Guide – How to Bind Non-Signatories to an Arbitration Clause; Guide – How to Prevent Non-Signatories From Being Bound by an Arbitration Clause

by

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GOWLINGS

Introduction*

Arbitration is a process by which parties agree by contract to resolve disputes by means of a private adjudicator called an arbitrator. The focus of this article will be to identify the situations and arguments that can be used to compel or resist arbitration involving a non-signatory. A guide in this area is required since complex and high value cases continue to be resolved increasingly through arbitration. The economic projects that generate such cases often require a series of interrelated contracts, subcontracts and other agreements. Sophisticated players may seek to ensure that all subcontracts or agreements contain arbitration clauses that mirror or incorporate the arbitration provisions of the main contract. Yet, this goal is sometimes forgotten or not achieved when unforeseen circumstances arise. Still, a party may wish to compel a non-signatory to arbitrate where that entity is inextricably intertwined with the dispute. On the other hand, non-signatories will typically wish to resist becoming parties to arbitrated disputes.

The central issue is that non-signatories will generally not be bound to (nor able to compel) arbitration because there is no privity of contract. However, there are exceptions to the general rule of privity of contract. As an arbitration agreement is governed by the ordinary principles of contract law, non-signatories may be compelled to arbitrate in a number of circumstances.

The Canadian jurisprudence on compelling non-signatories to arbitrate is often unsettled and at times contradictory. Compelling a non-signatory to arbitrate involves complex theories of contract law that are themselves unsettled or at least highly fact dependent in their application.

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* Thanks to Brett McGarry, Law Student, for his assistance and research in the preparation of this article.

Aside from the unsettled aspects of the law, Canadian courts have consistently held that associated and connected parties such as subsidiaries, shareholders, directors, employees, agents and the like might be required to join an arbitration in one of three ways: (1) by the governing law; (2) by the submission itself, to the extent the parties to the contract can bind other parties; or (3) by the later agreement of the other parties.[1]

An arbitration panel takes its jurisdiction from the agreement between the parties. It has no inherent jurisdiction to rule on disputes at large. The breadth of the arbitration agreement will determine the scope of the arbitrator's jurisdiction. A broadly crafted arbitration agreement may give an arbitration panel the jurisdiction to craft remedies in breach of contract as well as tortious and equitable relief.[2]

Most importantly for the purposes of this article, an arbitration panel can initially rule on whether it has jurisdiction over the parties.[3] Courts may substantially intervene on the matters of jurisdiction, and may make rulings on an arbitrator's jurisdiction over parties. However, where it is arguable that a party is bound by an arbitration agreement, the courts will leave this determination to the arbitrator in the first instance.[4] Finally, when a non-signatory attempts to bring a court action in relation to a matter that is before arbitration, the courts will generally stay the action pending the resolution of the arbitration.[5]

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[1] See *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129, 85 Alta. L.R. (2d) 287 (Alta. C.A.) [*Kaverit Steel*].
[2] *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178.
[3] Regarding domestic arbitration acts, see e.g. *Arbitration Act*, 1991, S.O. 1991, c. 17, s. 17(1). Concerning the *Model Law,* see *Rio Algom Ltd. v. Sammi Steel Co.* (1991), 47 C.P.C. (2d) 251 (Ont. Gen. Div.).
[4] See e.g. *Gulf Canada Resources v. Arochem International* (1992), 66 B.C.L.R. (2d) 113 (B.C.C.A.).
[5] See e.g. *Dalimpex Ltd. v. Janicki et al.* (2003), 64 O.R. (3d) 737 (Ont. C.A.); *Boart Sweden AB v. NYA Stromnes AB* (1988), 41 B.L.R. 295 (Ont. H.C.J.); *Morran v. Carbone* (2005), 7 C.P.C. (6th) 360, [2005] O.J. No. 409.

As part of the governing law, there are seven theoretical ways to join a non-party to an arbitration proceeding:[6]

(1) Piercing the Corporate Veil or *Alter Ego*
(2) Agency
(3) Assignment
(4) Incorporation by Reference
(5) Equitable Estoppel
(6) Assumption by Conduct
(7) Third-Party Beneficiary

Each theory is examined below in light of the Canadian, American, and British jurisprudence.

In short, as a general approach the Canadian courts have recognized that non-signatories may be compelled to arbitrate if the governing arbitration act permits and the facts of the case warrant it. However, the courts have generally been cautious in compelling non-signatories to arbitrate due to the competing considerations of privity of contract and the autonomy of the parties. Owing to the unsettled nature of the law, compelling non-signatories will, above all else, typically be a fact-driven enterprise requiring the careful consideration of the following seven theories.

Theory No. 1 - Piercing the Corporate Veil or A*lter Ego*

In the appropriate circumstances, the arbitration panel may pierce the corporate veil to subject a non-party to the arbitration process and decision. Piercing the corporate veil is similar to pushing aside a puppeteer's curtain to demonstrate

[6] See James J. Sentner Jr., "Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories" (2005) 6:1 Business Law International 55; Charles Lee Eisen, "What Arbitration Agreement? Compelling Non-Signatories to Arbitrate" (2001) 56:2 Disp. Resol. J. 40.

that it is not the puppet who is acting, but rather the puppeteer who is pulling the strings.

Generally, a corporation, its subsidiaries and its individual shareholders are separate and distinct legal entities. Consequently, an agreement by the parent will not bind its subsidiaries to arbitrate, nor can a subsidiary bind its parent entity to arbitrate. However, by piercing the corporate veil, a claimant may compel arbitration by a non-signatory individual or entity that is merely an alter ego of the parent company. Alternatively, an arbitral award against a parent company can potentially be enforced against its *alter ego* if a court is willing to pierce the veil.

A. General Principles of Piercing the Veil

Piercing the corporate veil is one of the more difficult ways to compel arbitration by a non-signatory. The *Salomon* principle that a corporation is a legal entity distinct from its shareholders is regarded with consistent deference.[7] The reason is that the corporate structure and limited liability lie at the core of the capitalist economic system.

(i) Deference to the *Salomon* Principle of Distinct Legal Entity

Although not an arbitration case, the sympathetic facts in *Kosmopoulos v. Constitution Insurance Co. of Canada*[8] presented the Supreme Court of Canada with a seemingly easy opportunity to pierce the corporate veil.[9] The Court refused to do so, instead rewriting longstanding principles of insurance law to avoid violating the principle of distinct legal entity. The strength of the *Salomon* principle's application in Canada is therefore evident.[10]

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[7] *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.) [*Salomon*].
[8] *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 [*Kosmopoulos*].
[9] *Ibid.*
[10] The Supreme Court of Canada also refused to pierce the corporate veil in *Guarantee Co. of North America v. Aqua-Land Exploration Ltd.*, [1966] S.C.R. 133, rev'g (1964), 44 D.L.R. (2d) 645 (Ont. C.A.); *Wandlyn Motels Ltd. v. Commerce General Insurance Co.*, [1970] S.C.R. 992.

Despite the Court's refusal to pierce the veil in *Kosmopoulos*, the majority established that the veil might be "lifted to do justice":[11]

> The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue".

Given that pronouncement by the Supreme Court, it will be instructive to canvass the factors used by the courts in assessing the justice of lifting the veil. First, a general test for piercing the veil is presented below. Then, other factors emerging from the case law that may modify the general test are discussed.

(ii) The General Test for Piercing the Corporate Veil

In *Transamerica,* [12] the Ontario Court (General Division) stated the general test for piercing the veil. The *Salomon* principle will only be disregarded where a corporation is: (1) completely dominated and controlled; and (2) being used as a shield for fraudulent or improper conduct."[13]

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[11] *Kosmopoulos*, *supra* note 8 at para. 12, quoting L.C.B. Gower, *Modern Company Law*, 4th ed. (London, England :Stevens & Sons, 1979), at 112.
[12] *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Ct. Gen. Div.) [*Transamerica*] (QL).
[13] *Ibid.*

In *Gregorio v. Intrans-Corp* the Ontario Court of Appeal affirmed that fraud is one justification for piercing the corporate veil.[14] In refusing to pierce the veil the Court stated the more general proposition that:[15]

> Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.

It remains to be seen whether the theory of piercing the corporate veil is readily applicable to non-signatories with respect to compelling them to participate in arbitration.

B. Compelling Arbitration and Piercing the Veil

(i) Canadian Cases Supporting Compelling Arbitration

The reasoning in two leading, non-arbitral cases (*De Salaberry* and *Jodrey Estate,* below) can be applied to compelling non-signatories to arbitration.

The Federal Court of Appeal case of *De Salaberry Realties Ltd. v. Canada (Minister of National Revenue),*[16] shows that the corporate veil of a seemingly small company may be lifted by looking at the economic reality of the situation. The scheme in *De Salaberry* to avoid capital gains tax would have been permissible on a strict application of the *Salomon* principle. However, the Court

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[14] *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (Ont. C.A.) [*Gregorio*]. In support of that proposition, *Gregorio* cited the following Canadian cases *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce* (1974), 3 O.R. (2d) 70 (Ont. C.A.) [*Canada Life*]; *Aluminum Co. of Canada v. Toronto (City)*, [1944] S.C.R. 267, [1944] 3 D.L.R. 609 (S.C.C.).

[15] *Gregorio, supra* note 14 at 536.

[16] *De Salaberry Realties Ltd. v. Canada (Minister of National Revenue)*, [1974] F.C.J. No. 221, 46 D.L.R. (3d) 100 (Fed. C.A.) [*De Salaberry*].

ruled that it need not confine its analysis to the isolated activities of a subsidiary company. Rather, the Court focused its attention on the wider economic reality evidenced by the activities of the subsidiary's sister and parent companies. The Court looked at three factors in deciding to pierce the corporate veil.

First, the Court applied the "instrumentality rule" i.e. that the subsidiary is nothing but an instrument in the hands of the parent. The Court stated that the control required to invoke the "instrumentality rule" is "not mere majority or complete stock control but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal."[17] Clearly, this is a high standard of control.

Second, the Court considered the "thin capitalization" of the subsidiary company. The subsidiary's thin capitalization was taken to indicate that it was in dire need of financial help from its parent companies.[18] However, it must be noted that nothing in Canadian law requires a corporation to have a minimum amount of capital.

Third, the Court disregarded the separate legal entity of the corporation because the subsidiary corporation was created to evade a statute or modify its intent.[19] The seriousness with which the courts protect tax revenues does not apply to arbitration agreements. However, if a subsidiary was created to modify or evade an arbitration agreement this policy consideration might apply by analogy (emphasis added). The analogy is strengthened by the fact that courts favour arbitration as a matter of judicial policy.

The lesson of *De Salaberry* for compelling arbitration is twofold. First, the courts may be more willing to ignore the doctrine of separate legal entity where the

[17] *Ibid.* at paras. 47-48.
[18] *Ibid.* at para. 49.
[19] *Ibid.* at paras. 49-50.

subsidiary is within a closely held group of corporations, although there is no general principle that all companies in a group of companies are to be regarded as one.[20] Second, if a subsidiary is created to frustrate an arbitration agreement then policy considerations may support piercing the veil.

The Supreme Court of Canada commented on when it might be appropriate to pierce the corporate veil in *Jodrey Estate*.[21] The case concerned a scheme to circumvent inheritance taxes in Nova Scotia by incorporating two companies in Alberta. The Court pierced the veil, noting that the two companies were in fact "bound hand and foot" and a "mere conduit" linking the parent company to the Jodrey estate. In terms of particular factors, the Supreme Court observed that:[22]

> Both companies were incorporated on the same day in the same office by the same lawyers. Neither the parent company nor the subsidiary company engaged in any business activity between their dates of incorporation and the date of Mr. Jodrey's death. Neither of them had any creditors. Both of them had the same directors. Both had the same officers.

Jodrey Estate illustrates that when a parent or subsidiary's only business activities are designed to frustrate a legal arrangement, such as an arbitration agreement, then the two corporations may be regarded as one entity. It must, however, be noted that the factors considered in *Jodrey Estate* are equally applicable to any number of legitimate and commonplace corporate structures.

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[20] *Adams v. Cape Industries PLC*, [1990] Ch. 433 at 532 (C.A.) [*Adams*]. See also *Peterson Farms, Inc. v. C&M Farming Limited*, [2004] E.W.H.C. 121 (Comm) [*Peterson Farms*], which distinguishes the "group of companies" doctrine first promulgated in the French case of *Dow Chemical v. Isover Saint Gobain*, France IX Yearbook (1984) 131, (1983) J.D.I. 899.

[21] *Covert v. Nova Scotia (Minister of Finance)*, [1980] 2 S.C.R. 774, (sub nom. *Jodrey Estate v. Nova Scotia (Minister of Finance)*) [*Jodrey Estate*].

[22] *Ibid.*

In *Concordia Project Management Ltd. c. Décarel Inc.*[23] the Quebec Court of Appeal compelled a non-signatory to arbitrate by piercing the corporate veil. The case concerned a joint venture contract for the construction of the Montreal Casino between two parties, Décarel and Concordia. The Quebec Court of Appeal ruled that Décarel and its two principals were, in effect, one.

Pan Liberty Navigation Co. v. World Link (H.K.) Resources Ltd. [24] also provides some support for piercing the veil in the arbitration context. The case is significant because the B.C. Court of Appeal ruled that, in principle, a non-signatory could be personally bound by an arbitration clause if that individual was the *alter ego* of the corporate signatory.

The principle enunciated in *Pan Liberty* stemmed from the B.C. Court of Appeal's stay of an action to enforce a foreign arbitral award. The British arbitral award was made against a charterer who defaulted and was judgement proof at the time of the B.C. enforcement action. The plaintiffs argued that World Link was the *alter ego* of the defaulting charterer. However, World Link was not a party to the arbitration agreement. Since the charterer was in default, the plaintiffs wanted to enforce the arbitral award in B.C. by seizing a ship that was under charter to the defaulting charterer's *alter ego*, World Link.

The Court of Appeal refused to make an order to seize the ship on the basis that it was for the British arbitrator to determine whether World Link was actually a party to the arbitration agreement. The Court of Appeal held that the Chambers Judge had erred by reasoning that the British arbitrator had no jurisdiction to rule on the *alter ego* argument and enforcing the order. The Chambers Judge had reasoned that the *alter ego* of a company could not possibly be a party to the foreign arbitration and he did not believe that he was treading on the jurisdiction

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[23] *Concordia Project Management Ltd. c. Décarel Inc.*, [1996] A.Q. No. 2136 (Que. C.A.) [*Décarel*].

[24] *Pan Liberty Navigation Co. v. World Link (H.K.) Resources Ltd.*, [2005] B.C.J. No. 749 (B.C.C.A.) [*Pan Liberty*].

of the foreign arbitrator. By contrast, the implication of the Court of Appeal's ruling is that the *alter ego* of a company could, in principle, fall within the boundaries of an arbitration clause. Otherwise, the Court of Appeal would arguably have considered piercing the veil and enforcing the arbitral award in B.C.

Hi-Seas Marine Ltd. v. Boelman[25] concerned the interplay between arbitration and court proceedings, as well as piercing the corporate veil of a one person corporation. The B.C. Supreme Court accepted that the *alter ego* theory could also apply in the arbitration context. However, the Court ruled that the *alter ego* argument was inapplicable on the facts of the case.[26] Ultimately, the Court dismissed Hi-Seas' claim because there were no *bona fide* trial issues. The facts of the case are discussed later, in the section on resisting attempts to compel arbitration through piercing the corporate veil.

(ii) American Cases Supporting Compelling Arbitration

As in Canada, American courts require an extremely fact-driven argument if they are to be persuaded to pierce the corporate veil. In general, American courts have the same perspective on piercing the veil, as evidenced by four observations. First, the American jurisprudence echoes the *Transamerica* test. That is, arbitration has been compelled where there is proof of fraud or some other legal wrong, which is accompanied by a parent completely controlling its subsidiary.[27] Second, some American cases have rejected the fraud requirement.[28] Third, an officer or shareholder of the corporate entity who has not signed the arbitration agreement in their personal capacity can be compelled

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[25] *Hi-Seas Marine Ltd. v. Boelman*, [2006] B.C.J. No. 655 (B.C.S.C.) [*Hi-Seas*].
[26] *Ibid.* at paras 82-93.
[27] See e.g. *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc.*, 2 F. 3d 24 (2d Cir. 1993).
[28] See e.g. *Callas v. Independent Taxi Owners Ass'n*, 62 App. D.C. 212, 66 F. 2d 192 (D.C. App. 1933).

to arbitrate in appropriate circumstances.[29] Finally, American courts will look to many of the same factors as Canadian courts in deciding whether to lift the veil.

Ten principal criteria have been identified as the basis for assessing whether one corporation is dominating another in the United States:[30]

> (1) disregard of corporate formalities;
> (2) inadequate capitalisation;
> (3) intermingling of funds;
> (4) overlap in ownership and control, officers, directors and personnel;
> (5) common office space, address and telephone numbers of corporate entities;
> (6) the degree of distinction shown by the allegedly dominated corporation;
> (7) whether the dealings between the entities are at arm's length;
> (8) whether the corporations are treated as independent profit centres;
> (9) payment or guarantee of the corporation's debts by the dominating entity; and
> (10) intermingling of property between the entities.

(iii) United Kingdom Cases Supporting Compelling Arbitration

British courts also share the Canadian reluctance to pierce the corporate veil. However, in *Roussel-Uclaf v. G.D. Searle & Co. Limited*[31] the Court pierced the veil between a wholly owned subsidiary and its parent corporation. This allowed the subsidiary to force its way into the arbitration between the parent and its supplier. The Court reasoned that the words "claiming through or under an

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[29] See e.g. *C.F. Trust, Inc. v. First Flight Ltd. Partnership, et al.,* 111 F. Supp. 2d 734 (E.D. Va. 2000).
[30] *Sentner, supra* note 6 at 67-68, citing *Mag Portfolio Consultant v. Merlin Biomed Group*, 268 F. 3d 58 at 63 (2nd Cir. 2001).
[31] *Roussel-Uclaf v. G.D. Searle & Co. Limited and G.D. Searle & Co.,* [1978] R.P.C. No. 25 (Ch.D.) [*Roussel-Uclaf*].

agreement containing a submission" in s. 2 of the *Arbitration Act 1975*, should be interpreted so as to include a wholly owned subsidiary claiming a right to sell patented articles which it had obtained from and been ordered to sell by its parent.[32]

C. Resisting Arbitration and Piercing the Veil

Resisting arbitration is relatively straightforward given the law's bias against lifting the veil. There is a body of case law holding the veil should not be pierced in order to compel arbitration or to enforce foreign arbitral awards.

(i) Canadian Cases on Resisting Piercing the Veil

In *Javor v. Francoeur,*[33] the British Columbia Supreme Court refused to pierce the corporate veil. A California arbitrator had ruled that Mr. Francoeur was the *alter ego* of the corporate respondent. As such, the arbitrator compelled Mr. Francoeur (a non-signatory) to participate in an arbitration where he was held to be personally liable for his corporation's debts. The B.C. Supreme Court refused to enforce the arbitral award in B.C. because Mr. Francoeur could not be a party to the arbitration agreement under B.C. law.[34] The British Columbia Court of Appeal affirmed the decision without any substantive comment.[35]

In *Hi-Seas*[36]recall that the B.C. Supreme Court accepted that the *alter ego* theory could also apply in the arbitration context, while rejecting its application on the

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[32] In Canada, *Roussel-Uclaf* was distinguished in *Kaverit Steel, supra* note 1, discussed below. However, *Roussel-Uclaf* may still be good law in Canada based on *Lough v. R.E. Belluz Realty Ltd.*, 1987 CarswellOnt 2718, Docket No. 2121/86 (Ont. Dist. Ct.) [*Lough*].
[33] *Javor v. Francoeur*, [2003] B.C.J. No. 480 (B.C.S.C.), aff'd, [2004] B.C.J. No. 448 (B.C.C.A.) [*Javor*].
[34] See *Foreign Arbitral Awards Act,* R.S.B.C. 1996, c. 154, s. 4; *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, ss. 2, 7, 35.
[35] *Javor, supra* note 33.
[36] *Hi-Seas, supra* note 25.

facts of the case. The case demonstrates that *alter ego* arguments should mainly be opposed on the facts of a given case.

In *Hi-Seas*, the arbitration agreement in question was between Hi-Seas Marine and Trinav Shipping. Mr. Boelman was not a party to the arbitration agreement, but he was arguably the *alter ego* of Trinav Shipping. In short, Trinav was arguably a one person corporation under the control of Mr. Boelman. Hi-Seas obtained an arbitral award against Trinav, but could not recover from the corporation. So, Hi-Seas sought a court order to recover the award from Mr. Boelman personally. The issue was whether Hi-Seas' failure to make Mr. Boelman a party to the arbitration now precluded it from bringing an action against him in court.

Mr. Boelman argued that based on *Pan Liberty*, which he characterized as an *alter ego* case, Hi-Seas should have made him a party to the arbitration proceeding. Mr. Boelman argued that Hi-Seas' failure to make him a party to the arbitration precluded it from bringing an action against him in court based on the doctrine of *res judicata*.

Hi-Seas argued that Mr. Boelman could not personally have been added as a party to the arbitration since he was not a party to the arbitration agreement. Hi-Seas advanced two reasons. First, it cited the precedent in *Javor v. Francoeur*[37] (discussed above) to support its position that Hi-Seas could not have added Mr. Boelman as a party in the arbitration proceeding.[38] Second, Hi-Seas argued that the positions taken by Mr. Boelman in the arbitration estopped him from advancing the opposite argument before the B.C. Supreme Court. Mr. Boelman had argued that the arbitration panel had no personal jurisdiction over him. The

[37] *Javor, supra* note 33.
[38] *Justice Davies* commented at paras. 50-51 of *Hi-Seas* that his decision, "makes it unnecessary to further explore the very interesting question arising from the two potentially contradictory decisions of our Court of Appeal in *Pan Liberty* and *Javor v. Francoeur*."

court accepted the argument that Mr. Boelman should be estopped from subsequently arguing that he should have been personally included as a party.

Ultimately in *Hi-Seas,* the B.C. Superior Court refused to pierce the veil based on its application of the B.C. Court of Appeal's precedent in *B.G. Preeco 1 (Pacific Coast) Ltd. v. Bon Street Hold. Ltd*.[39] as considered in *Re Down.*[40] In *B.G. Preeco*, the Court of Appeal made the following comment regarding shell companies:[41]

> [. . .]the fact that the principals of the company may have intended even at the time of the undertaking the obligation on behalf of the company to take advantage of the limited liability of the company if it suited their purposes does not per se make the company a sham, i.e., it does not expose its principals to liability for the company's obligations.

Seaton J.A. rejected the proposition that the corporate veil should be lifted where it would be unfair to do otherwise because such an approach could not co-exist with the *Salomon* principle. Seaton J.A. then went on to consider specific instances where it might be appropriate to pierce the veil on the grounds of "fraud or improper conduct," and observed:[42]

> The cases in which the corporate veil is pierced on the ground of "fraud or improper conduct" deal with instances where a corporation is used to effect a purpose or commit an act which the shareholder could not effect or commit.

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[39] *B.G. Preeco 1 (Pacific Coast) Ltd. v. Bon Street Hold. Ltd.* (1989), 37 B.C.L.R (2d) 258, 60 D.L.R. (4th) 30 (B.C.C.A.) [*B.G. Preeco*].
[40] *Re Down* (2000), 80 B.C.L.R. (3d) 28, 2000 BCSC 1148.
[41] *Hi- Seas, supra* note 25 at para. 83, citing *B.G. Preeco, supra* note 39 at 8.
[42] *Hi- Seas, supra* note 25 at para. 85, citing *B.G. Preeco, supra* note 39 at 268.

Applying these precedents, the Court in *Hi-Seas* refused to pierce the veil based mainly on the following facts. First, it was Mr. Boelman's regular business practice to operate through corporations for the purpose of limiting his personal liability. Second, and "most importantly," the corporate structure was made clear to both Hi-Seas and its lawyers.[43] Both these factors should therefore be highlighted in an argument that seeks to resist being compelled to arbitrate.

In *Kaverit Steel and Crane Ltd. v. Kone Corp.,*[44] the Alberta Court of Appeal refused to compel non-signatories to arbitrate by piercing the veil. The Court's refusal was made despite the fact that the non-signatories were wholly owned subsidiaries of Kone, who were violating Kone's exclusive distributorship agreement with Kaverit Steel.

Kaverit Steel concerned a situation that commonly goes to arbitration. The plaintiff distributor commenced an action against the licensor and its subsidiaries for breach of contract. The defendant Kone was a Finnish manufacturer of industrial cranes who held international patents on some devices. The plaintiff, Kaverit Steel and Crane Ltd., was an Alberta corporation that operated an industrial supplies business. The two firms entered into an exclusive distributorship agreement for Western Canada that contained an arbitration clause. While Kone was party to the agreement containing the arbitration clause its subsidiaries were not. Subsequently, Kaverit complained that Kone or its subsidiaries had begun to compete with it in Western Canada. Kaverit claimed that the subsidiaries were controlled by Kone and did its bidding.

The Court of Appeal based their refusal to compel arbitration on a narrow reading of the language in the Alberta *International Commercial Arbitration Act.*[45] The

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[43] *Hi- Seas, supra* note 25 at para. 88.
[44] *Kaverit Steel, supra* note 1.
[45] *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6 [*Alberta Act*]. See *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5.

Act was held to only apply to parties who actually signed the contract in writing.[46] The value of *Kaverit Steel* as a precedent must be regarded with some caution. Indeed, in cases with broader wording than the Alberta statute, courts have compelled arbitration by non-signatories.[47]

(ii) United Kingdom Cases on Resisting Piercing the Veil

The Privy Council refused to pierce the veil in order to compel arbitration in a construction delay and defect case, *The Bay Hotel and Resort Limited.*[48] The case dealt with a situation in which a party to a construction contract, Cavalier, formed a foreign subsidiary to carry out the construction. The Privy Council refused to compel arbitration by the non-signatory despite the fact that the subsidiary company was nothing more than an extension of its parent, who entirely financed the subsidiary and was to receive all profits. In the British case of *Peterson Farms v. C & M Farming Limited*, the court also refused to pierce the veil.[49]

D. Summary of Piercing the Veil

Piercing the corporate veil will always be a difficult and fact driven enterprise. Yet, it may be an effective option where a claimant has an arbitration agreement with a corporate subsidiary that has become judgement proof. In that case, the only available relief may be to join the parent corporation or the principal

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[46] The *Alberta Act* adopts the test in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1958, as a schedule to the *Act*. In the words of the Court in *Kaverit*, 'The Convention applies, according to Article II, s. 1, only to "[…] an agreement in writing under which the parties undertake to submit to arbitration […]". Article II, s. 2, clarifies that "parties" are the parties signatory: "The term 'agreement in writing' shall include an arbitral clause in a contract ... signed by the parties[...]".'

[47] See *Lough, supra* note 32.

[48] *The Bay Hotel and Resort Limited and Zurich Indemnity Company of Canada v. Cavalier Construction Co. Ltd. and Cavalier Construction Co. Ltd. (a Turks and Caicos Islands Registered Company*) (16 July 2001), Privy Council Appeal No. 32 of 2000 (P.C.) (BILII) [*Bay Hotel*].

[49] *Peterson Farms, supra* note 20.

shareholder in his personal capacity as a co-respondent in the arbitration.[50] It may also be effective in complex contracts involving multiple subsidiaries, for example construction contracts.

In sum, arguments in favour of piercing the corporate veil must focus on the facts of the case and the injustice that would result from a rigid application of the *Salomon* principle. Beyond simply claiming injustice, the following factors will support piercing the veil: complete control and domination by the parent company; conduct akin to fraud; an intent to evade or modify the arbitration agreement; a group of closely held corporations forming a single economic unit; thin capitalization; and whether the parent/subsidiary actually engages in business activities. The factors employed by the American courts should also be considered.

When opposing an *alter ego* argument, always remember that piercing the veil is an exception to a deeply entrenched rule in our legal and economic system. In an arbitration setting, the weight of Canadian authority suggests that arguments that the veil should be pierced will be difficult to advance successfully. Moreover, an arbitration is created by contract, unlike a court proceeding. It might, therefore, be argued that arbitrators should be especially hesitant to pierce the veil. That is to say, since the doctrine is rarely applied by the Superior Courts who possess inherent jurisdiction, arguably arbitrators should be even more reluctant to pierce the veil.

Theory No. 2 - Principles of Agency

Principles of agency may be used to bind a non-signatory to an arbitration agreement. When an agent enters into a contract with a third person within the scope of its express or implied authority, the principal becomes a party to the

[50] Eisen, *supra* note 6 at 42.

contract and assumes its benefits and obligations.[51] Whether the agent acts within its apparent or ostensible authority is determined by the reasonable perceptions of the third-party.[52] Note that while agency is similar in some respects to piercing the veil, especially given the similarities between the factors considered, agency is nevertheless a distinct theory.

A. Compelling Arbitration and Agency

A principal will generally be bound by an arbitration clause in a contract signed by its agent. As a result, arguments about whether a non-signatory should be compelled to arbitrate will only arise where there is no explicit contract between the principal and its agent, and the principal does not wish to be part of the arbitration. Agency is defined as:[53]

> …the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts…

The concept of agency has been woven through our jurisprudence for nearly as long as that of a corporation's distinct personality. In *Patton v. Yukon Consolidated Gold Corp.* (1934), the Ontario Court of Appeal cited the following passage from the British case of *Rainham Chemical Works Limited v. Belvedere Fish Guano Company Limited* (1921):[54]

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[51] See *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 at 666 (Ont. C.A.); *Adams, supra* note 20 at 536-37.
[52] See S.M. Waddams, *The Law of Contracts*, *5th ed.* (Aurora : Canada Law Book Inc., 2005) at 179-180.
[53] G.H.L. Fridman, *The Law of Agency, 7th ed*., (Toronto : Butterworths, 1996) at 11.
[54] *Patton v. Yukon Consolidated Gold Corp. Ltd*., [1934] O.W.N. 321 (Ont. C.A.), citing *Rainham Chemical Works Limited v. Belvedere Fish Guano Company Limited*, [1921] 2 A.C. 465 at 475.

> A company, therefore, which is duly incorporated, cannot be disregarded on the ground that it is a sham, although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence.

There is every reason to believe that agency principles are applicable to compelling non-signatories to arbitrate since they are entrenched in Canadian law. Therefore, the principles that emerge from outside the arbitration context on the factors for implying agency are discussed first. Then, the few reported Canadian cases where principles of agency have been considered as a method of compelling a non-signatory to arbitrate are discussed.

(i) Implied Agency – Factors to Consider

Absent an explicit agency agreement created by contract, a court may imply agency where the relationship between a parent and subsidiary is such that the only business carried out by the subsidiary is the parent's business.[55] It is a question of fact whether the subsidiary is carrying on business for the parent's benefit or its own. The following list of factors are frequently cited as useful guidelines for this inquiry:[56]

i. were the profits treated as those of the parent or the subsidiary?
ii. were the people involved in the day-to-day operations of the subsidiary appointed by the parent?
iii. was the parent the head and the brain of the subsidiary's day-to-day operation?

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[55] See *Adams, supra* note 20 at 536-37. See also H. Sutherland et al, *Fraser & Stewart Company Law of Canada*, 6th ed. (Toronto : Carswell, 1993) at 23 [*Fraser*].
[56] *Shibamoto & Co. v. Western Fish Producers, Inc. Estate* (T.D.) (1991), 43 F.T.R. 1; aff'd (1993), 56 F.T.R. 160 (F.C.A.), citing *Smith, Stone and Knight, Ltd. v. Birmingham Corporation,* [1939] 4 All E.R. 116 at 118 (K.B.).

iv. did the parent make policy and financial decisions that were merely carried out by the subsidiary?
v. were the profits directly traceable to the skill and direction of the parent?
vi. was the parent in effectual and constant control?

A similar list was formulated by Gale C.J.O., in *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce*.[57] In approaching the question of whether an affiliated Canadian bank was carrying on business as the agent of an American bank, the Court considered:[58]

i. the capitalization of the subsidiary;
ii. the degree of observance of corporate formalities;
iii. the extent of the relationship between the business of the parent and subsidiary;
iv. the nature and extent of the business dealings between parent and subsidiary;
v. the corporate histories of both parent and subsidiary;
vi. the relationship between the boards of directors and upper management personnel of parent and subsidiary; and
vii. the extent of the ownership interest of the parent in the subsidiary.

Although there is much overlap in these questions, a general rule can be extracted from the cases: factors indicating that a sole shareholder has behaved as if the corporation had no independent existence or responsibility for the operation will help to establish an agency relationship.[59] As in an analysis of piercing the corporate veil, assessing implicit agency will be a fact driven inquiry.

(ii) Company X vs. Company A

[57] *Canada Life, supra* note 14.
[58] *Ibid*. at 84-85.
[59] *Fraser*, *supra* note 55 at 23.

In this complex arbitration, Company A sought to purchase Company X. On the eve of the closing, Company A incorporated a temporary acquisition vehicle (i.e., a shell company) to be the purchaser in the Stock Purchase Agreement ("SPA") in place of Company A. The temporary acquisition vehicle did thereby acquire the shares and upon completion of the transaction it was merged with Company X.

When a dispute arose, the actual buyer, Company A, moved for dismissal before the arbitrator on the basis that it was not a party to the SPA establishing the arbitration.

The arbitrator found that the temporary acquisition vehicle was the agent of Company A. The arbitrator wrote: "[. . .] in such circumstances it is entirely appropriate for Company A to be treated as a party to the SPA [. . .] a party may be found to be a party to an arbitration agreement by operation of law under the governing law of the contract."

(iii) American Cases on Agency

Interbras Cayman Co. v. Orient Victory Shipping Co.[60] stemmed from Frota's agreement to charter a vessel. Frota then sub-chartered the vessel to Interbras. Interbras attempted to invoke the arbitration agreement from the original charter, arguing that it was the undisclosed principal of Frota. The Appellate Court sent the agency issue back for a determination at trial. However, the Appellate Court held that as a matter of legal principle, an undisclosed principal could enforce an arbitration agreement made for its benefit by an agent even though the signatory to the arbitration agreement was unaware of the existence of the principal.

[60] *Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F. 2d 4 (2d Cir. 1981).

In *Cosmotek*, the Court held that when an agent enters into a contract containing an arbitration clause and "fails to reveal that he or she is signing as an agent of behalf of a undisclosed principal, then the agent is deemed to be acting on his or her own behalf and may be compelled to arbitrate". [61]

On other hand, in *Lerner v. Amalgamated Clothing & Textile Workers Union* the Court held that an agent who enters into an agreement on behalf of a disclosed principle will not be individually bound to the agreement in the absence of clear evidence demonstrating the agent's intention to bind him or herself. [62]

B. Resisting Arbitration and Agency

An American case and a Canadian case each illustrate that agency arguments must also contend with the *Salomon* doctrine of distinct legal entity. In addition, the Canadian case illustrates that agency may be difficult to factually establish.

(i) Canadian Cases on Resisting Agency

In *Hi-Seas*, a case discussed above, the B.C. Superior Court disagreed in *obiter* with the arbitration panel's finding that Mr. Boelman was personally liable to Hi-Seas based on principles of agency. Although the decision was primarily based on the Court's refusal to pierce the veil, the Court also commented on the agency argument advanced by Hi-Seas.

Hi-Seas had argued that two consequences flowed from the fact that Mr. Boelman knew of the agency and trust relationship between Hi-Seas and his company Trinav.[63] First, Mr. Boelman was obliged to ensure that Trinav did not

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[61] Eisen, *supra* note 6 at 44, citing *Cosmotek Mumessillik Ve Ticaret Ltd. Sirkketi v. Cosomotek USA, Inc. et al,* 942 F. Supp. 757, 760 (D. Conn. 1996) (citing *Becks v. Suro Textiles Ltd.,* 612 F. Supp. 1193, 1194 (S.D.N.Y. 1985)) [*Cosmotek*].
[62] Eisen, *supra* note 6 at 44, citing *Lerner v. Amalgamated Clothing & Textile Workers Union,* 938 F. 2d 2, 5 (2d Cir. 1991).
[63] *Hi-Seas*, *supra* note 25 at para. 94.

breach its fiduciary obligations to Hi-Seas. Second, and most important, Mr. Boelman was precluded from obtaining any direct or indirect personal benefit as a consequence of any breach of a fiduciary duty by Trinav.

Davies J. rejected Hi-Seas' arguments because Hi-Seas could not establish that an agency relationship existed or that Mr. Boelman had committed actual fraud, stating:[64]

> I agree that it is arguable that the relationship between Hi-Seas and Trinav has some attributes that could give rise to the application of agency principles in determining disputes between the parties. It does not, however, follow that the terms of the Vessel Management Agreement that define the obligations of the parties can be wholly overridden by application of equitable agency principles. To that extent, I disagree with the Arbitration Panel's conclusions which not only elevate general equitable agency principles over contractually negotiated terms, but also do not consider whether those terms inform the scope of any trust obligations that might arise under a contract that was entered into without undue influence no matter how one-sided its terms might appear. [*Emphasis added]*

(ii) American Cases on Resisting Agency

EI DuPont de Nemours v Rhone Poulenc Fiber is an example of a failed agency argument.[65] The case concerned a joint venture to manufacture textiles in China between the subsidiaries of DuPont and Rhone. The joint venture agreement between the subsidiaries contained an arbitration clause. The two principals were not party to the arbitration agreement. DuPont sued Rhone, while Rhone

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[64] *Hi-Seas*, *supra* note 25 at para. 97.
[65] *EI DuPont de Nemours v. Rhone Poulenc Fiber*, 269 F. 3d 187 at 198 (3rd Cir 2001) [EI *DuPont]*, cited in Sentner*, supra* note 6 at 67.

sought to compel arbitration based on the agency theory. Rhone claimed that because of DuPont's intimate involvement in the joint venture, DuPont's subsidiary acted as it agent in entering into the joint venture agreement. The Court rejected the argument, noting that a corporation whose shares are owned by another parent corporation does not by that fact alone become an agent of that other company.

C. Summary – Choosing to Argue Agency Instead of Piercing the Veil

Generally, arguing agency as opposed to asking a court to pierce the corporate veil is an easier method to compel arbitration by a non-signatory. However, the American case *EI DuPont* suggests that there is a potential strategic drawback to claiming agency instead of trying to pierce the veil. The Court noted:[66]

> Unlike the alter ego/piercing the corporate veil theory, when customary agency is alleged the proponent must demonstrate a relationship between the corporation and the cause of action. Not only must an arrangement exist between the two corporations so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing.

Nevertheless, there are several reasons why claming agency is generally the easier route. First, agency principles are well established and settled in Canadian law. By contrast, an attempt to pierce the corporate veil must always contend with the laws' foundational presumption that a corporation is a distinct legal entity. Moreover, the law on lifting the corporate veil is unsettled and uncertain. By contrast, claims made using agency work with the established law rather than against its biases. Second, it is easier to establish an agency relationship than it is to present a court with enough evidence to persuade it to

[66] *Ibid*.

pierce the veil. To pierce the veil one has to show "complete control and domination" of the subsidiary by the shareholder. This difficult burden does not need to be overcome when agency is claimed.

Theory No. 3 - The Concept of Assignment

A contractual right is a form of property, and like other forms of property it can be transferred from one person or corporation to another.[67] In terms of compelling a non-party to arbitrate, assignment is a relatively simple and uncontroversial method. It is uncontroversial because assignment does not violate privity of contract or the doctrine of distinct legal entity. For example, in *ABN Amro Bank Canada v. Krupp*[68] the Court held that both the benefits and burdens follow a contract when it is assigned.[69] Consequently, the arbitration clause follows the primary contract and is also assigned. However, the recent Ontario Court of Appeal decision in *SimEx Inc. v. IMAX Corp.*[70] shows that careful attention must be paid to what exactly has been assigned. Careful analysis is required to determine whether the arbitration agreement truly attaches to the asset or right that has been assigned.

A. Compelling Arbitration by Assignment

In *ABN*, the Divisional Court of Ontario compelled a non-signatory to arbitrate because it was assigned an agreement that explicitly contained an arbitration clause. The case stands for the principle that the non-signatory assignee of a primary contract will be bound by the primary contract's arbitration contract.

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[67] *Waddams*, *supra* note 52 at 187.
[68] *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* (1996), 135 D.L.R. (4th) 130, 49 C.P.C. (3d) 212 (Ont. Div. Ct.) [*ABN*].
[69] See also *Petro-Canada v. 366084 Ontario Limited* (1995), 25 B.L.R. (2d) 19 (Ont. Gen. Div.) at para. 55.
[70] *SimEx Inc. v. IMAX Corp* (2005), 11 B.L.R. (4th) 214, 206 O.A.C. 3 (Ont. C.A.) [*IMAX*], rev'g [2005] O.J. No. 817, 2 B.L.R. (4th) 142 (Ont. S.C.J.).

The *ABN* case arose out of a contract for the overhaul of a Canadian Coast Guard Ship by the defendant Krupp, a large German company. Krupp agreed to meet the contract's Canadian content requirement through a sub-contract to a third-party company, NsC. Krupp and NsC entered into an agreement whereby NsC was granted exclusive North American manufacturing and shipping rights. The significant point was that the agreement explicitly contained an arbitration clause.

ABN, a bank, lent money to NsC. Subsequently, ABN received a general assignment of accounts from NsC, which included the contract containing the arbitration clause with Krupp. Significantly, ABN had full knowledge that the assignment was accompanied by an arbitration clause.

The arrangement went awry when ABN determined that a required amount of equity was not injected into NsC by Krupp. ABN alleged that the owners of NsC and Krupp had conspired to give the illusion of an equity injection through a series of fraudulent financial arrangements. ABN argued that it was not bound by the arbitration clause due to fraud and wanted to proceed by way of court. Krupp wanted to arbitrate the dispute.

In binding ABN to the arbitration clause, Adams J. stated for the majority:[71]

> ABN is, in law, a party to the arbitration agreement. It is a fundamental and, I think, universal commercial legal principle that an assignor is not entitled to divide that which is assigned amongst assignees so as to convey the benefits and nullify the burdens. Thus, a party seeking to enforce assigned rights under an agreement can only do so subject to the terms and conditions embodied therein. This principle has been applied, by this and other courts, to include arbitration clauses. [*Emphasis added*]

[71] *ABN*, *supra* note 68 at para. 14.

As a general principle, it is clear that a party who is assigned a primary contract containing an arbitration clause will be bound to the clause when disputes arise out of the primary contract.

(i) American Cases Supporting Assignment

The American position is the same as the Canadian stance. Except in rare circumstances, parties are free to assign or transfer their contractual right, including the right to arbitration, unless their contract says otherwise.[72]

B. Resisting Arbitration and Assignment

The principle enunciated in *ABN* must be applied with a careful analysis of the assigned right or asset. In *SimEx Inc. v. IMAX Corp,* [73] the Ontario Court of Appeal reversed the application judge's decision to compel arbitration by a non-signatory based on the precedent set in *ABN*. Upon a reassessment of the facts, the Ontario Court of Appeal ruled that *ABN* did not apply to the circumstances of the case. The lesson of *IMAX* is to always ask whether the arbitration agreement has actually been assigned.

The facts of *IMAX* are the key to the case. Ridefilm was a wholly owned subsidiary of IMAX. Ridefilm and Midland Production Corp. entered into a Film Production Agreement whereby Ridefilm obtained the rights to the films produced by Midland in exchange for royalties. Notably, an arbitration agreement to cover all disputes was contained in the Film Production Agreement.

IMAX eventually decided to get rid of its subsidiary Ridefilm. To avoid potential liability, IMAX needed to find an entity that would be willing to fulfill Ridefilm's

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[72] Sentner, *supra* note 6 at 70.
[73] *IMAX, supra* note 70.

contractural obligations. IMAX entered into a Transfer Agreement with SimEX. The Transfer Agreement assigned IMAX/Ridefilm's ownership of the film rights to SimEx, but did not explicitly transfer the seemingly concomitant obligation to pay royalties to Midland for use of the films. It is from this irregular assignment that litigation arose.

When royalties were not paid to Midland, it commenced an arbitration against IMAX. IMAX cross-claimed that SimEx had been assigned all the liabilities and obligations under the original Film Production Agreement. SimEx argued that it was a non-signatory and hence not a party to the Film Production Agreement's arbitration clause. Nevertheless, Midland served an amended statement of claim purporting to add SimEx as a party to the arbitration.

The resolution of the case turned on the interpretation of several provisions of the Transfer Agreement. It was only by focusing on the Transfer Agreement that the Court of Appeal could determine what portions of the Film Production Agreement might have been incorporated by reference and hence assigned to SimEx.[74] The Court reasoned that nothing in the Transfer Agreement stated that SimEx agreed to pay Midland royalties. In other words, the transfer of ownership rights was distinct from the obligation to pay royalties. On this point, the Court distinguished *ABN*, stating:[75]

> Obviously, if [IMAX] had assigned the entire Production Agreement, the principle set out in ABN would apply and SimEx as the assignee of the Agreement would have been bound to pay the contingent compensation and bound by the arbitration clause. IMAX assigned its rights to the films not to the agreement. (emphasis added)

[74] *Ibid.* at para. 25.
[75] *Ibid.* at para. 48.

The main lesson from *IMAX* is that there is no rule of law that prevents a party to a contract (IMAX/Ridefilm) from assigning the rights or benefits of the contract to a third-party (SimEx), while keeping the burdens. In fact, without the consent of the third-party to the contract (Midland), the general rule is that the assignor (IMAX/Ridefilm) can only assign the benefits of the contract and will remain liable to the other party for the liabilities.[76] An attempted arbitration against a non-signatory can therefore be resisted where the assignment of an asset or right does not clearly assign the arbitration agreement or incorporate it by reference.

Theory No. 4 - Incorporation by Reference

It is possible to incorporate an arbitration agreement by reference. For example, standard conditions may be described in a document separate from a contract, but referenced in that contract.[77] A party will therefore be a signatory to the main contract which references a secondary document containing an arbitration clause, but a non-signatory to that secondary document. However, under the theory of incorporation by reference that non-signatory may be subject to the arbitration agreement and compelled to arbitrate.

A. Compelling Arbitration and Incorporation by Reference

If the standard conditions clearly include an arbitration clause by reference, it will likely be sufficient to bind the non-signatory to arbitration.[78] When an arbitration agreement has been properly incorporated by reference, the courts will not hesitate to stay an action until the arbitration is concluded.[79]

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[76] *Ibid.* at para. 50.
[77] J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure* (Huntington: Juris Publishing, Inc., 2005) at 59.
[78] *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (Ont. S.C.J.) [*Kanitz*].
[79] See e.g. *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd.* (1994), 113 D.L.R. (4th) 536 (F.C.A.) [*Nanisivik*].

Kanitz v. Rogers Cable Inc.[80] is an example of an arbitration agreement being successfully incorporated by reference. The Ontario Superior Court of Justice held that posting an amended customer user agreement containing an arbitration clause on a web site was sufficient to compel the customer to arbitrate. The practice of including arbitration agreements in standard form customer contracts represents a trend where vendors attempt to prevent individual and class suits.

Bills of lading have posed a particular problem in terms of incorporating arbitration agreements. It has been a significant problem because shipping has traditionally been an economic activity giving rise to arbitration claims. Both English and Canadian courts have consistently held that the general words "all terms, conditions and exceptions governing the charter party are herby incorporated herein" in a bill of lading are insufficient to incorporate an arbitration clause included in the charter party.[81] The courts have based their holdings on commercial necessity, as bills of lading are negotiable instruments. As such, a third-party would not ordinarily believe that it contained an arbitration agreement absent clear and specific wording.[82] Where there is clear and specific wording, an arbitration agreement that is incorporated into a bill of lading will be enforceable as in the case of *Nanisivik Mines Ltd. v. Canartic Shipping Co.*[83]

The Canadian and British position is in accordance with the American jurisprudence concerning incorporation by reference. Non-signatories have been compelled to arbitrate under bills of lading[84] and in the wider context.[85]

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[80] *Kanitz, supra* note 78.
[81] *Supra* note 77 at 60.
[82] See e.g. *Siderurgica Mendes Junior S.A. and Mitsui & Co. (Canada) Ltd. v. Ice Pearl (The Ship)*, [1996] 6 W.W.R. 411, (1996), 18 B.C.L.R. (3d) 182 (B.C.S.C.); *Conagra (International) S.A. v. Seamotion Navigation Ltd.,* [1995] B.C.J. No. 482 (B.C.S.C.); *Welex AG v. Rosa Maritime Ltd.*, [2002] EWHC 762 (Comm).
[83] *Nanisivik, supra* note 79.
[84] See e.g. *Continental U.K. Ltd. v. Anagel Confidence Compania Naviera,* S.A., 658 F. Supp. 809 (S.D.N.Y. 1987).
[85] See e.g. *Import Export Steel Corp. v. Mississippi Valley Barge Line Co.,* 351 F.2d 503 (2d Cir. 1965).

B. Resisting Arbitration and Incorporation by Reference

In terms of resisting arbitration, the obvious strategy is to argue that the main contract does not clearly and specifically incorporate the arbitration agreement by reference. The following two cases demonstrate that this strategy is applicable outside the bill of lading context as well.

Recall that in the previously discussed *IMAX* case,[86] a Film Production Agreement containing an arbitration clause was at issue. Certain parts of the Film Production Agreement had been incorporated by reference into the Transfer Agreement by the use of the words "subject to the terms and conditions of the relevant agreements". However, the Ontario Court of Appeal held, *inter alia*, that the arbitration agreement was not adequately incorporated by reference. *IMAX* also demonstrates that the concepts of assignment and incorporation by reference will often be linked.

The recent Quebec Court of Appeal decision in *Dell Computer Corporation v. Union des Consommateurs*[87] demonstrates that the type of online incorporation by reference strategy utilized in *Kanitz* may be vulnerable to attack.

In *Dell*, the plaintiff consumer protection agency brought a class action against Dell. The suit stemmed from a pricing error for handheld computers on Dell's website. Dell filed a motion to stay the case for lack of subject-matter jurisdiction in light of the arbitration clause contained in the standard terms of sale posted on Dell's website. The standard terms contained an arbitration clause stating that any dispute arising from an online purchase was to be resolved by arbitration.

The Court of Appeal rejected the plaintiff's argument that the arbitration clause was inconsistent with the intent of Quebec's *Consumer Protection Act*.[88]

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[86] *IMAX*, *supra* note 70.

[87] *Dell Computer Corporation v. Union des Consommateurs*, [2005] R.J.Q. 1448 (Que. C.A.) [*Dell*], leave to appeal granted, [2005] S.C.C.A. No. 370.

Nevertheless, the Court found the arbitration clause to be null under the Quebec *Civil Code*. The reason was that the arbitration clause was an external contract that had not been adequately brought to the consumer's attention.

Theory No. 5 - Equitable Estoppel

Equitable estoppel prevents a party who knowingly accepts the benefits of a contract containing an arbitration agreement from avoiding the obligation to arbitrate. The doctrine has been infrequently applied in Canada in the arbitration context. By contrast, the American courts have applied the doctrine more regularly. Several American cases will be presented first, in order to provide a wider context in which to discuss the two Canadian cases.

In both Canada and the United States, the basic concept of estoppel is the same. That is, a party is precluded from retracting a representation upon which another has relied. The representation may be made explicitly by word or conduct, or implicitly through silence or inaction. In the arbitration context, the doctrine of equitable estoppel recognizes that a non-signatory to a contract may be estopped from asserting that he is not subject to that contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced for his benefit.

A. Compelling Arbitration and Equitable Estoppel

(i) The American Position on Equitable Estoppel and Arbitration

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[88] *Consumer Protection Act*, R.S.Q. c. P-40.1.

American courts have been willing to permit non-signatories to compel arbitration or be compelled to arbitrate in certain limited cases.[89] In the United States, two theories have been recognized for holding a party estopped.[90] The first theory is that a non-signatory who knowingly accepts the direct benefits of a contract containing an arbitration agreement can be compelled to arbitrate by a signatory.[91]

American Bureau of Shipping v. Tencara[92] is an example of this first theory. Tencara contracted with a syndicate to build a yacht. The contract required the American Bureau of Shipping (ABS) to classify the ship. Tencara entered into a contract containing an arbitration contract with the ABS to classify the ship. The ship sustained serious hull damage due to poor design and construction. Tencara sued the ABS in Italy. The yacht's owners sued the ABS in France. The ABS brought suit in New York to compel all parties to arbitrate their claims together. The owners argued that they were not party to the contract between Tencara and the ABS and, therefore, not a party to the arbitration agreement. Following the first theory, the Court held that the owners were compelled to arbitrate as non-signatories. Since the owners had received the benefit of the ABS's classification (e.g., lower insurance rates), they were precluded from claiming that the arbitration provision did not apply to them.

The second theory is that a non-signatory can compel arbitration with a signatory when the issues the non-signatory is seeking to resolve are inherently inseparable or inextricably intertwined with the agreement and the non-signatory is closely related to the signatory.[93] The American test to determine when non-

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[89] See e.g. *Grigson, et al. v. Creative Artists Agency, L.L.C., et al.*, 210 F. 3d 524 (5th Cir. 2000), cert. denied, 121 S. Ct. 570 (2000) [*Grigson*]; *International Paper Company v. Schwabedissen Maschinen & Anlangen GMBH*, 206 F. 3d 411 (4CA 2000).
[90] See Sentner, *supra* note 6 at 58-59; Eisen, *supra* note 6 at 44.
[91] See e.g. *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, US*, 9 F. 3d 1060 (2nd Cir. 1993) [*Deloitte*].
[92] *American Bureau of Shipping v. Tencara Shipyard SpA,* 170 F. 3d 349 (2nd Cir. 1999).
[93] See e.g. *Astra Oil Company, Inc. v. Rover Navigation, Ltd*., F. 3rd (2nd Cir. 2003).

signatories will be allowed to compel arbitration was enunciated in *MS Dealer Serv. v. Franklin* as follows:[94]

> Existing case law demonstrates that equitable estoppel allows a non-signatory 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 term of the written agreement in asserting its claim against the non-signatory. When each of the of the 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 an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the signatory 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 favour of arbitration would be effectively thwarted.

The second American theory of equitable estoppel can be illustrated with reference to the following two categories of cases:[95]

(a) Permitting non-signatories to compel arbitration by signatories

Sunkist Soft Drinks, Inc. v. Sunkist Growers Inc.,[96] is an example of a non-signatory compelling arbitration because the signatory had to rely on the terms in

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[94] Sentner, *supra* note 6 at 60, quoting *MS Dealer Serv Corp. v. Franklin,* 177 F. 3d 942, 947 (11th Cir. 1999).

[95] Eisen, *supra* note 6 at 44-45. See also *Thomson-CSF, SA v. American Arbitration Association*, 64 F. 3d 773 (2nd Cir. 1995) [*Thomson-CSF*]; *Mississippi Fleet Card, LLC v. Bilstat, Inc.,* 175 F. Supp. 2d 894 (S.D. Miss. 2001) [*MFC*].

the arbitration agreement in asserting its claim against the non-signatory. The defendant Sunkist had entered into a licence agreement. The licensee was then acquired and absorbed by Del Monte. Del Monte, a non-signatory, was allowed to compel arbitration for breaches of the license agreement because the claims were "intimately founded in and intertwined with the license agreement."[97] Therefore, Sunkist was estopped from avoiding arbitration.

Sam Reisfeld & Son Imp. Co. v. S.A. Eteco[98] is an example of a non-signatory compelling arbitration because the signatory was alleging interdependent and concerted misconduct by both the non-signatory and a signatory. In that case, the Court of Appeals compelled Eteco's parent and successor corporations to arbitrate because the charges against the non-signatories were based on the same operative facts and were inseparable from the claims against Eteco.

(b) Permitting signatories to compel arbitration by non-signatories

McBro Planning and Development Co. v. Triangle Electronic Construction Co., Inc.[99] concerned a hospital renovation. Both McBro and Triangle had arbitration provisions in their respective contracts with the hospital, but none with each other. Despite the lack of a written agreement between the two parties, McBro nevertheless tried to compel an arbitration proceeding between itself and Triangle. The Court held that Triangle was estopped from refusing to participate in the arbitration because its claims were intimately founded on and intertwined with McBro's underlying contract with the hospital.

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[96] *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,* 10 F. 3d 753, 757 (11th Cir. 1993), cert. denied, 513 U.S. 869 (1994).
[97] *Ibid.*
[98] *Sam Reisfeld & Son Imp. Co. v. S.A. Eteco,* 530 F. 2d 679 (5th Cir. 1976).
[99] *McBro Planning and Development Co. v. Triangle Electronic Construction Co., Inc*., 741 F. 2d 342 (11th Cir. 1984).

A similar principle was applied in *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile.*[100] Ryan had contracts, some containing arbitration agreements, with Rhone's foreign affiliates. Ryan had no contractual relations with Rhone itself. Ryan brought a court action against Rhone and its affiliates. The Court referred all the claims to arbitration despite the fact that there was no written agreement between the parties. The Court held that when claims against a parent and its subsidiaries are inherently intertwined and based on the same set of facts, then a court may refer the claims against the parent to arbitration notwithstanding the fact that the parent is a non-signatory.

(ii) Canadian Cases Supporting Equitable Estoppel

Canadian cases concerning equitable estoppel as the basis for compelling arbitration have been scarce. However, the following two cases suggest that the doctrine could apply in Canada.

In *Condominiums Mont St-Sauveur Inc. c. Constructions Serge Sauvé Ltée,*[101] Rothman J.A. compelled a non-signatory to arbitrate. Rothman J.A. seems to have implicitly applied the doctrine of equitable estoppel, although the judgement was not entirely clear in its reasoning.

Condos Mont. St.-Sauveur concerned an arbitration between the plaintiff condominium developer and two co-defendants for defects in construction and design. The defendant general contractor was a party to the arbitration agreement with the developer. The defendant architect was a non-signatory to the arbitration agreement, as the architect had contracted with the general contractor directly. When the developer began a court action, the general contractor invoked the arbitration agreement and argued that the Superior Court had no jurisdiction. The developer argued that arbitration was inappropriate

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[100] *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., et al.*, 863 F. 2d 315 (4th Cir. 1988).
[101] *Condominiums Mont Saint-Sauveur Inc. c. Constructions Serge Sauvé Ltée,* [1990] R.J.Q. 2783 (Que. C.A.) (QL) [*Condos Mont St-Sauveur*].

because it was seeking joint and several damages against the general contractor and the non-signatory architects.

Rothman J.A. ruled that developer could not have his cake and eat it too, making the following statement, which implies equitable estoppel as its basis:[102]

> Finally, there remains appellant's [the developer] argument that the architects are not bound by the arbitration clause so that they would have to be sued in the ordinary courts while the claim against the builder would be decided by arbitration. In the result, appellant could not pursue joint and several claims against the two debtors in the same action. That may be so, but it is difficult to see how appellant can be heard to complain about the effect of contractual arrangements it has, itself, put in place. *[Emphasis added*]

Arguably, the court could have determined that the non-signatory architect should have been able to compel arbitration on the American standard for estoppel. That is, that the developer was alleging interdependent misconduct by both the non-signatory architect and the general contractor who had signed the arbitration agreement. Recall that American courts have allowed non-signatories to compel arbitration on this basis.[103]

The *Hi-Seas* case*,* already discussed, also dealt with equitable estoppel. The B.C. Supreme Court effectively endorsed the doctrine of equitable estoppel in the arbitration context, albeit not to compel arbitration. Rather, the court employed the doctrine in holding that because Mr. Boelman had argued that the arbitration panel had no personal jurisdiction over him, he was estopped from later advancing the opposite argument in court.

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[102] *Ibid.* at para. 53.
[103] See e.g. *Grigson, supra* note 89.

B. Resisting Arbitration and Equitable Estoppel

Given the paucity of Canadian cases, not much can be said regarding resisting arguments to arbitrate that are based on equitable estoppel. However, a brief caveat is in order regarding the precedential value of *Condos Mont. St.-Sauvuer.*

Recall that in *Condos Mont. St.-Sauveur,* the Quebec Court of Appeal referred both the general contractor and architects to a single arbitration proceeding. Since then, at least one Quebec Court of Appeal Justice has disagreed with that interpretation. Chamberland J.A.'s dissent in *Décarel* commented that the ruling in *Condos Mont. St. Sauveur* did not actually compel the non-signatories to arbitrate.[104] Instead, Chamberland J.A. argued that the ambiguous ruling implied that only the general contractor and developer were compelled to arbitrate, but not the architect. This is a plausible interpretation given the ambiguous wording of *Condos Mont. St.-Sauveur.*

Theory No. 6 - Assumption by Conduct

The American courts have recognized that a party who has not executed an arbitration agreement may bind itself to arbitration by its conduct. The assumption theory has not been judicially treated in Canada. In the United States, the actions of a non-signatory in performance of a contract can lead to a ruling that the obligation has been assumed.[105]

The conduct relied on for the claim of assumption must clearly manifest an intent to arbitrate the dispute.[106] For example, in *Gvozdenovic v. United Air Lines*[107] it was held that voluntary participation in arbitration hearings by a non-signatory constituted assumption. The plaintiffs were a group of former Pan Am flight

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[104] *Décarel, supra* note 23 at paras. 20-21.
[105] Sentner, *supra* note 6 at 58, citing *Thomson-CSF*.
[106] Sentner, *supra* note 6 at 58.
[107] *Gvozcenovic v. United Air Lines, Inc.*, 931 F. 2d 1100 (2nd Cir.), cert. denied, 502 US 910, 112 S. Ct. 305.

attendants who joined United Airlines after it purchased Pan Am. The Court upheld the dismissal of the plaintiffs' arguments in support of overturning an arbitral award. The reason was that the plaintiffs had designated a committee and counsel to represent them in an arbitration proceeding with United Airlines.

It must be noted that the assumption theory is difficult to distinguish from the equitable estoppel theory at times. For example, in *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*,[108] the Court ruled that the non-signatory Deloitte Norway was bound by an arbitration clause based on its receipt of a contract without objection. Much like the estoppel theory, the court noted that Deloitte was bound because it accepted the benefits of a contract that contained an arbitration clause.[109] The confusion between assumption and estoppel is also evidenced in *Petition of Transrol Navegacao SA,* [110] where the Court referred a non-signatory to arbitration because they had claimed arbitration as a defence to a previous lawsuit.

As the concept of "assumption" is not part of Canadian law in either the arbitration or contract law contexts, it seems that arguments for compelling arbitration should rely on the doctrine of equitable estoppel as opposed to assumption.

Theory No. 7 - Third-Party Beneficiaries

A non-signatory may compel arbitration or participate in arbitration under the theory of third-party beneficiary. The theory is now well accepted in Canada both in contract law and the arbitration context more specifically. However, since the determination will turn on proof of contractual intent, it will generally require a fact-driven argument that is difficult to establish. The difficulty stems from the

[108] *Deloitte, supra,* note 91.
[109] Eisen, *supra* note 6 at 43, citing *Deloitte, supra* note 91.
[110] Sentner, *supra* note 6 at 58, citing *Petition of Transrol Navegacao SA*, 782 F. Supp. 848 (S.D.N.Y. 1991).

fact that parties seldom specifically state their intent to benefit a third-party. Rather than specific intent, the focus of a third-party beneficiary argument will often be the class to which the third-party belongs.

A. Compelling Arbitration and Third-Party Beneficiaries

(i) General Canadian Cases on Third-Party Beneficiaries

In the leading case of *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*,[111] the Supreme Court of Canada ruled that the strict rules of privity could be incrementally relaxed in order to conform to the commercial reality and justice. In that case, the Supreme Court applied the incremental approach utilizing the theory of third-party beneficiaries. Specifically, the Supreme Court ruled that if an employer's limitation of liability clause extends its benefits to employees, then the employees are entitled to benefit from the clause if they are acting within the scope of their duties and performing the services provided for in the contract. It must be noted that the Supreme Court was cautious in its decision and refused to overthrow the often criticized rule of privity of contract in its entirety.

However, the third-party beneficiary exception was again extended in the leading case of *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*[112] In that insurance subrogation case, the Supreme Court of Canada ruled that the principled exception in *London Drugs* was not confined to the employer-employee relationship. The Supreme Court went on to state the test for

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[111] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 [*London Drugs*].
[112] *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.,* [1999] 3 S.C.R. 108 [*Can-Dive*].

establishing whether the third-party beneficiary exception applies on the facts of a given case. That test is based on two cumulative factors:[113]

> (a) did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision; and (b) are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

The following lower court decisions illustrate that the two leading Supreme Court cases on relaxing the doctrine of privity to allow third-party beneficiaries to enforce a contract are applicable in the arbitration context as well.

(ii) Canadian Cases on Third-Party Beneficiaries and Arbitration

In *Zeldin v. Goldis*,[114] the Court stated in *obiter* that a non-signatory could invoke an arbitration clause as a third-party beneficiary. The Court based its decision on the Supreme Court decision in *Can-Dive.*

Notably, the plaintiff customer in *Zeldin* signed an agreement stating that the broker and its employees were third-party beneficiaries of the arbitration agreement. The arbitration agreement also mandated that New York law apply to the dispute and that New York was to be the forum for any disputes. Nevertheless, the Canadian plaintiff brought an action in Ontario for breach of contract against his American stockbroker.

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[113] *Ibid.* at para. 32.
[114] *Zeldin v. Goldis*, [2000] O.J. No. 3001 (Ont. S.C.J.) [*Zeldin*].

In response to Zeldin's Ontario suit, the Defendant brought a motion to stay the Ontario proceeding in favour of the New York arbitration. The plaintiff argued that if his action was not allowed to proceed in Ontario he would lose the benefit of being able to assert that the doctrine of privity precluded the defendant from relying on an agreement to which he was not party. The Court rejected the plaintiff's argument with the following telling statement:[115]

> The second problem with the Plaintiff's submission is that it is by no means clear that in Ontario the Defendant would not be able to rely upon the contract as a third party beneficiary of same. The Supreme Court of Canada has recently confirmed that if the parties to the contract intend to extend the benefit of a contract to a third party seeking to rely on a contractual provision, and if the activities performed by the third party seeking to rely on the contractual provision are the very activities that were contemplated as coming within the scope of the contract then there will be an exception made to the privity doctrine. (*Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.* (S.C.C.) at para 32 per Iacobucci J.) [*Emphasis added*].

In *Ming Minerals Inc. v. Blagdon*,[116] the third-party beneficiary theory was applied, in *obiter*, to a contract containing an arbitration clause. In arriving at its conclusion, the Newfoundland Court applied the Supreme Court of Canada's decision in *London Drugs.*[117]

On the facts of *Ming Minerals,* the Court stated that, "it is sufficient to observe that this would have been an appropriate case in which an incremental change to the doctrine of privity could be fashioned to enable non-contracting shareholders

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[115] *Ibid.* at para. 23.
[116] *Ming Minerals Inc. v. Blagdon* (1998), 163 Nfld & P.E.I.R. 351[*Ming Minerals*].
[117] *Ibid.* at para. 29. The Newfoundland Supreme Court (Trial Division) also cited with approval the British case of *United Dominions Trust Ltd. v. Kirkwood,* [1966] 2 Q.B. 431 (Eng. C.A.), Denning, M.R.

to take the benefit of an agreement between the corporation and prospective shareholders." The Newfoundland Court further commented that third-party beneficiaries should be able to enforce a contract in two circumstances. First, where there is a clearly established general commercial practice in favour of third-party rights. Second, in particular cases where parties have based a commercial relationship upon an agreement conferring benefits upon third parties whose commercial interests were affected.

(iii) American Cases Supporting Third-Party Beneficiaries

The American requirements for establishing the existence of a third-party beneficiary are quite similar to the Canadian standard. In *Mississippi Fleet Card v. Bilstat, Inc.,*[118] the Court compelled the non-signatories to arbitrate as they were third-party beneficiaries of a contract containing an arbitration clause. The Court stated the American test for establishing that an entity is a third-party beneficiary as follows:[119]

> (1) that the terms of the contract are expressly broad enough to include the third party either by name or as one of a specified class and (2) the said third party was evidently within the intent of the terms so used, the said third party will be within its benefits if (3) the promise had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract.

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[118] *MFC, supra* note 95.

[119] Sentner, *supra* note 6 at 69-70, citing *ibid.* at 902. See also *Industrial Electronic Corp. of Wisconsin v. Power Distribution Group, Inc.*, 215 F. 3d 677 (7th Cir. 2000); *Ross Brothers Constr. Co., Inc. v. International Steel Services Inc.,* 283 F. 3d 867 (7th Cir. 2002).

The facts of *MFC* met the American test. Mississippi Fleet Card (MFC) was an association of oil companies. Bilstat was a credit card company. The two entities entered into agreement that Bilstat would issue credit cards to the individual members of MFC. The agreement contained an arbitration clause, but each independent member of MFC was not a signatory to the agreement. A suit stemmed from charges that Bilstat misappropriated funds. The Court held that the individual members of MFC were third-party beneficiaries of the primary agreement. Therefore, the MFC members could not enforce their rights under the contract without submitting to arbitration.

B. Resisting Arbitration and Third-Party Beneficiaries

In *Bakorp Management Ltd. v. Pepsi-Cola Canada Ltd.*,[120] the Court rejected a non-signatory's suggestion that it be allowed to invoke an arbitration clause as a third-party beneficiary. The non-signatory, Ball, based its argument on *London Drugs*, stating that it was an intended third-party beneficiary owing to an identity of interests between it and one of the signatories. The Court disagreed in the following statement:[121]

> However, I do not see Ball as coming within the purview of "incremental change" to the common law as referred to by Iaccobuci J. [in *London Drugs*] at p. 367. Notwithstanding the very wide breadth of the release it is painfully obvious that Pepsi negotiated it for the benefit of itself, related corporations (in the sense of within the same organization group) and officers and directors thereof. There is not a whisper of a hint that there was any intention express or implied that suppliers such as Ball or Crown

[120] *Bakorp Management Ltd. v. Pepsi-Cola Canada Ltd.*, [1994] O.J. No. 873 [*Pepsi*].
[121] *Ibid.* at para. 39.

> would come in from the rain under this umbrella. Rather the SA appears to be an exercise in "Sauve qui peut!"

As with agency and piercing the veil, it is evident that the outcome of arguments based on the third-party beneficiary theory will be fact driven. In particular, arguments against this theory should focus on the contracting parties lack of intent to make the claimant a third-party beneficiary. However, it appears well settled as a matter of principle that non-signatories can compel arbitration through the third-party beneficiary theory.

Conclusion

High stakes domestic and international arbitration coupled with complex inter-related corporate structure ensures that the issue of whether a non-signatory is bound by an arbitration decision will be a critical one.

Lawyers engaged in drafting contracts which contain arbitration clauses must be sensitized to the fact that a non-signatory may be added to the arbitration. If this risk exists, then clients must be advised of this risk, and, language added to the contract and, arbitration clause, to minimize the risk of a related non-signatory party being bound by the arbitrator’s decision.

At the same time, when an arbitral dispute arises, counsel acting for a signatory must be aware that it is legally possible to add non-signatories. Counsel must fully explore this issue, and, bring a motion before the arbitrator to add a non-signatory if possible. Failure to do so, could make counsel professionally liable should the signatory be without assets when an effort is made to enforce the final arbitral award.

This potential risk of non-payment to a successful claimant, and, the potential risk of a lawyer being sued for negligence, makes the issue of adding non-signatories one of the most crucial in any hard fought, high stakes arbitration.