprudence and the writings of noted scholars asserting that “arbitration is a creature of contract.” See, e.g., Lon L. Fuller, *Collective Bargaining and the Arbitrator*, in *COLLECTIVE BARGAINING AND THE ARBITRATOR’S ROLE* 8, 14 (Mark L. Kahn ed., 1962). Party-autonomy, the salient arbitral principle rooted in autonomy to fashion an arbitral clause, itself is subject to considerable constraints pertaining to limits on arbitrability of subject matter, limitations in the form of public policy, limits in second instance review, and even limits in the applicable law. Thus, when submitted to sustained analysis, party-autonomy to arbitrate is not a self-contained precept that may be severed from the imperative of the state.

3. See Federal Arbitration Act (FAA), 9 U.S.C. § 4 (2012) (“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for

rationale presents is indeed compelling, forceful, and seductive. At first glance, the actual aesthetics of this ontological pronouncement would seem to invite commentators and practitioners to conclude that the underlying doctrines of contract and agency law serve as tempered constraints on the policy favoring arbitration that underlies the rubric of the Federal Arbitration Act and is reflected in a plethora of Supreme Court opinions that address international commercial arbitration and the law of arbitration as a whole.⁴ After all, a pro-arbitration policy designed to obviate long-standing judicial prejudices concerning arbitral proceedings generally, so that these proceedings may be held to be in *pari materia* with judicial cases, cannot serve as an unbridled policy for foisting arbitral proceedings on non-signatories.⁵

arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.”) (emphasis added); *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 353 n.3 (5th Cir. 2003) (citing *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002) (holding that arbitration agreements “must be in writing and signed by the part[ies]” and may apply to non-signatories only “in rare circumstances”) (alteration in original)); *E.I. DuPont de Nemours v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 194-95 (3d Cir. 2001) (“Because arbitration is a creature of contract law, when asked to enforce an arbitration agreement against a non-signatory to an arbitration clause, we ask ‘whether he or she is bound by that agreement under traditional principles of contract and agency law.’”); *accord Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (noting that “arbitration is a matter of contract and cannot, in general, be required for a matter involving an arbitration agreement non-signatory”); *cf. EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (“Arbitration under the [FAA] is a matter of consent, not coercion.” (alteration in original) (internal quotation marks omitted)); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so . . .”).

4. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”); see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115-16 (2001); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985). The FAA applies to both international and domestic arbitration. Indeed, the explicit purposes of Chapters 2 and 3 of the FAA are to incorporate the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Inter-American Convention on International Commercial Arbitration (the Panama Convention), respectively. See 9 U.S.C. § 201 *et seq.*

5. See PEDRO J. MARTINEZ-FRAGA, *THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION: DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS* 14 (2009). The four badges and vestiges of conceptual prejudice upon which judicial hostility directed toward arbitration was premised are the following: (1) the ousting of jurisdiction from courts of otherwise competent jurisdiction; (2) the view that an arbitration proceeding requires judicial supervision; (3) the conviction that arbitration is not well-suited for administering complex domestic or international cases; and (4) the idea that arbitration is not the appropriate dispute resolution methodology to administer certain types of statutory claims that provide defendants with rights in situations where they lacked equal bargaining fiat. *Id.*

In a similar vein, the jurisprudence applying the “inextricability test,” pursuant to which a *non-signatory* to an arbitration agreement may bring an arbitral proceeding against a *signatory*, also reflects rational symmetry and consistency.⁶ Because a signatory to a contract is held accountable for the terms and conditions of an agreement it ratifies, it *seems* to follow that a non-party with the requisite standing should also be able to enforce this same agreement against the signatory. Presumably, the signatory negotiated and approved the agreement, thus making arbitration regarding the agreement foreseeable. Here, too, fundamental tenets of contract law are *seemingly*, if not altogether deceptively, appropriately applied.

To the extent that this test suggests that non-signatories have an advantage over signatories, the jurisprudence argues that because signatories are presumed to have been active participants in the negotiation, drafting, and execution of the underlying contract, they cannot assert that having their own contract’s dispute resolution clause enforced against them by non-signatories would be prejudicial or unforeseeable.⁷ In broad strokes, this is the landscape in which the doctrinal rubric governing the extension of arbitral clauses is situated; namely, a space defined by and beholden to rudimentary principles of contract law. It is a static scenario aspiring to encompass dynamic legal principles and configurations.

This reasoning, which descriptively points to a desire for fundamental fairness between signatories and non-signatories, is less than comprehensive. As it will be suggested, this rationale for disparate treatment is ill-conceived as it is limited to the application of a contract-based analysis. Absent from this rationale is any reference to a broader scope of factors, such as the specialized nature of the contract’s subject matter as alleged, policies concerning international commerce, characteristics of cross-border transactions, parties’ training and expertise, presumptions of knowledge arising from the specific industry sector at issue, and the economic context surrounding the transaction.⁸

It shall be further suggested that the existing jurisprudence, as articulated by the Second Circuit in the seminal case on the subject, *Thomson-CSF v. American Arbitration Association*,⁹ and its progeny, requires substantial doctrinal development. This doctrinal development should comport with the need to preserve and further the rudimentary principles on which international commercial arbitration is founded: party-autonomy, consent, uniformity, transparency of standard, and predictability.¹⁰ International

6. According to the inextricability test, a non-signatory to a contract containing an arbitration clause could be bound by a signatory to arbitrate a dispute where the claims asserted are “intimately founded in and intertwined with” duties created in the underlying contract. See, e.g., *McBro Planning & Dev. Co. v. Triangle Elec. Const. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984).

7. See, e.g., *id.*

8. See, e.g., *E.I. DuPont*, 269 F.3d at 199-202.

9. *Thomson-CSF, S.A. v. Am. Arb. Ass’n*, 64 F.3d 773, 773 (2d Cir. 1995).

10. See Pedro J. Martinez-Fraga, *Good Faith, Bad Faith, but Not Losing Faith: A Commentary on the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 43 GEO. J. INT’L L. 387, 391, 411 n.83 (2012).

commercial arbitration seeks to guard and enhance these principles while simultaneously addressing the legal and commercial exigencies that the current global economic environment demands of international dispute resolution methodologies and of private international law.

International arbitration serves as a temporary forum for the resolution of private international law disputes until transnational courts of civil procedure become a common forum in which to air commercial disputes.¹¹ The exponential proliferation of international commercial arbitral disputes can be attributed to three core causes. First, international commercial arbitration is the legal counterpart to economic globalization in private international law and, more particularly, in the field of transnational dispute resolution.¹² Second, international commercial arbitration is a recourse that keeps claimants from having to litigate in foreign, and potentially hostile, judicial tribunals.¹³ Third, at times the obstacles endemic to the recognition and execution of judgments are virtually insurmountable. These obstacles make it beneficial for parties to be able to enforce a foreign arbitral award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 (commonly referred to as the New York Convention). The New York Convention provides an efficient and proven methodology for the enforcement of judgments that makes international commercial arbitration more attractive and viable for claimants because they can pursue enforcement of a final judgment in a foreign judicial tribunal.¹⁴

The twin goals of the New York Convention are to avoid litigation in a foreign tribunal and to be able to enforce foreign arbitral awards in jurisdictions that are signatories to the Convention. The practice of binding non-signatories to an arbitration agreement, in lieu of prosecuting the agreement in a judicial forum foreign to one or more of the parties, materially undermines the goals of the New York Convention.

This Article is divided into four distinct but profoundly interdependent sections that aspire to bring greater conceptual and normative cohesion, as well as uniform practical application, to the strictures now governing the extension of a binding arbitration clause to a non-signatory. It also seeks to develop a standard governing non-signatory practice that meets the demands that economic globalization has placed on the configuration of contractual and commercial relationships. Furthermore, this Article seeks to meet the needs of commercial associations conducting international business with other multinational corporations. These by-

11. See, e.g., AM. LAW INST. & UNIDROIT, *PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* (2006).

12. See Martinez-Fraga, *supra* note 10, at 430.

13. Pedro J. Martinez-Fraga & Rafael Domingo Oslé, *Globalization and Developments in the Apportionment of Jurisdiction Between Arbitrators and Courts Concerning International Commercial Arbitration*, 8 J. INT'L BUS. & L. 63, 65 (2009).

14. The United States, for example, as of the date of this writing, has not executed a treaty with any nation concerning the recognition and enforcement of foreign judgments. See, e.g., Gary B. Born, *Planning for International Dispute Resolution*, 17 J. INT'L ARB. 61, 71 (2000).

products of economic globalization need to be balanced against a federal policy favoring arbitration. Part I explores the Second Circuit's imprimatur and underlying analysis in *Thomson-CSF v. American Arbitration Association*. This Part asserts that the district court's holding and legal reasoning more closely advances the primary tenets on which international commercial arbitration is premised. Similarly, this Part suggests that the district court's analytical framework is actually more in line with the developments and expectations that economic globalization has foisted on international dispute resolution than the Second Circuit's landmark authority.

Part II analyzes the jurisprudence governing claims that arise from an arbitration agreement asserted by a non-signatory against an undisputed signatory. It suggests that both *non-signatories* and *signatories* to international commercial arbitral agreements should be treated similarly, if not identically, within the framework of a standard that is more practicable and relevant to an environment of economic globalization and a federal policy favoring arbitration. This standard is preferable to the current, flawed test, which is based on the law of contract and agency.

Part III addresses the material differences between state and federal jurisprudence concerning the five theories that comprise the "*Thomson-CSF test*."¹⁵ Here, it is suggested that both state and federal jurisprudence must be reconciled; otherwise, we risk forsaking such fundamental precepts as consent, party-autonomy, and predictability. This Part attempts to develop a common ground that would unify materially different analytical constructs.

Finally, Part IV suggests that the basic principles of contract and agency law, without more, do not serve the interests and aspirations of international commercial arbitration because of the theoretical developments, exigencies, and expectations that economic globalization has spawned. The current system does not fulfill international commercial arbitration's promise to serve as an avenue of relief to the universe of claimants seeking to avoid foreign venues. This Part argues that the demands of economic globalization require that arbitration shed traditional principles of U.S. contract and agency law in favor of universal criteria. A more flexible and universal criteria would better serve a global economic environment characterized by ever-increasing porous trade borders and closer economic ties between capital-exporting and capital-importing countries.¹⁶ The complex, multi-layered, and ubiquitous constitution of contemporary

15. See *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 777-80 (2d Cir. 1995).

16. See, e.g., Craig C. Briess, *The Crescent and the Corporation: Analysis and Resolution of Conflicting Positions Between the Western Corporation and the Islamic Legal System*, 8 RICH. J. GLOBAL L. & BUS. 453 (2009); Jens Drolshammer, *The Future Legal Structure of International Law Firms - Is the Experience of the Big Five in Structuring, Auditing and Consulting Organizations Relevant?*, 2 EUR. J.L. REFORM 713 (2000); Franklin A. Gevurtz, *The Globalization of Corporate Law: The End of History or a Never-Ending Story*, 86 WASH. L. REV. 475 (2011); Timur Kuran, *The Absence of the Corporation in Islamic Law: Origins and Persistence*, 53 AM. J. COMP. L. 785 (2005); Hong Liu, *Old Linkages, New Networks: The Globalization of Overseas Chinese Voluntary Associations and its Implications*, 1998 CHINA Q. 582 (1998).

multinational corporations provides a sound normative foundation for the development of a more effective standard. The standard should be equitable and conceptually compatible in order to appropriately govern the extension of an arbitration clause to non-parties that would also serve as a tempering constraint on the federal policy favoring arbitration. Economic globalization also requires a procedure pursuant to which non-parties to an arbitration clause may pursue claims against signatories to the agreement based upon the very dispute resolution methodology articulated in such a clause.

I. Revisiting the Workings of the Current Paradigm Based Upon Rudimentary Precepts of Contract and Agency Law: Redefining *Thomson-CSF v. American Arbitration Association*

A. The Orthodox Rubric Based on “Ordinary Principles of Contract and Agency Law”

International commercial arbitration’s genesis and longstanding normative roots in the law and jurisprudence of contract¹⁷ provides more than just symmetrical and historical elegance. These roots also suggest that because arbitration is a creature of contract deemed to be in *pari materia* with judicial tribunals, arbitration clauses must be construed to exclude claims and parties unforeseen by signatories to the original underlying contract.¹⁸ This dogmatic rigidity, which limits the scope and application of an arbitration clause to signatories, inevitably creates a dissonance between this narrow construction and the ever-increasing gamut of commercial scenarios that affect non-signatories.¹⁹ In attempting to limit the application of arbitration clauses to signatories, while simultaneously attempting to meet the demands that the benefits and liabilities of non-signatories created, courts almost reflexively turned to basic principles of contract and agency law.²⁰

17. See, e.g., *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

18. For a narrative of the historically conventional development of arbitration in the United States, see MARTINEZ-FRAGA, *supra* note 5, at 6-37; see also *Deloitte Noraudit v. Deloitte Haskins & Sells*, U.S., 9 F. 3d. 1060, 1063-64 (2d Cir. 1993); *Fisser v. Int’l Bank*, 282 F.2d 231, 233 (2d Cir. 1960).

19. As is more fully detailed in Parts I.D-E and II, the quantity and complexity of configuration pertaining to these scenarios reached its apogee with economic globalization.

20. For authority on the proposition that a non-signatory may be bound to an arbitration agreement so long as it is consonant with “ordinary principles of contract and agency,” see, for example, *City of Delray Beach v. Citigroup Global Mkts., Inc.*, 622 F.3d 1335, 1342 (11th Cir. 2010); *Donaldson Co. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 731 (8th Cir. 2009); *Kirleis v. Dickie, McCamey, & Chilcote, P.C.*, 560 F.3d 156, 160 (3d Cir. 2009); *Fleetwood Enters. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002); *McAllister Bros., Inc. v. A&S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980); *A/S Custodia v. Lessin Int’l, Inc.*, 503 F.2d 318, 320 (2d Cir. 1974). This jurisprudence uniformly holds that an arbitration clause may be extended to non-signatories but only where basic strictures of the law of contract and agency so command. With respect to non-signatories seeking to bind a signatory, the equitable estoppel doctrine facilitates

As the immediate and long-term consequences of economic globalization become more apparent, resorting to principles of contract and agency law for a solution may indeed harbor intuitive appeal. Since arbitration agreements are “creatures of contract” and eminently “contractual by nature,” why should doctrines foreign to the law of contract govern their application to non-signatories?²¹ Moreover, the application of contractual legal principles is more attractive considering that the jurisprudence of contract is itself formed and transformed by the very market forces that compel its application in the first place. The argument follows that international arbitration would run the risk of being denaturalized if it strays too far afield from the very tenets upon which it is premised.

By maintaining principles of contract law as a source of arbitration’s own normative legitimacy, U.S. courts have fashioned five standards (orthodox to contract law) for binding non-signatories to an arbitration agreement.²² Even though these five theories constitute separate tests, they need not stand alone with respect to each other. Their less-than-perfect application is apparent when analyzing the inherent dissonance in employing these formalistic standards in the commercial space that economic globalization has spawned. In turn, this economic context underscores the need for more flexible and universal criteria. Sustained analysis of the “conversation” between the court of first instance and the Second Circuit will help to crystallize the need for a new colloquy.

B. *Thomson-CSF* Revisited

Thomson-CSF is the seminal case articulating the governing standard for binding non-signatories to an arbitration agreement. Current commercial exigencies suggest that the *Thomson-CSF* test should be modified to meet the very standard that was reversed by the Second Circuit. In reversing the district court’s decision, the Second Circuit characterized the lower court’s opinion as having “rejected each of [the] traditional theories as sufficient justification for binding [a non-signatory] to the arbitration agreement of its subsidiary.”²³ Revisiting *Thomson-CSF* actually vindicates the

this aspiration, which is not applicable to the converse situation. This creates an asymmetry between a willing signatory seeking to bind an unwilling non-signatory and a willing non-signatory seeking to bind an unwilling signatory.

21. See *Int’l Longshoremen’s Ass’n v. New York Shipping Ass’n*, 403 F.2d 807, 809 (2d Cir. 1968) (“To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute.”); see also *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995) (quoting *United Steelworkers of Am.*, 363 U.S. at 582) (“Arbitration is contractual by nature—a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”).

22. These five standards or theories are readily recognizable and susceptible to immediate classification pursuant to the doctrines of contract and agency: (i) incorporation by reference; (ii) assumption; (iii) agency; (iv) alter ego; and (v) estoppel. See, e.g., *Thomson-CSF*, 64 F.3d at 776. There is scant authority for the proposition that a sixth theory—third-party beneficiary—is also binding. See *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 356 (5th Cir. 2003).

23. *Thomson-CSF*, 64 F.3d at 776.

lower court's then-seemingly erratic discussion and holding. This section asserts that the district court's "hybrid" approach provides for a more flexible standard, which reconciles the lack of symmetry between signatories and non-signatories to an arbitration clause. The district court's "inextricability" standard also addresses the demands for a standard that better comports with the complex transactional setting and judicial entities that economic globalization now has created and imposed.

In *Thomson-CSF*, the plaintiff, Thomson, initially refused to answer a demand for arbitration and instead filed an action in federal district court seeking a declaration that it was not bound by an agreement that it had neither negotiated nor signed.²⁴ Thomson also applied for injunctive relief proscribing the prosecution of any claim against it arising from the operative contract (Working Agreement).²⁵ Defendant E&S cross-moved to compel arbitration in furtherance of a demand for arbitration that it had filed against Thomson alleging breach of obligations arising out of the Working Agreement.²⁶ Notably, the Second Circuit reversed the district court's denial of plaintiff's request for declaratory and injunctive relief while granting defendant-appellee's cross-motion to compel arbitration.²⁷

The practical and theoretical consequences of this ruling have established draconian conceptual categories for binding non-party signatories, contributed to inequities between signatories and non-signatories, disavowed meaningful structural and financial considerations that are not in the ambit of classical contract and agency law, and fostered varying and disconcerting applications of contract law between federal and state courts concerning the extension of an arbitration clause to a non-party signatory.²⁸ In large measure, the Second Circuit's contract-based analysis has led to inequities and aberrant procedural postures. Parties that should rightfully have standing to bind non-signatories have been relegated either to bringing a claim in a judicial forum—a recourse that goes against the

24. *Id.* at 775. The underlying agreement was identified in the Second Circuit's opinion as the "Working Agreement." While the Working Agreement did not define the term "parties to the contract," it did define both "E&S" and "Rediffusion" as entities that "wherever used in [the] Working Agreement, shall include the affiliates of [either E&S or Rediffusion depending on the entity named]." *Id.* Moreover, the Working Agreement defined an "affiliate" of a party to that contract as meaning "any person, firm or corporation that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such party." *Id.* Subsequent to entering into the Working Agreement, Rediffusion was sold to Hughes Aircraft Company, which amended and extended the Working Agreement. *Id.* On December 31, 1993, Hughes Aircraft Company sold Rediffusion to Thomson. Even though E&S informed Thomson prior to its acquisition of Rediffusion that E&S intended to bind Thomson and its flight simulation division to the Working Agreement, Thomson never consented to being bound. Thomson affirmatively wrote to E&S seeking to have it waive those provisions of the Working Agreement that E&S opined to be binding upon Thomson. Upon acquiring Rediffusion, "Thomson explicitly informed E&S that it was not adopting the Working Agreement and did not consider itself bound by Rediffusion's agreement . . ." *Id.*

25. *Id.*

26. *Id.* at 776.

27. *Id.* at 780.

28. See, e.g., Aubrey L. Thomas, Comment, *Nonsignatories in Arbitration: A Good-Faith Analysis*, 14 LEWIS & CLARK L. REV. 953 (2010).

most basic principles governing international commercial arbitration—or to being named a party-defendant in a judicial tribunal where the non-signatory files an action for a declaration similar to the one pursued in *Thomson-CSF*.²⁹

C. Deconstructing the Second Circuit's Analysis in *Thomson-CSF*

The Second Circuit premised its reversal of the district court's holding on eight discreet grounds, only two of which concerned the application of law to fact.³⁰

First, in reviewing the district court's alter-ego pronouncement, the Second Circuit concluded that even though Thomson shared common ownership with Rediffusion and had incorporated Rediffusion into its own organizational and decision-making structure, "in light of the totality of the circumstances, Thomson cannot be bound by Rediffusion's arbitration agreement under a veil piercing/alter ego theory."³¹

Second, in the context of an estoppel analysis, the Second Circuit gleaned that Thomson did not "directly"³² benefit from the Working Agreement. Here, it drew a distinction between any gains indirectly derived from the Working Agreement and those resulting from the direct and proximate consequence of Thomson's acquisition of Rediffusion.³³

The Second Circuit's analysis emphasized a line of settled authority showing that non-signatories may be bound by the doctrine of "incorporation by reference."³⁴ The rationale underlying the use of the incorporation by reference doctrine to bind non-signatories to an arbitration clause appears to be part of a thoughtful effort to be all-inclusive in articulating the five³⁵ recognized theories for extending arbitral clauses to non-signato-

29. See, e.g., *Veera v. Janssen*, No. 05-Civ-2145 (SHS), 2005 WL 1606054, at *1-3 (S.D.N.Y. July 5, 2005).

30. *Thomson-CSF*, 64 F.3d at 778-79.

31. *Id.* at 778.

32. *Id.* at 779.

33. *Id.*

34. See *Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503, 505-06 (2d Cir. 1965) (finding that a separate agreement with non-signatory expressly "assum[ing] all the obligations and privileges of [signatory party] under the . . . sub-charter" constitutes ground for enforcement of arbitration clause by non-signatory); *In re Arbitration Between Keystone Shipping Co. & Texport Oil Co.*, 782 F. Supp. 28, 31 (S.D.N.Y. 1992) (upholding signatory's right to enforce an arbitration agreement on a non-party who did not sign or otherwise negotiate the subject agreement); see also *In re Arbitration Between Cont'l U.K. Ltd. & Anagel Confidence Compania Naviera, S.A.*, 658 F. Supp. 809, 813 (S.D.N.Y. 1987) ("If a charter party's arbitration clause is expressly incorporated into a bill of lading, nonsignatories who are linked to that bill through general principles of contract law or agency law may be bound.").

35. As will be discussed, the Fourth, Seventh, and Eleventh Circuits have endorsed "an alternative estoppel theory" that arguably increases the number of theories expanding the scope of an arbitration clause to bind non-signatories to six distinct theories. While this sixth theory has received some support, it does appear to be a minority viewpoint in the case law and in terms of doctrinal influence. See, e.g., *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *McBro Planning & Dev. Co. v. Triangle Elec. Const. Co.*, 741 F.2d 342, 344 (11th Cir. 1984).

ries. This doctrine plainly did not constitute a material element of the district court's opinion. Indeed, the Second Circuit quite candidly acknowledged that "[a]s the district court noted, E&S has not attempted to show that the Working Agreement was incorporated into any document which Thomson adopted. Thus, Thomson cannot be bound under an incorporation theory."³⁶

The scant treatment of the *incorporation by reference* doctrine comports with the less-than-detailed account that the doctrine has received since it was first used in an arbitration context in 1973.³⁷ Subsequent authority applying the theory has failed to consider, let alone develop, conceptual bases arising from the underlying policies unique to arbitration as premises for its application.³⁸ Nowhere does this jurisprudence consider party-autonomy, consent, predictability, transparency of standard, and uniformity as elements to be weighed together with orthodox contractual precepts in determining whether an arbitration agreement is binding on a non-signatory. It is precisely this lack of doctrinal development that contributes to the need to have a more elaborate framework that is enriched by standards outside the realm of contract law.

The Second Circuit similarly stated that the "*assumption theory*," constituting the second of the five contract standards, was equally unavailing.³⁹ The fact pattern in *Thomson-CSF* certainly was susceptible to such a construction. Significantly, the operative contract in that case, the Working Agreement, persuasively provided for the possible binding of a non-signatory pursuant to an "affiliate" premise that would survive the requisite normative foundation for application of an *assumption theory*.⁴⁰ The Second Circuit noted that "[w]hile Thomson was aware that the Working

36. *Thomson-CSF*, 64 F.3d at 777.

37. The *incorporation by reference* theory was used in a domestic arbitration to bind a non-signatory in a construction dispute, where a subcontractor had incorporated the arbitration clause into the subcontract as a general condition of the prime contract. The Fifth Circuit in that case observed that "as a matter of contract law, incorporation by reference is generally effective to accomplish its intended purpose where, as here, the provision to which reference is made has a reasonably clear and ascertainable meaning. These two propositions tend to indicate the arbitration provision in this case was a valid and enforceable part of the subcontract." *J. S. & H. Constr. Co. v. Richmond Hosp. Auth.*, 473 F.2d 212, 215 (5th Cir. 1973). It is important to note, however, that but for a single, fleeting mention of the "policy of the Federal Arbitration Act," the Court's analysis merely engaged in a very simple and orthodox contract law analysis. *Id.* at 216.

38. See, e.g., *World Rentals & Sales, LLC v. Volvo Const. Equip. Rents, Inc.*, 517 F.3d 1240, 1244-45 (11th Cir. 2008) (relying on a strict contractual analysis in holding that an arbitration clause that was incorporated by reference into an operative agreement did not apply to the dispute because the agreement expressly excluded affiliates); *Emp'rs Ins. of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1323-26 (11th Cir. 2001) (extending arbitration agreement to non-signatory based on contractual analysis without engaging in any sustained analysis concerning policies underlying arbitral proceedings); *U.S. Fid. & Guar. Co. v. W. Point Constr. Co.*, 837 F.2d 1507, 1508 (11th Cir. 1988).

39. *Thomson-CSF*, 64 F.3d at 777.

40. The Working Agreement in § 6.1 allowed for arbitration between the "parties" to the Agreement. Even though the Agreement did not provide for an explicit and dispositive definition of the word "parties," it did define "E&S" and "Rediffusion":

Agreement purported to bind it as an 'affiliate' of Rediffusion, at no time did Thomson manifest an intention to be bound by that Agreement."⁴¹

The Second Circuit's statements concerning the *assumption theory* leave much to be desired. Specifically, the Second Circuit fails to consider federal policy analysis favoring arbitration or any need to apply principles other than basic norms of contract law. Rather, the opinion appears to suggest that within the limited confines of a contractual analysis, a non-signatory is not bound to an arbitration agreement even where the contract containing such an agreement explicitly provides for the non-signatory's privity through its "*indisputabl[e]*"⁴² status as an "affiliate." Here, it is implied that the non-signatory's *conduct* standing alone, in contrast with its actual legal *status*, negates any effect that the plain language of the contract at issue may otherwise have on the non-signatory. This conclusion in and of itself is problematic.

In rejecting application of the *assumption theory*, the Second Circuit was open to excluding Thomson's "assumption" of affiliate status as binding on the non-signatory and recognizing as dispositive Thomson's selective exclusion of obligations arising from its acquisition of Rediffusion.

Equally lacking from the treatment of the *assumption theory* is consideration of the non-party's relationship to the Working Agreement and acceptance of the terms and conditions of the Working Agreement as the purchaser of Rediffusion who now seeks to renegotiate the terms of that acquisition.⁴³ Any deliberation of the extent to which a non-signatory is

1.14 The term "E&S," wherever used in this Working Agreement, shall include the affiliates of E&S. The term "Rediffusion" wherever used in this Working Agreement, shall . . . mean Rediffusion and each of its affiliates.

1.6 An "affiliate" of a party hereto shall mean any person, firm or corporation that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such party.

Id. at 775. The broad definition of "affiliate of a party" renders it not just plausible but compelling to view Thomson rightfully (as did the district court) as Rediffusion's affiliate because it was uncontested that Thomson controlled Rediffusion.

41. Because Thomson "explicitly disavowed any obligation arising out of the Working Agreement" and affirmatively took steps to distance itself from the Agreement, not the least of which was the filing of an action seeking a declaration of non-liability, the Second Circuit simply held that "it cannot be said that Thomson assumed the obligation to arbitrate." *Id.* at 777.

42. *Id.* at 776 (emphasis added).

43. The Second Circuit's factual recitation in the opinion discussed the negotiations between E&S and Thomson, but had absolutely no mention of the negotiations between Hughes Aircraft Co. and Thomson, during which Thomson sought to modify or alter the Working Agreement so as to avoid being bound by that Agreement's arbitration clause. This narrative merits citation:

At the time Thomson began publicly contemplating the acquisition of Rediffusion, E&S informed Thomson that, if it purchased Rediffusion, E&S intended to bind Thomson and its flight simulation division to the Working Agreement. Specifically, E&S told Thomson that upon purchasing Rediffusion both Rediffusion and Thomson's Training and Simulation Systems Division would be required to purchase all needed computer-generated image equipment from E&S. In response, Thomson wrote to E&S seeking to have it waive those provisions of the Working Agreement that E&S believed to be binding upon Thomson. Thomson did not, however, concede that it would be bound by

bound by obligations arising from an agreement that it did not negotiate or execute, must be in part premised on specific facts showing that the non-signatory's knowledge of the contract's terms is comparable to that of the signatory seeking enforcement.⁴⁴ A mechanical approach to the application of the *assumption theory* is unworkable if it does not consider federal arbitration policy or the balancing of a non-signatory's actual status with respect to the signatory seeking enforcement of an arbitration clause. Such a mechanical approach would be conducive to litigation and not to arbitration, thus undermining federal policy.⁴⁵

In addition to the *incorporation by reference* and *assumption theories*, the Court in *Thomson-CSF* identifies a third "[t]raditional principle[] of agency law [as binding on a] nonsignatory to an arbitration agreement."⁴⁶ Understandably, the Second Circuit observed that "[b]ecause the Working Agreement was entered into well before Thomson purchased Rediffusion, Thomson could not possibly be bound under an agency theory."⁴⁷ A more complex analysis than the two sentences accorded to the consideration of agency was warranted in the discussion of the fourth contractual theory that may bind a non-signatory to an arbitral clause: veil-piercing/alter-ego.

After discussing the two general circumstances where courts are likely to pierce the corporate veil, the Second Circuit stated that "E&S [had] not demonstrated that Thomson exerted the degree of control over Rediffusion

Rediffusion's Working Agreement. In fact, when it *became clear that Thomson and E&S could reach no agreement prior to Thomson's acquisition of Rediffusion, Thomson explicitly informed E&S that it was not adopting the Working Agreement and did not consider itself bound by Rediffusion's Agreement which it had neither negotiated nor signed.*

Id. at 775 (emphasis added).

The Second Circuit's opinion provides no facts regarding the sale and purchase agreements between Hughes Aircraft Co. and Thomson. Accordingly, there is no factual basis from which to glean how the Working Agreement was treated for purposes of the transaction between these two parties in undisputed privity. The silence as to this point, however, must be considered in assessing the weight to be given to the communications between E&S and Thomson versus the new obligations engrafted upon Thomson once it legally acquired the status of an "affiliate" of Rediffusion that "controlled" Rediffusion.

44. The relative knowledge of the parties (signatory and non-signatory) with respect to the contract at issue is of course critical. Courts in the wake of the *Thomson-CSF* case have seized upon this factor in support of the proposition that under an estoppel theory a non-signatory may enforce an arbitral agreement against a signatory, even though the converse would not hold true. See, e.g., *Petitions of Laitasalo*, 196 B.R. 913, 924 (Bankr. S.D.N.Y. 1996) ("The Court of Appeals held that under an estoppel theory a non-signator can be compelled to arbitrate a dispute where the contract had an arbitration provision, the non-signatory had knowledge of the contract, benefitted from the contract and did not object to the terms of the contract.").

45. This omission is particularly glaring in the context of the *Thomson-CSF* case because Thomson's acquisition of Rediffusion, based on the opinion's factual recitation, (i) took place between presumably equally sophisticated parties in the same industry sector and (ii) occurred after pre-acquisition discussions regarding the Working Agreement were held between Thomson, E&S (signatory), and the seller. See *Thomson-CSF*, 64 F.3d at 775.

46. *Id.* at 777.

47. *Id.*

necessary to justify piercing the corporate veil.”⁴⁸ Hence, “[w]hile the district court found that ‘Thomson has common ownership with [Rediffusion]; that Thomson actually controls [Rediffusion]; . . . [and] that Thomson incorporated [Rediffusion] into its own organizational and decision-making structure,’ the district court did not find an abandonment of the corporate structure.”⁴⁹ Three basic propositions supported this conclusion.

First, the evidence did not establish that corporate formalities between Rediffusion and Thomson were abandoned.⁵⁰ Second, there was no showing of an absence of adherence to corporate formalities on the part of the signatory seeking enforcement.⁵¹ Third, the record did not establish facts from which it may be inferred that Thomson and Rediffusion had intermingled funds.⁵² These three premises were bolstered by the district court’s observation that “Rediffusion continued to function as a distinct entity closely incorporated into the existing corporate structure of its parent company, Thomson.”⁵³ Consequently, the Court held a veil-piercing/alter-ego theory to be inapposite.

The fifth and final theory comprising the contract-agency law rubric that is dispositive of whether an arbitration clause is binding on a non-signatory is the “*doctrine of estoppel*.”⁵⁴ Much like the theory of *incorporation by reference*, the *doctrine of estoppel* provides greater latitude for non-signatories seeking to bind signatories to an arbitration agreement. The elements of the doctrine as applied in this specific context are plain: a party who directly or indirectly derives a benefit from the terms of a contract cannot later assert that it is not bound by that instrument because the

48. *Id.* at 778. “[T]he courts will pierce the corporate veil ‘in two broad situations: to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary.’” *Id.* at 777 (citing *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int’l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993)). A veil piercing alter-ego theory is more flexible and organic than its contractual counterpart for purposes of binding a non-signatory. The jurisprudence on this theory, however, typically requires fraud or other comparable wrongdoing as the business purpose of either the parent or the instrumentality. This predicate is rarely present in the international commercial arbitration context.

49. *Id.* at 778 (alterations in original).

50. *Id.* Circuit Courts are of a common voice in holding that the piercing of the corporate veil is warranted pursuant to a totality of the circumstances analysis where there is an indication that, among other considerations, the affiliated entities (i) shared common office and staff; (ii) are managed by overlapping officers and/or directors; (iii) engage in a comingling of funds and incident accounting record-keeping practices that do not distinguish between the income of the respective entities; (iv) deal at less than arm’s length with each other; and (v) are in no way viewed or treated internally as distinct profit centers as to expenses, profits, etc. See, e.g., *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131 (2d Cir. 1991). The *Thomson-CSF* Court indeed cited to *American Protein Corp. v. A. B. Vogel*, 844 F.2d 56, 60 (2d Cir. 1988), and *Walter E. Hellar & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 53 (2d Cir. 1984), for this totality of the circumstances analysis test. See *Thomson-CSF*, 64 F.3d at 788.

51. *Id.* at 778.

52. *Id.*

53. *Id.*

54. See, e.g., *id.* at 776, 778.

party did not sign it.⁵⁵ In *Thomson-CSF*, the Second Circuit's unexpressed intent to fashion an opinion that comprehensively articulates the entire gamut of contract-based tests governing the binding effect of an arbitration clause on a non-signatory is quite apparent.⁵⁶ It is important to note that the district court did not consider the estoppel theory for joinder. In this regard, the Second Circuit stated that although the district court did not analyze the case at bar under an estoppel theory, the district court did find that

Thomson had notice of the Working Agreement prior to . . . completing the purchase of Rediffusion, that E & S expressed the intention to bind Thomson to the Agreement prior to the completion of the purchase of Rediffusion, that Thomson incorporated [Rediffusion] into its own organizational and decision-making structure, and that Thomson benefitted from that incorporation.⁵⁷

Critical to application of an estoppel theory⁵⁸ is a showing that the non-signatory directly benefitted from the contract at issue.⁵⁹

To enunciate a contract-based rubric for determining the extent to which an arbitral agreement is binding upon a non-signatory presumably in furtherance of a policy seeking (i) to protect non-signatories and (ii) to limit standards binding non-signatories to "traditional theories of contract law,"⁶⁰ the Second Circuit made clear that "the district court improperly extended the law of this Circuit and diluted the protections afforded non-

55. See, e.g., *Dominium Austin Partners, L.L.C. v. M.J. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001); *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 416-18 (4th Cir. 2000); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 756-58 (11th Cir. 1993); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 838-39 (7th Cir. 1981).

56. *Thomson-CSF*, 64 F.3d at 776 ("[W]e have recognized five theories for binding non-signatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.").

57. *Id.* at 778.

58. See *id.* at 779. The single authority relied upon in articulating the estoppel theory was the Court's decision in *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993).

59. Accordingly, the Second Circuit emphasized that "[h]ad Thomson directly benefitted from the Working Agreement by seeking to purchase equipment from E & S or enforcing the exclusivity provisions of the Agreement, it would be estopped from avoiding arbitration. The benefit which E & S asserts, however, derives directly from Thomson's purchase of Rediffusion, and not from the Working Agreement itself Thus, Thomson is not bound by its subsidiary's arbitration agreement" *Thomson-CSF*, 64 F.3d at 779.

60. *Id.* at 779-80. The Second Circuit refused to apply an alternative estoppel theory recognized by the Fourth, Seventh, and Eleventh Circuits, which provides for a signatory to be bound, at the insistence of a non-signatory, to arbitrate "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and [the fact that] the claims were 'intimately founded in and intertwined with the underlying contract obligations.'" *Id.* at 779 (quoting *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (7th Cir. 1984)). The Second Circuit concluded that Thomson "cannot be estopped from denying the existence of an arbitration clause to which it is a signatory because no such clause exists." *Id.*

signatories by the 'ordinary principles of contract and agency.'⁶¹

D. Revisiting the District Court's Opinion in *Thomson-CSF*:
Foundations for a New Test

Adherence to the "traditional principles" of contract law for the purported protection of non-signatories creates a doctrinal test that does not promote symmetry (equitable treatment) between signatories and non-signatories seeking extension of an arbitral clause and undermines federal policy favoring arbitration. The district court's analysis, which aptly sought to fashion a test binding non-signatories to an arbitral agreement where the "traditional principles" standard was not met, proves to be more consonant with the federal policy supporting arbitration, fundamental precepts of equity (equal treatment between non-signatories and signatories), and demands that economic globalization has engrafted upon classical configurations of professional associations, corporations, and other legal entities. It also best addresses the multilayered effect that complex contractual agreements have on non-signatories to such instruments. To be sure, the district court initiated a dialogue that the Second Circuit hardly addressed.

Standing in sharp relief with respect to the Second Circuit's analysis, the district court's treatment of the issue before it, which it identified as whether the non-signatory "may be bound to arbitrate under the Working Agreement, and . . . if so bound, has refused, failed or neglected to arbitrate such that an FAA § 4 motion to compel must be granted," emphasized federal policy commanding courts to rigorously enforce arbitration agreements.⁶² The district court also emphasized that the U.S. Supreme Court has stated beyond cavil that issues concerning the scope of an arbitral proceeding should be resolved in favor of arbitration.⁶³ It also asserted that the policy favoring arbitration "is especially emphatic in the field of international commerce."⁶⁴

Analytically, the contrast between the two opinions is stark. The Second Circuit's opinion did not reference federal policy favoring arbitration or the need to apply "traditional principles" of contract-agency law in extending application of an arbitral clause to a non-signatory in the context of this federal policy, international commerce, or economic globalization.⁶⁵ Failure to consider federal policy in fashioning a standard for the

61. *Id.* at 780 (citing *McAllister Bros. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980)).

62. *Thomson-CSF, S.A. v. Evans & Sutherland Computer Corp.*, No. 94 Civ. 6181, 1994 WL 593805, at *3 (S.D.N.Y. Oct. 28, 1994) [hereinafter *Thomson-CSF District Case*].

63. *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

64. *Thomson-CSF District Case*, 1994 WL 593805, at *3.

65. The Second Circuit's failure even to reference federal policy favoring arbitration or to otherwise consider international commerce where presented with an issue touching upon arbitration, i.e., forum selection, disavows and disregards long-settled Supreme

extension of an arbitration clause to non-signatories has the effect of decontextualizing arbitration while merely focusing on the contractually based genesis of commercial arbitration as a dispute resolution methodology.

While the district court in fact considered and rejected the five contractual theories reviewed,⁶⁶ it did acknowledge that the skillful drafting of broad “inclusive provisions” seeking to bind non-signatories is insufficient as the sole ground for extending the clause.⁶⁷ A close reading of the district court’s treatment of the analysis reveals that a two-prong test was actually applied, although not altogether clearly enunciated. First, the operative arbitration agreement must be analyzed. In this regard, the relevant clauses need to be sufficiently broad so as to include non-signatories from a purely contractual perspective. This first prong, however, standing alone is insufficient. A “plus element” is required in order to exhaust the panoply of elements that would point to a determinative factor compelling extension. We shall suggest a third element to ensure a workable scope.

Second, the “plus element” is what loosely has been termed the “inextricability test.”⁶⁸ This “inextricability” component represents a non-contractually based, flexible approach that is fundamentally premised on the connections between the non-signatory and the underlying instrument comprising an arbitration agreement, as well as to the claims asserted.⁶⁹ Essential to this analysis is strict scrutiny of the commercial effects of the transaction at issue.⁷⁰ This approach invites tribunals to weigh and consider the actual workings of a transaction at a micro level between the signatories and from a more macro perspective touching non-parties to the agreement. Certainly, it would not be altogether implausible for a tribunal to focus on issues pertaining to industry sectors or broader market considerations. A “connectivity” review of the claims to determine whether a spe-

Court precedent suggesting that considerable deference should be accorded to the parties’ forum selection, particularly where international commerce is at issue. *See, e.g., Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Even though *Thomson-CSF* is not a case concerning an international commercial agreement, the standard enunciated in that jurisprudence constitutes the guidepost for the test determining the extension of an arbitral agreement to a non-signatory. Therefore, to the extent that the issue before a court is framed as one falling within the ambit of the Federal Arbitration Act, as was the case here, consideration of the test being fashioned in the context of an international arbitration is not only appropriate but necessary.

66. *Thomson-CSF District Case*, 1994 WL 593805, at *4-6.

67. In particular, the district court stated that it did “not agree, however, that two signatories to an agreement to arbitrate can bind a non-signatory to that agreement simply by drafting it with inclusive terms. *Something more is required before the Court can compel a non-signatory to arbitrate.*” *Id.* at *4 (emphasis added).

68. The district court draws the elements of the non-contractual component of its standard from the Second Circuit’s pronouncement in *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, U.S., 9 F.3d 1060 (2d Cir. 1993). In that case, in the context of determining an FAA § 4 Motion to Compel Arbitration, the Second Circuit held that an order compelling a non-signatory to participate in an arbitration without a hearing on the § 4 petition is warranted, so long as there is a sufficient connection between the non-signatory and the agreement at issue.

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

70. *Id.*

cific non-party is materially affected, or affected at all by the operative averments, also challenges the tribunal to undertake (i) joinder,⁷¹ (ii) indispensable party,⁷² (iii) standing,⁷³ and (iv) third-party related analyses.

71. See FED. R. CIV. P. 18–21. For example, consider FED. R. CIV. P. 20(a), identifying persons who may join or be joined to proceedings, and which specifically provides:

- (1) Plaintiffs. Persons may join in one action as plaintiffs if:
 - (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
 - (B) any question of law or fact common to all plaintiffs will arise in the action.
- (2) Defendants. Persons—as well as a vessel, cargo, or other property subject to admiralty process *in rem*—may be joined in one action as defendants if:
 - (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
 - (B) any question of law or fact common to all defendants will arise in the action.

72. See FED. R. CIV. P. 19(a), which provides:

- (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
 - (A) in that person's absence, the court cannot accord complete relief among existing parties; or
 - (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (i) as a practical matter impair or impede the person's ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

See also *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1154–55 (9th Cir. 2002) (“Application of Federal Rule of Civil Procedure 19 determines whether a party is indispensable. The inquiry is a practical, fact-specific one, designed to avoid the harsh results of rigid application. We must determine: (1) whether an absent party is necessary to the action; and then, (2) if the party is necessary, but cannot be joined, whether the party is indispensable such that in ‘equity and good conscience’ the suit should be dismissed.”) (internal citations omitted).

73. Standing requirements in United States civil procedure emerge from the Article III of the Constitution stricture that federal courts may adjudicate only actual “cases” and “controversies.” *Allen v. Wright*, 468 US 737, 750–51 (1984). This requirement has been interpreted to encompass three primary requirements:

- (i) Injury: The injury alleged must be, for example, “distinct and palpable,” and not “abstract” or “conjectural” or “hypothetical.” The injury must be “fairly” traceable to the challenged action, and relief from the injury must be “likely” to follow from a favorable decision. *Id.* at 751.
- (ii) Causation: There must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly. . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).
- (iii) Redressability: It must be likely, as opposed to merely speculative, that a favorable court decision will redress the injury. *Id.* at 560–61 (quoting *Simon*, 426 U.S. at 38–43).

See also FED. R. CIV. P. 17, which provides that: “An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought: (A) an executor; (B) an admin-

Thus, from a purely formalistic perspective, the district court forged a test that is contractually based and, therefore, inclusive of and consonant with arbitration's contract genesis; it is also predicated on a relative (non-static) and organic "inextricability" or "connectivity" component that considers the totality of the circumstances.⁷⁴

Fashioning a comprehensive rubric that incorporates (i) the five "traditional principles" contract-agency based standard,⁷⁵ (ii) a "connectivity"/"inextricability" element, and (iii) sustained analysis of the operative provisions of the underlying contract to ensure that predicate broad inclusion clauses will further federal policy, comport with the tangible commercial consequences of contractual relationships that materially benefit or affect non-signatories, provide for greater equity in the treatment of signatories and non-signatories, and best meet the demands of international commerce foisted upon multinational corporations in an environment of economic globalization. Also, this three-pronged approach maximizes the precepts of "consent" and "party autonomy" as premises central to international commercial arbitration while minimizing the likelihood of misapplication of federal policy. The need to develop a more flexible and responsive rubric becomes more apparent when canvassing the contours of the application of the *Thomson-CSF* standard in the context of international arbitral disputes.

II. Anomalies Arising From the Application of *Thomson-CSF* in International Arbitration

The jurisprudence applying the *Thomson-CSF* standard in international commercial arbitration is expansive.⁷⁶ Limited doctrinal or practical

istrator; (C) a guardian; (D) a bailee; (E) a trustee of an express trust; (F) a party with whom or in whose name a contract has been made for another's benefit; and (G) a party authorized by statute."

74. Within the narrow factual parameters presented to it, the district court applied this second prong by focusing on the following six fundamental factors, which, although rooted within the realm of specific case facts, are readily susceptible to being extrapolated from particular factual inquiries to general conceptual categories that would have to be met: (i) is there record evidence of common ownership between Thomson (non-signatory) and Rediffusion; (ii) whether Thomson actually controls Rediffusion; (iii) the extent to which Thomson had notice of the underlying agreement prior to the acquisition of Rediffusion; (iv) whether E&S (signatory) expressed an intent to bind Thomson to the agreement prior to the completion of the transaction concerning the purchase of Rediffusion; (v) was Rediffusion formally and actually incorporated into the non-signatory's organizational and decision-making structure; and (vi) did Thomson benefit from that incorporation. *Thomson-CSF District Case*, No. 94 Civ. 6181, 1994 WL 593805, at *5 (S.D.N.Y. Oct. 28, 1994).

With respect to (vi), the circuit court somehow crafted a test pursuant to which the "benefit" received had to be *direct* and not *indirect* if, in fact, the arbitral clause was to be extended. There was no citation for this authority in the Second Circuit's opinion. See *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995).

75. As noted, these five principles are (i) incorporation by reference, (ii) assumption, (iii) agency, (iv) veil-piercing/alter-ego, and (v) estoppel. See *id.* at 776.

76. See, e.g., *Invista S.A.R.L. v. Rhodia, S.A.*, 625 F.3d 75 (3d Cir. 2010); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005); *Intergen N.V. v. Grina*, 344 F.3d 134 (1st Cir.

effect would be gleaned merely by fashioning a rosary of anomalous results arising from application of the doctrine. The most salient shortcomings, however, all share one material common denominator that in large measure stems from a historical and longstanding judicial prejudice that afflicts arbitration generally and international commercial arbitration in particular:⁷⁷ the subordination of federal policy favoring arbitration to ordinary contract principles.⁷⁸

Adherence to this inverted hierarchy that the Second Circuit has crafted as a dispositive normative standard materially limits the scope of participants to arbitration and relegates prospective parties to the realm of domestic courts. As such, federal policy favoring arbitration is not only subordinated to the application of very basic contract principles, but actually abandoned in its totality: the relevant jurisprudence nowhere engages in a balance of interests test that even considers federal policy as a factor to be weighed in extending an arbitration clause.⁷⁹ Application of ordinary contract principles absent any consideration of (i) a federal policy, (ii) factors touching on international commerce, or (iii) the consequences of even simple, commercial transactions on non-signatories, fosters a policy that leaves claimants who would otherwise have recourse to arbitration with no alternative but to seek relief in judicial tribunals, most notably foreign courts.⁸⁰

2003); *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000); *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88 (2d Cir. 1999); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349 (2d Cir. 1999).

77. See MARTINEZ-FRAGA, *supra* note 5, at 6-37.

78. See cases cited *supra* note 18.

79. The totality of authority canvassed is wholly bereft of any such balancing standard analysis or criterion pursuant to which federal policy is considered. In fact, in most of the cases analyzed, federal policy is foreclosed even from fleeting references. See *id.*

80. It is unusual for tribunals to engage in "effects-test" analyses. A prime example in the ambit of determining extraterritorial application of U.S. law may be gleaned from *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F. 2d 597, 610 (9th Cir. 1976). This approach was later adopted in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987), which provides:

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activi-

Ordinary contract principles were not crafted or even subsequently developed to encompass the broader precepts of international dispute resolution. These precepts command a flexible and organic standard that is inclusive yet sufficiently static to preserve and spawn party autonomy, consent, transparency of standard, uniformity, and predictive value as defining elements. The debilities endemic in the current contract-based regime make it unsustainable. Even the most basic of the “traditional theories” proves to be inadequate when administered by itself. This dilemma, a veritable squaring of the circle, simply cannot be reconciled.

A contract-premised rubric, such as the *Thomson-CSF* “traditional principles” test, proves to be inadequate, if not altogether unworkable, particularly where the underlying claims are based on tort instead of contractual causes of action.⁸¹ The connectivity typically found between business

ties, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state’s interest is clearly greater.

In addition, the *Timberlane* approach was subsequently adopted by the Third, Fifth, and Tenth Circuits. See *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884-85 (5th Cir. 1982); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 868-69 (10th Cir. 1981); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979). The D.C. and Seventh Circuits have rejected the *Timberlane* approach. See *Laker Airways Ltd. v. Sabena, Belg. World Airlines*, 731 F.2d 909, 939-41 (D.C. Cir. 1984); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255 (7th Cir. 1980).

81. See, e.g., *Bel-Ray Co., v. Chemrite (PTY) Ltd.*, 181 F.3d 435 (3d Cir. 1999). In that case, the Third Circuit overruled the district court’s ruling that found non-signatories to an arbitration agreement were bound to arbitrate pursuant to the terms of that contract. Indeed, the Third Circuit succinctly framed the question to be determined as “whether an employee or agent who did not agree to arbitrate can be compelled to arbitrate his personal liability on the basis of a commitment made by the corporation he serves.” *Id.* at 445. After engaging in an analysis that canvassed the test in *Thomson-CSF*, the court held that “[plaintiff-appellee] has tendered no authorities supporting its position. Nor has our own research revealed supporting authority. On the contrary, the authority that does exist suggests to us that the District Court erred in compelling the Individual Appellees to arbitrate.” *Id.*

This case is illustrative because a more careful review of the record before the Third Circuit, without the “blindness” of traditional principles of contract and agency law, would support the district court’s finding that the individual appellees should have been forced to arbitrate. Most significantly, the individual appellees were “officers or directors as well as shareholders, of Chemrite,” the predecessor in interest of the defendant corporation. Those individuals were alleged to have “conspired to misappropriate [appellee’s] technology and other proprietary information and intentionally defrauded

torts, the defendants against whom such allegations are directed, and the underlying contract, tends to be proximate and material. Such relationships, however, are simply not cognizable to a *Thomson-CSF* “*traditional principles*” test. The doctrinal construct is too fundamentally limited to provide a normative or even a descriptive basis for extending an arbitration clause under these circumstances.

A. Extending the Clause to Sovereigns: A Perpetual Paradox

A direct consequence of economic globalization is increased foreign direct investment typically by investors (usually multinational corporations) from capital-exporting host countries (developed nations) flowing to capital-importing countries (developing nations). The nature and character of cross-border disputes spawned by this phenomenon invite inquiry into the workings of government sponsored and/or created entities in the host-state that are designed to interface with the investor and its myriad of industry-sector affiliates. Nowhere do the shortcomings of the *Thomson-CSF* standard appear to be so glaring as when applied to the following scenarios: where a government instrumentality is a signatory to a contract executed under the auspices of the government agency and where application of the “*traditional principles*” test proscribes binding the supervising and often proactive government non-signatory.⁸²

Far from asserting that every government instrumentality necessarily binds the incident government pursuant to a traditional contract-agency

[appellee] by leading it to believe that Lubritene [appellant] would abide by the Trade Agreements.” *Id.* at 439. Moreover, the allegations asserted that the corporate and individual defendants “marketed [appellee’s] products falsely under Lubritene’s trade name, and conversely marketed inferior Lubritene products under [appellee’s] trade name thereby damaging [appellee’s] business reputation.” *Id.*

In addition to breach of contract, the fundamental claims underlying that action were based upon “(i) unfair competition, (ii) fraud, and (iii) misappropriation.” *Id.* Significantly, nowhere did the Third Circuit consider the connection between the claims alleged and the individual defendants to the agreement embodying the subject arbitration clause. Even surface consideration of the inextricability of the claims alleged, the subject matter of the underlying contract, and the relationship between the individual appellant and the defendant corporation, in addition to that entity’s predecessor, certainly would compel extension of the arbitration clause.

82. See, e.g., *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003). In that case, after spilling an inordinate amount of ink on a rather basic threshold inquiry of determining whether “agency is a legal concept,” and, therefore, subject to a plenary review, or is a matter of fact governed by a standard of clear error, the Fifth Circuit rejected the district court’s holding that the appellant instrumentality (Turkmenneft) was acting as an agent of the Government of Turkmenistan. *Id.* at 356, 358. The district court’s holding was premised on evidence showing that the Government of Turkmenistan approved and “completely guaranteed” the underlying transaction, the operative agreement in part read that “interests, rights, and obligations of Turkmenistan” are represented by the Turkmenian Party, and the Government’s Minister of Oil and Gas had represented in writing that “the Ministry is the Turkmenian Party.” *Id.* at 355 n.5, 357. The Fifth Circuit’s analysis nowhere considered reversing the district court’s finding based upon application of a test that considered, among other things, the relationship of the non-signatory to the operative documents, representations tendered by the non-signatory, the nature of the claim, and underlying policies attendant to international commerce and international commercial arbitration.

analysis,⁸³ the suggestion here advanced is premised on a descriptive analysis of the current investment protection dispute resolution regime. Despite the proliferation of regional and bilateral investment treaties, there are numerous instances where the flow of funds between capital-exporting and capital-importing countries arising from foreign investment simply is not governed by any treaty system.⁸⁴ Where bilateral and regional investment protection treaties are not available to claimants, the single recourse available rests strictly within the purview of private international law.⁸⁵ Such claimants, absent very particular circumstances that are statistically inconsequential, are foreclosed from asserting treaty-based claims arising from conventional and customary international law to be aired in supranational fora.⁸⁶ Therefore, they are confined to asserting conventional tort and contract causes of action based on application of national law.⁸⁷ It is

83. *Accord Hester Int'l Corp. v. Fed. Republic of Nigeria*, 879 F.2d 170, 176-81 (5th Cir. 1989) (holding that an instrumentality of Nigeria was not the government's agent for purposes of an agreement between the instrumentality and an American corporation despite a guarantee by the Nigerian government of all loans necessary for offshore financing); see *InterOcean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975). Indeed, commentators have quite aptly noted how the intricacies of concession agreements and other instruments that necessarily are executed by government instrumentalities must be considered as constituting a separate and distinct category of transaction precisely because of the multiple variables that are introduced by virtue of a sovereign's direct and indirect participation in the subject transaction. See, e.g., PETER D. CAMERON, *INTERNATIONAL ENERGY INVESTMENT LAW* 62-68 (2010) (discussing the interaction among contract, legislation, and treaty law unique to contracts with states and/or their instrumentalities).

84. It is estimated that there are over three thousand bilateral investment treaties in place that seek to regulate the economic relationships concerning capital exporting (industrialized countries) and capital importing (developing) nations. See JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 2 (2010). While these public international law contentions are ever-increasing and critical for investors and host-states alike, the overwhelming majority of international contentions are decided within the realm of private international law pursuant to international commercial arbitration premised on arbitration agreements; these agreements embody the parties' consent rather than the language of a multilateral or bilateral investment treaty. See, e.g., Christopher R. Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*, 22 *ARB. INT'L* 291, 299 (2006) ("Published reports highlight some basic facts about the use of international arbitration and its growth over time. From 1993 to 2001, annual case filings with 11 leading international arbitration institutions almost doubled, from 1,392 cases per year to 2,628 cases per year. Over roughly the same time period, the cumulative number of treaty-based investment arbitrations before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) has increased from only three through 1994 to 106 through November 2004.").

85. See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *HARV. INT'L L.J.* 67, 75 (2005).

86. See R. Doak Bishop, Sashe D. Dimitroff, & Craig S. Miles, *Strategic Options Available When Catastrophe Strikes the Major International Energy Project*, 36 *TEX. INT'L L.J.* 635, 638 (2001) (describing limited situations under which international obligations occur and can be pursued).

87. See, e.g., *Ali v. Ashcroft*, 213 F.R.D. 390, 405 (W.D. Wash. 2003) ("While Petitioners may not directly invoke rights under non-self-executing treaties, or challenge statutes when Congress has clearly abrogated international law, they certainly may argue that the Court should adopt the statutory interpretation that is consistent with international law.").

in the application of domestic law that recourse to the “traditional principles” most clearly reflects their limitations; often the instrumentality is deemed beyond the sphere of these narrow contractual categories. “Traditional principles” of contract-agency law are inadequate for purposes of addressing, let alone redressing, issues that inevitably arise from complicated concession agreements and other contracts created to attract, process, and maximize foreign investments in crucial industry sectors such as energy, financial institutions, and infrastructure. This approach emphasizes formal consideration over the actual substantive status and relationship of the contractual parties.

Such transactions quite often require approval, supervision, guarantees, and collateral participation for execution purposes from the sovereign, pursuant to ministry-level management in the form of issuance and administration of requests for arbitration. Policies governing international commerce, public and private international law, and principles regulating international commercial arbitration cannot be excluded from consideration for the sake of applying a narrow standard that never envisioned managing these unique and very complex relationships.

The jurisprudence of contract and agency “are not equitable in nature but contractual, and do not necessarily bend in favor of justice.”⁸⁸ In the context of analyzing whether a signatory instrumentality binds the non-signatory sovereign, a veil-piercing/alter-ego inquiry is generally inapposite. Most of these disputes do not concern fraud or are otherwise premised on wrongdoings that are essential to alter-ego analyses. In fact, in such instances it is typically understood that the instrumentality is ultimately beholden to the sovereign, is derived directly from the sovereign’s exercise of sovereignty, and enjoys a juridic existence that is fictitious in that the instrumentality’s board is typically responsive to a specific ministry or ministries. For example, it would be aberrant for a sovereign to fashion an instrumentality to engage in an international request for proposals and at the same time cause the instrumentality to enter into binding contractual relationships that necessarily command international attention in order to engage in fraudulent or criminal conduct. Certainly in these instances, the veil-piercing/alter-ego construct hardly provides a more flexible alternative to the remaining four traditional theories enunciated in *Thomson-CSF*. In turn, the district court’s general approach is more normatively appetizing and practically responsive.

Similarly, a plain “incorporation theory” may just raise more queries than it can ever aspire to answer when applied to cross-border commercial transactions that are material to an entire universe of non-parties.⁸⁹ Central to the development of the law binding non-signatories to an arbitration

88. See *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 359 (5th Cir. 2003)

89. See, e.g., *Intertec Contracting A/S v. Turner Steiner Int’l, S.A.*, No. 98-CV-9116 (CSH), 2000 WL 709004, at *10 (S.D.N.Y. May 31, 2000) (holding that a subcontract does not incorporate by reference the arbitration clause in a general contract between the parties thereby proscribing extension of arbitration clause to non-signatory in an international complex).

agreement is an inversion of the current standard subordinating federal policy to the law of contract.

III. An Alternative Estoppel Theory: The Lack of Symmetry Between a Non-Signatory Seeking to Bind a Signatory to an Arbitration Agreement and the Converse Proposition

Application of classical principles of contract law has spawned judicial policy that seeks to protect non-signatories who may be otherwise compelled to arbitrate pursuant to circumstances where doing so would violate the principle of consent.⁹⁰ The general proposition asserts that the alternative estoppel theory “applies only to prevent ‘a signatory from avoiding arbitration with a non-signatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.’”⁹¹ This doctrine disproportionately favors contract doctrine rather than federal policy and therefore contends that “a signatory may not estop a nonsignatory from avoiding arbitration regardless of how closely affiliated that nonsignatory is with another signing party.”⁹² Close scrutiny demonstrates that this policy does not comport with the exigencies of international commerce. Moreover, in failing to do so, it materially undermines federal policy favoring arbitration.

The disparate treatment between signatories and non-signatories is not founded on a policy that translates disparity into equitable treatment. The three premises used to justify this unfair treatment are intuitively appealing but substantively problematic. First, it is asserted that because arbitration is a creature of contract, the law of contract should take precedent over federal policy.⁹³ Second, it is also claimed that because of arbitration’s deep roots in the law of contract a signatory must necessarily be estopped from extending an arbitration clause to a non-signatory; because the non-signatory did not participate in the negotiation, execution, and performance of the underlying contract, it is therefore presumed to be disadvantaged.⁹⁴ Third, a non-signatory should be privileged to compel a signatory to an arbitration agreement to arbitrate in furtherance of that

90. The applicable case law frames the issue differently by re-phrasing it in terms of an alternative estoppel theory that renders it viable for a non-signatory to bind a signatory to an arbitration clause but not the converse proposition. *See, e.g.,* Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-58 (11th Cir. 1993); J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988); McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342, 343-44 (11th Cir. 1984).

91. *Bridas*, 345 F.3d at 361 (quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 779 (2d Cir. 1995) (emphasis omitted)); *see id.* (referring to this alternate estoppel theory as the “Grigson version of estoppel”); *Grigson v. Creative Artists Agency*, 210 F.3d 524, 526-27 (5th Cir. 2000).

92. *MAG Portfolio Consult, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58, 62 (2d Cir. 2001); *see E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 202 (3d Cir. 2001).

93. *See Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073-74 (5th Cir. 2002).

94. *Bridas*, 345 F.3d at 360-61.

contract because the signatory forms an integral part of the agreement and thus should be estopped from avoiding the very dispute resolution mechanism that the signatory negotiated and later even ratified.⁹⁵

No longer can international commercial arbitration sport the luxury of exclusively subscribing to “ordinary and traditional principles of contract.” Mere “foreseeability” or “proximity to the contract by virtue of being a signatory to it” are insufficient for purposes of providing a non-signatory with the right to bring an arbitration claim against a signatory. Instead, assuming the non-signatory complied with ordinary standing requirements, the three-prong test identified should be determinative.⁹⁶ Likewise, the same standard should be dispositive with respect to the degree to which a signatory may extend an arbitration clause to a non-signatory.⁹⁷ This jurisprudence consistently applies a “connectivity” test to determine whether the subject matter of the action filed should be within the scope of the arbitration clause. In addition, cases relying on *Thomson-CSF* also tend to regurgitate the rule that federal courts “have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues that the nonsignatory is seeking to resolve in an arbitration are intertwined with the agreement that the estopped party has signed.”⁹⁸ This authority,

95. *Id.*; see also J. Douglas Uloth & J. Hamilton Rial, III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?*, 21 REV. LITIG. 593, 633 (2002) (arguing that “[i]t is more foreseeable and thus more reasonable, that a party that has actually agreed in writing to arbitrate claims with someone might be compelled to broaden the scope of his agreement to include others”).

96. See *supra* Part I.D.

97. The proposition that a non-signatory may estop a signatory from enforcing an arbitration agreement upon the non-signatory irrespective of how closely the non-signatory may be affiliated with another signing party manifestly disadvantages the signatory and creates disparities where the operative agreement is inclusive and the non-signatory is intertwined with the agreement’s subject matter or signatory parties. The alternative estoppel doctrine has been widely adopted by the circuit courts. See, e.g., *Allianz Global Risk U.S. Ins. Co. v. Gen. Elec. Co.*, 470 F. App’x. 652, 653 (9th Cir. 2012); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App’x 704, 708-10 (10th Cir. 2011); *PRM Energy Sys., Inc. v. Primenergy, L.L.C.*, 592 F.3d 830, 835-36 (8th Cir. 2010); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1046 (9th Cir. 2009); *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008); *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 178 (2d Cir. 2004); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 628-29 (6th Cir. 2003) (analyzing the alternative estoppel doctrine, even though it ultimately declined to extend the arbitration clause to the third party under the specific facts of the case); *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 199-202 (3d Cir. 2001); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 526-28 (5th Cir. 2000); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 840-41 (7th Cir. 1981).

98. See, e.g., *Sourcing Unlimited, Inc.*, 526 F.3d at 47 (quoting *Thomson-CSF*, 64 F.3d at 779); *CD Partners, L.L.C. v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005) (“[A] willing nonsignatory seeking to arbitrate with a signatory that is unwilling may do so under what has been called an alternative estoppel theory which takes into consideration the relationships of persons, wrongs, and issues”); *E.I. Dupont*, 269 F.3d at 199 (“[C]ourts have bound a signatory to arbitrate with a non-signatory ‘at the non-signatory’s insistence because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory’s obligations and duties in

however, does not impose estoppel on a willing signatory seeking to enforce an arbitration agreement on an unwilling non-signatory where the non-signatory has not knowingly exploited the agreement containing the arbitration clause.⁹⁹

Certainly, the alternative estoppel theory, despite the fundamental unfairness of its application, is susceptible to being viewed more broadly as a doctrine that emphasizes a more flexible, non-contract based test that is premised on (i) the relationship between the entities involved; (ii) the operative allegations and their connection with the non-signatory's obligations, benefits, and duties; and (iii) the scope of the underlying contractual obligations. Federal policy favoring arbitration would be well-served if even the Eleventh Circuit's "inextricability-test" (alternative estoppel) were to be applied equally to a fact pattern where a willing signatory seeks to bind an unwilling non-signatory. It is equally in keeping with the precepts underlying international commercial arbitration to fashion a non-contract based test that would be more amenable to the increasingly complex nature of cross-border transactions and disputes. The fair and equitable treatment of both non-signatories and signatories constitutes a fundamental first step in that effort.

IV. Dissonance Between Federal and State Jurisprudence on the Applicable Test: The Need for Uniformity and an End to Chaos

A standard governing the extension of an arbitration clause to a non-signatory based upon principles of contract law has led to conflicting regimes among different states applying their respective substantive jurisprudence and positive law. State common law addressing this issue finds

the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations.'") (quoting *Sunkist Soft Drinks, Inc.*, 10 F.3d at 757); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (indicating that a non-signatory asserting breach of contract and breach of tort claims under the contract could not avoid the arbitration agreement in the contract); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) ("Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. 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] claims' against the nonsignatory. When each of a signatory's claims against a non-signatory 'makes reference to' or 'presumes the existence of the written agreement, the signatory's claims 'arise[] out of and relate[] directly to the [written] agreement,' and arbitration is appropriate. Second, 'application of equitable estoppel is warranted . . . when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.' Otherwise, 'the arbitration proceedings [between the two signatories] would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.'") (internal citations omitted).

99. Only where a non-signatory has exploited the underlying contract will it be estopped from avoiding arbitration that a signatory initiates. See, e.g., *Mundi*, 555 F.3d at 1046; *Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 267-68 (5th Cir. 2004).

itself in considerable disarray.¹⁰⁰ Canvassing the contours of state court authority places in sharp relief three commonly recurring paradigms that are disconcerting.

First, federal authority on the subject either has been disavowed or simply ignored.¹⁰¹ Second, courts “cherry-pick” elements of the *Thomson-CSF* opinion, thereby often misapprehending the alternative estoppel doctrine with the “traditional principles” five-theory standard.¹⁰² Third, a line of cases appears merely to apply principles of contract as construed by the idiosyncrasies of a particular jurisdiction.¹⁰³

A common denominator shared by this authority is the absence of any effort to engage in analysis aspiring to attain uniformity with and an integration of federal policy and economic/commercial consideration, or a clear articulation of the elements of any “inextricability” standard. Because the vast majority of state court law arises from domestic arbitral disputes, it would be unreasonable to presume that state courts would evaluate the intricacies of cross-border commercial transactions in formulating a monolithic and coherent test. Indeed, even within a single jurisdiction it is not uncommon to discern various appellate courts in different districts applying inconsistent standards to bind non-parties.¹⁰⁴

While it is understood that elements of any test relating to the extension of an arbitration agreement to a non-signatory must vary depending upon applicable state law, uniformity and policy considerations would mitigate both the theoretical and practical effects of this need. Certainly, a first step in meaningfully addressing this dilemma would be to develop a holistic federal regime that state courts would understand to be persuasive, albeit non-binding, authority. Although rife with challenges, this goal remains eminently attainable.

100. See, e.g., *First Am. Title Ins. Corp. v. Silvernell*, 744 So. 2d 883, 886-87 (Ala. 1999) (confusing the alternative estoppel doctrine with the test in *Thomson-CSF* and engaging in *sui generis* contract analysis that proscribes arbitration); *Pozo v. Roadhouse Grill, Inc.*, 790 So. 2d 1255, 1260-61 (Fla. 5th Dist. Ct. App. 2001) (disavowing federal jurisprudence concerning the extension of an arbitration clause to non-signatories, as binding on Florida courts); *Fradella v. Seaberry*, 952 So. 2d 195, 199-200 (Miss. App. 2006) (referencing *Thomson-CSF* but “applying state-law contract principles, [to find that] Mississippi requires that parties to a contract first come to an agreement, or ‘meeting of the minds,’ on essential elements of the contract in order for it to be enforceable.”); *Gettysburg Inv., LLC v. Prime Holdings, LLC*, 2010 Ohio 2134 (Ohio 2d Ct. App. 2010) (referencing *Thomson-CSF* without applying it and altogether omitting alternative estoppel doctrine in proscribing arbitration).

101. See, e.g., *Pozo*, 790 So. 2d at 1260-61.

102. See, e.g., *First Am. Title*, 744 So. 2d at 886-88.

103. See, e.g., *Fradella*, 952 So. 2d at 199-200. It is important to emphasize that the five legal theories enunciated in *Thomson-CSF* in turn also differ depending on the applicable state law.

104. Compare *Pozo*, 790 So. 2d at 1255, with *Liberty Commc'ns v. MCI Telecommc'ns Corp.*, 733 So. 2d 571, 574 (Fla. 5th Dist. Ct. App. 1999) (acknowledging that “[n]onsignatories have been held to be bound to arbitration agreements under the theories of (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel”), and *Johnson v. Pires*, 968 So. 2d 700, 701-02 (Fla. 4th Dist. Ct. App. 2007).

Conclusion

The *Thomson-CSF* model is deficient, has undermined federal policy, created inequities as to the treatment of signatories and non-signatories, and contributed to the creation of conflicting decisional law *among* state appellate tribunals and *between* state and federal common law on the subject. Moreover, the subordination of federal policy advancing arbitration to “traditional principles” of contract law is inevitably conducive to a rigid and formulaic construct that either misapprehends, or does not apprehend at all, nascent corporate structures and affiliations that economic globalization has fostered. The alternative estoppel doctrine, which is only one element of traditional contract law that has failed in its effort to provide a prescriptive basis for affording a non-signatory participation in an arbitration, is illustrative of the consequent application of a static doctrine to an issue that may only be comprehensively addressed by including as part of its functional goal a balancing test that considers factors such as international commerce and arbitral policy together with actual as well as formal transactional elements and corporate structure.

The traditional five-theory paradigm is not to be abandoned, but rather incorporated as part of an analysis that is much more akin to the district court’s “inextricability” standard than to the Second Circuit’s rubric, which is comprehensive from a contract law perspective but ultimately unworkable. The tripartite standard suggested in this Article, which is to be balanced against commercial, corporate, and arbitral policy considerations, shall hardly ensure that signatories and non-signatories will not suffer inequities under very particular circumstances, or that non-signatories may rely on being appropriately bound to arbitration clauses.

It does, however, reconcile arbitration’s genesis in the law of contract and the primacy of consent as an integral part of international commercial arbitration, with a federal policy favoring arbitration while also considering the effects of international commerce. To be sure, it is but a minor suggestion in what appears to be a daunting aspiration that seeks to modernize and translate the jurisprudence governing the extension of international arbitration clauses to non-signatories and by non-signatories to signatories into a structure that will redeem international commercial arbitration’s promise to serve as a juridic-dispute resolution counterpart to economic globalization. The current regime’s diminution of federal policy has relegated claimants to foreign tribunals perceived to be hostile and parochial as the single recourse for affirmative relief. Perhaps their plight justifies this Article’s modest suggestion.

